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मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

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

- Editor

CORRIGENDUM

Esteemed readers are requested to effect following correction in the 6th line of Note No. 166 Part II, of June 2004 issue :

After - "Reported in 2004 (I) MPWN 64" portion – "= 2004 (1) JLJ 110 (FB)" may be deleted.

संपादक की कलम से

प्रेम कांत दुबे
संचालक

सांस्थानिक प्रकाशन के इस द्विमासिक अंक को आपके हाथों में सौंपते हुए मुझे एक सुखद अनुभूति हो रही है। इस संस्थान में संचालक के रूप में मेरा आगमन तथा अधिवार्षिकी आयु पूरी होने के क्रम में न्यायिक संस्था से विलग होने की मिश्रित अनुभूतियों को व्यक्त कर पाना मेरे लिए या किसी के लिये भी अत्यन्त दुष्कर हो सकता है, लेकिन इस द्विमासिक प्रकाशन के संपादक के रूप में आपसे अपने भावों और विचारों को बांटने के इस अवसर को मैं अपने लिए अप्रतिम सौभाग्य का विषय मानता हूँ। न्यायिक अधिकारी के रूप में सुदीर्घ सेवाकाल के अपने अनुभवों के आधार पर जो एक बात मैं निश्चित रूप से कह सकता हूँ वह यह है कि मध्यप्रदेश की न्यायपालिका ने एक गौरवशाली परम्परा का निर्वाह करते हुए न्यायदान में आने वाली चुनौतियों को स्वीकार किया है, लेकिन हमारा कार्य अभी भी अधूरा है। समय के साथ–साथ न्यायपालिका से जनसामान्य की अपेक्षाएं बढ़ी हैं। कुछ स्थितियों में जाने–अनजाने हम उनकी अपेक्षाओं पर खरे नहीं उतर सके हैं, अतः हमें दृढ़ प्रतिज्ञ होकर इस बात के लिये प्रयास करना होगा कि हम स्वयं के औचित्य को भली–भांति उन लोगों के समक्ष रख सकें जो न्याय पाने की आस में 'न्याय मंदिरों' के चक्कर लगाते–लगाते स्वयं को थका हुआ महसूस करने लगे हैं तथा अपनी समस्याओं के निदान के लिये अन्य क्षितिजों की ओर देखने लगे हैं। जब तक हम राष्ट्रपिता महात्मा गांधी के 'अंतिम व्यक्ति' की अपेक्षाओं पर खरे नहीं उतरते हैं तब तक हमारी इस प्रतिबद्धता में किसी प्रकार की क्षीणता नहीं आनी चाहिए।

ज्ञान एवं विवेक की जलधारा में निरंतर बहते हुए न्यायाधीश को न्यायदान के महत्वपूर्ण उत्तरदायित्व का निर्वाह करना होता है। निष्पक्षकता, निर्भीकता, विनम्रता एवं सुचिता की प्रतिमूर्ति बनकर ही न्यायाधीश न्यायदान के उस संवैधानिक लक्ष्य को प्राप्त करने में स्वयं को प्रभावी सहभागी मान सकता है, जिसकी कल्पना भारतीय संविधान की प्रस्तावना में संविधान निर्माताओं ने जन–जन 'We the people' की भावनाओं को व्यक्त करते हुए की है।

यह संस्थान विकास क्रम में अपने शैशवकाल को पार करते हुए उस अवस्था में पहुँच चुका है जहां इसकी उपादेयता एवं उपयोगिता न्यायाधीश साथियों के मन में अपना स्पष्ट स्थान बना चुकी है। संस्थान की इस यात्रा के ११ वें वर्ष में मेरा इस संस्थान से जुड़ना मेरे लिए अपने आप में एक सुखद अनुभूति रही है। संस्थान के द्वारा माननीय मुख्य न्यायाधिपति महोदय के मार्गदर्शन

में नवीन गतिविधियों एवं कार्यक्रमों को प्रारंभ किया गया है तथा एक दिवसीय कार्यशालाएं आयोजित कर न्यायिक प्रशासन तंत्र के सभी अंगों को जागरूक बनाने की पहल संस्थान की ओर से की गयी है। इस क्रम में पहली कार्यशाला का आयोजन दिनांक 26 सितम्बर 04 को किया गया जिसमें जबलपुर तथा उसके सीमावर्ती जिलों के पुलिस उप–अधीक्षक एवं वरिष्ठ स्तर के अधिकारियों की सहभागिता रही। यह कार्यशाला अपराध अनुसंधान से संबंधित विधिक आयामों पर केन्द्रित रही। यद्यपि ऐसे कार्यक्रमों के चमत्कारिक परिणाम अल्प कालावधि में नहीं मिल सकते हैं लेकिन यदि दीर्घकाल तक प्रयासों का क्रम अनवरत् बना रहे तो निश्चित रूप से न्यायिक प्रशासन को एक नई दिशा मिल सकती है।

इस संस्थान के संचालक के रूप में मेरा कार्यकाल अत्यन्त अल्प रहा है। यह संस्थान उत्तरोत्तर प्रगति के पथ पर प्रशस्त हो, राष्ट्रीय स्तर पर अपनी पहचान स्थापित करे तथा प्रदेश के न्यायिक अधिकारियों को उनके दायित्वों व कर्तव्यों के निर्वहन में सक्षम बनाने में सार्थक योगदान करता रहे, ऐसी मेरी कामना है।

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No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.

-THEODORE ROOSEVELT

PART - I

VICTIMOLOGY: A DEVELOPING CONCEPT

JUSTICE DIPAK MISRA
High Court of M.P.

Crime and punishment are as old as the organised human culture founded on collective interest. As the civilization and economic growth expand there is an auxesis of philosophy to restrain snowballing of crime as a criminal propensity gets garnered and generated in a sophisticated method as if there is a class determination to create a cleavage with ingenuity. Crime when understood with perception of historicity has a different conception dependent upon the social milieu, collective ethos, social strata and community setting. In every society a crime has a definitive notion and with the change of society, both in time and clime, there is a perceptual shift as regards the conception of criminality. There may be accentuation on crime and emphasis on value based facets which have entered into moral and virtuous infrastructure of the society and value integrated social process. In certain cases there is a different consideration attached to crime which gets liberalized and in the process there is mollification of punishment depending upon the collective desideratum, economic front, accent on certain kind of permissiveness and acceptability of normative change. On certain occasions when the value system of the society gets deranged and is on the path of declension, the crimes of a different nature are taken cognizance of and the law makers countenancing such a spectrum make the law applicable in a rigorous manner. But, the basic feature that, in a way, has remained unchanged, is that the crime is regarded to be one against the State hampering the collective interest, social equanimity and group equilibrium.

An individual may commit a crime against another but the commission of crime does not confine and constrict itself to the individual realm of crime but metamorphoses itself to a crime that creates a dent, a concavity or a hole somewhere in the social fabric. One may conceive the idea that it is on the individualistic plane, the crime being less grave, but in effect and purport, it has some impact and repercussion on the law and order situation of the society of which the State is the legal guardian. The society, one may say, is the moral guardian of law. Thus, essentially put, every crime is against the State. But its gravity depends upon the degree and the extent to which it affects the functional and governmental aspects of the State. That is why some crimes are treated as grave and some not so grave, and some, minor. Whatever may be the nature of the crime, there is a victim - a person waiting behind the curtain, sometimes peeping through to be looked at, to be noticed, and to be looked after. He has illimitable hope and enormous aspiration to be treated with honest humane consideration, kinetic sympathy and permissible concern. Not for nothing it has

been stated that the term 'victim' is of wide connotation. A victim may be the injured, may be a witness and may be that part in society that makes a loud cry for getting justice. Victims can be one's own family, the near relatives, the dear friends, the close neighbours and intimate colleagues. The singular inherently engulfs and encapsules the plural when the individual traumatic experience gets transformed to an agonized and anguished experience of the society at large.

A victim cannot be kept at bay as he has the primary role in a trial without becoming a protagonist at the centre stage. The accused may be the spinal but the victim has to have space, an allowable one. In criminal justice system a victim of crime some times goes through a distressing and disturbing experience. Many a time the victims themselves are witnesses to the crime and their evidence can help, aid and assist to convict an offender. It is noticeable that few victims come forward to adduce evidence. They harbour a feeling that their deposition in Court may leave them with an unhappy experience. They do not intend to face the unhappy situation. Such an apprehension is mothered by lack of information, lack of consideration, undue delay in trial, a fear for aggressive cross-examination, the feeling of fear for the accused who has, at times, been able to demolish the psychic resistance, intimidation by the community and on occasions the fear psychosis for the Court itself. The witnesses are not made aware about the sense of security, turn of their case in Court, the reason for adjournment of cases and the catastrophe which eventually takes place because of speaking the truth in Court. In addition, they are subjected to unnecessary stressful court-room experiences. It cannot be lost sight of the fact that they are not given Long Term Support ('the LTS'). They are also not given Adequate Security Measure ('the ASM'). There has to be growth of the LTS and the ASM so that the injured victims who are witnesses and also the witnesses who support the injured do not get into oblivion and ultimately suffer.

While thinking about the victimology one should never forget that the purpose of criminal justice system is reduction of crime, instilling a fear for indulging in crime on the bedrock of the principle of deterrence and social stigma, marginalization of fear of the public at large to approach a Court of Law, dispensation of justice in a fair and efficient manner and promoting of truthful evidence within the bounds of Rule of Law. In the absence of repose of public confidence in the criminal justice system it is bound to shake the faith of collective and consequently anarchy gets ushered in in the social setting. It is a pre-requisite that criminal justice system must get itself acclimatized to the needs of victims and witnesses who are victims in prospects. The psychograph of the victims should be understood and appreciated in a purposeful manner. It is imperative that the offenders are booked under law, dealt with fairly and speedily, and the victim be given his due recognition. A balance, a moderation and a synthesis have to pave the path of justice. The apt thing to create is to grow a sense of effective confidence in a Court of Law so that the victim does not feel

physically injured, emotionally traumatized, frightened by future torment and potentially carry a long lasting psychological anguish, and the accused also does not harbour a feeling that his interest is jeopardized and there is some sort of predisposition or determined mind set. It has to be achieved with objective legal art and positive craftsmanship.

The concept can be made tangible by developing feelings among the people at large that the collective has a duty, the State has an obligation and the judiciary has a sacrosanct and positive role. Everyone is duty-bound to see that the offenders are brought to justice. The victim with the adjudicatory process must feel satisfied that there has been a fair trial and proper dispensation of justice and in addition, he must feel happy to be witness in the trial. Information and technology have gained ground. Hence, a time has come when victims must be well informed about the action taken by the investigating agency. Security must be provided as far as practicable to all the witnesses. There should not be unnecessary postponement of cases, as such postponements are likely to create disillusion and collapse of faith.

Victimology in its expanse would also include conferral of emotional support to the victims and to unclothe the fear of witnesses who feel, in this country, to be perpetual victims. The visit of the victims to Court should be made safe and comfortable. The Court also has a duty to see that no witness is victimized by way of inappropriate, unwarranted and uncalled for stretched cross-examination. With the introduction of modern technology, efforts and attempts should be made for effecting implementation of recording evidence by 'video conferencing'. Courts' staff should ensure that the victims and the witnesses have come to a temple and they being the guards, it is inherent in their duty to see that witnesses are given treatment which is due to them as citizens of the country who come to Court to aid and assist in the dispensation of justice. Sacrosanctity of the said duty should not be marginalized and no individual should be treated as an unperson or nonperson. They should be treated with respect, consideration and discretion.

Certain categories of victims like children, victims of rape, domestic violence and those who experience repeat victimization need specific and special attention. They suffer a different kind of trauma, an ordeal of a different nature. Their cases are to be handled with utmost sensitivity, social experience gathered in life and a sense of concern. Their behavioral pattern, unless deliberate, should not be taken exception to immediately. There has to be a perceptual shift with regard to young victims. A child witness should not be harassed and a curative attitude should be shown to him. He should not be treated as any other witness.

The prosecution has a role in victimology. It should see that more supports are provided to the victims and witnesses. Victims of road and traffic accident have to be differently dealt with. There should be energetic and effective dialogue

with the victims and other witnesses. There should be co-ordination to achieve the common goal so that there is no destruction of faith in the system. The victim should be kept informed about the proceedings of the trial and the prosecution must make it an obligation to involve him throughout the investigation so that he does not feel distanced.

At this juncture it is seemly to have a penetrating look at obtaining factual scenario. It is not out of place to state that certain rights are recognized in criminal jurisdiction, but presently it is a limited one. The Code of Criminal Procedure makes a provision where the informant or the person aggrieved can, with the permission of the Court, assist the Public Prosecutor. There are suggestions to implead them as parties. The debate is still on. In this connection provisions enshrined under Sections 437(5) and 439(2) of the Code of Criminal Procedure are worth noticing. An informant or a complainant can move an application for cancellation of bail. Section 321 of the Code permits the prosecution to withdraw the case. In such cases the victims or persons aggrieved can challenge the action of the State. But the same has to be viewed in a larger canvass and a broader spectrum.

The next aspect which requires to be considered is compensation for the victims. In this regard provisions contained under Sections 357(1) and 357(3) of the Code are noticeable. The Apex Court and certain High Courts in this connection have concretized the theory of compensation as a matter of punishment in certain cases. It is profitable to take note of the said decisions.

In the case of *Palaniappa Gounder Vs. the State of Tamil Nadu and Others, AIR 1977 SC 1323* the Supreme Court indicated the concept of compensation and held that it would be the duty of the Court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.

In the case of *Sarwan Singh and others etc. Vs. The State of Punjab, AIR 1978 SC 1525* the Apex Court expressed the view as under:

> "The object of the section therefore, is to provide compensation payable to the persons who are entitled to recover damages from the person sentenced even though fine does not form part of the sentence. Though S. 545 enabled the Court only to pay compensation out of the fine that would be imposed under the law, by S. 357 (3) when a Court imposes a sentence, of which fine does not form a part, the Court may direct the accused to pay compensation. In awarding compensation it is necessary for the Court to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should

be paid, then the capacity of the accused to pay a compensation has to be determined. In directing compensation, the object is to collect the 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 or, imposing a default sentence for non-payment of fine would not achieve the object. If the accused is in a position to pay the compensation to the injured or his dependents to which they are entitled to, there could be no reason for the Court not directing such compensation. When a person, who caused injury due to negligence or is made vicariously liable is bound to pay compensation. It is only appropriate to direct payment by the accused who is guilty of causing an injury with the necessary Mens Rea to pay compensation for the person who has suffered injury."

In the case of *Guruswami Vs. State of Tamil Nadu, 1979 CrLJ 704* the view expressed in the case of *Sarwan Singh (supra)* was followed. Compensation was granted for the loss caused to the victims who were the widow and the minor children. The concept gathered momentum when two-Judge Bench of the Apex Court in the case of *Hari Kishan and State of Haryana Vs. Sukhbir Singh and others, AIR 1988 SC 2127* in paragraphs 10 and 11 ruled thus:

> "10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section (3). *It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is an addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice.* It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

> 11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."
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> (emphasis added)

In the aforesaid case Rs.50,000/- was granted as compensation for meeting the ends of justice.

In *Braj Lal Vs. Prem Chand and another, AIR 1989 SC 1661* the Apex Court while imposing fine directed Rs.18,000/- should be paid to the victim.

Yet again in *State of U.P. Vs. Jodha Singh and Others, AIR 1989 SC 1822* while converting the punishment, 75% amount recovered towards fine was directed to be paid as compensation to the victim.

Though stated in a different context a two-Judge Bench of the Apex Court in the case of *P.C. Singh Vs. Dr. Praful B. Desai and another, 2003 AIR SCW 1885* held as under:

> "It must be remembered that the first duty of the Court is to do justice. As has been held by this Court in the case of *Shri Krishna Gobe Vs. State of Maharashtra [(1973) 4 SCC 23)]* Courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce reliable evidence. Of course the rights of the accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victim also have rights."

In this context it is profitable to refer a recent decision rendered in the case of *Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others, 2004 AIR SCW 2325* wherein it has been held as follows:

> "The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a

trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. *It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trail is as much injustice to the accused as is to the victim and the society.* Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

(emphasis supplied)

From the aforesaid it is luminescent and clear as day that the requirement of the victim and the needs of the witnesses are to be understood in a magnified canvass and it must enter into our hearts that in criminal justice system endeavour has to be made to ensure that justice is not only done expeditiously but with grace, respect, mercy and care. The prosecution has to make an effort to empower the witnesses and victims to give best evidence in a most secure atmosphere.

While discussing about the conception of victimology a passing reference is requisite to be made to sentencing structure. The Court trying a criminal case should not show any kind of avidity to punish the accused. Thomas Paine would like to put this aspect as dangerous to liberty. The learned jurist has expressed the view that he who would like his own liberty to be ensured must guard even of his enemy from oppression. Sometime a view has been expressed that the punishment should not be an instrument to terrorise men. The said concept when properly understood would convey that the value of moderation is the apt path. No terror, but justice, no ignominy but faith, no destructive approach to annihilate liberty but a constructive structuralism to establish acceptable freedom. At this juncture it would be condign to refer a passage of Lord Denning on capital punishment:

> "Punishment is the way in which society expresses its denunciation of wrong doing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because wrong doer deserves it, irrespective of whether it is deterrent or not."

Thus, the totality of circumstances would show that punishment must be severe but it cannot encompass or engulf a sense of brutality. A punishment should be effective and moderate but cannot be too moderate to destroy the effectiveness of punishment. The Courts have to consider various factors while imposing sentence: the gravity of offence, the impact on society, organised offenders, habitual offenders, casual offenders, age of offender, age of the victim, offender's previous character, antecedents, the circumstances under which the crime was committed. Offences committed by professional offenders, economic offences, cyber crimes, sexual offences, child abuse, drug trafficking, trafficking in women and child, hijacking of aircrafts, participation in terrorist activities are to be viewed in a different manner by Courts imposing sentence. An exhaustive categorization is difficult to be made. What is being stated is illustrative. But these guidelines are to be kept in view while imposing sentence. It has to be borne in mind an appropriate sentence is a composite resultant of many a factor.

In essence all these factors are to be considered sometimes cumulatively, sometimes separately and at times individually to justify the sentence. Eagerness to punish should not be the motto. Simultaneously to allow the offender to get away with leniency should not be the routine task. Victim's cry for attention and justice has to be understood and appropriate response is to be sent. The goal to be achieved is that the offender is punished in an adequate manner so that the loud cry of the society gets a positive answer and victim, as an individual, gets satisfaction and none can point out that the accused has not been dealt with fairly. All these have to form a part of a cohesive system. All concerned participating in the criminal justice dispensation system have a role albeit, however, minor but the same has to be performed with devotion, dedication, earnestness, wholeheartedness and above all with allegiance to truth. Empathetic actualization in respect of a victim can irrefragably be achieved by systemic understanding and dynamic application of the fundamental idea.

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THE SUPREME COURT OF THE UNITED STATES

JUSTICE N.K. JAIN
President, M.P.S.C.D.R.C.

Symbol of Faith - "The Republic endures" declared Chief Justice Charles Evans Hughes, as he helped lay the corner stone of the Supreme Court building in Washington DC in 1932, "and this is the symbol of faith".

Supreme Court of USA is established under Article III[rd] of the American Constitution and the most important wing of the Federal Government of the USA. The Supreme Court sits at the very top of the U.S. judicial system. Below it are a variety of "inferior" or "lower" Courts. All these courts exist to resolve disputes arising between individual people, between institutions and between individuals and institution, as also between individuals and the States.

Under the U.S. judicial system besides the Supreme Court at the top, there are variety of Courts at the lower levels;

- Local Courts at the lowest level dealing with most of the traffic offences, violation of local ordinances and other petty criminal charges.

- State Courts established with a particular State under the Constitution of that State (in U.S. every State has its own Constitution and State laws) dealing with the legal disputes arising within the States under the law of that State; and

- Federal Courts established under the Federal laws of the country consists of District Courts, Federal Courts of appeals and the Legislative Courts.

The U.S. Supreme Court has both original and appellate jurisdiction. It has original jurisdiction over all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party. It is, in fact, the highest Appellate Court in the land and the one with the broadest jurisdiction. As the highest Appellate Court in the land it can over-rule any or all the other courts and agencies. As the final guardian of the U.S. Constitution, it can under certain circumstances overturn laws passed by the U.S. Congress and tell the President of the U.S. What to do. This ability to give orders to the Government of the most economically and militarily powerful nation on the earth makes the Supreme Court the most powerful Court in the world.

The Constitution of America though established the Supreme Court but said almost nothing about what Supreme Court should do. So, despite the grand title it had, the Supreme Court did not start out as the powerful branch of the Government, it has now become. In fact, it began as a fairly simple and modest institution. To start with it had only 6 Justices including the Chief Justice. The number swelled to 10 at the time of civil war, but during reconstruction the number shrunk to 7 by 1869, when Congress reset it permanently at 9.

To put it mildly, a seat on the Court was not considered as a prized one in the early days. Not surprisingly, President George Washington had trouble coming up with six distinguished men to fill the seat. John Jay who took over as the first Chief Justice soon declared the post "intolerable". He ran for Governor of the New York, first unsuccessfully in 1792 and then in 1794 when he won and happily resigned as CJ to become Governor of New York. But it was not to be so for ever.

In February 1803 in the case of *Merbury vs. Madison 5 US 137 (1803)*, the court headed by the Chief Justice John Marshal handed down a decision that astounded the nation and established a Momentous new rule for the Supreme Court.

In theory, the Court though ruled in favour of the executive branch of the Government, but in reality, the Court was ruling in favour of itself. It was giving an immense new power- the power to accept or reject the laws written by Congress. "It is emphatically the province and duty of the Judicial Department to say what the laws is?" declared the Court. What is more, since "the constitution is superior to any ordinary act of the legislature", the Court has the power to review the law passed by the Congress and strike them down if the court decides they conflict with the Constitution. The Supreme Court thus for the first time legally established and armed itself with the power known as the power of "Judicial Review".

Marshal (1801-1835) was succeeded by Roger Taney, Chief Justice (1836-1854). He was known as "a common man" who upheld the interests of the public over those of wealthy and powerful individuals or businesses. His majority decision in the case of the Charles Riverbridge Co. vs. Warren Bridge, 36 US 420 (1837) established the principle "the object and end of all Government is to promote happiness and prosperity of the community" Although "rights of private property must be sacredly guarded", Roger Taney, Chief Justice wrote, "We must not forget that the community also have rights..." This was an important principle that helped to form the basis of the regulatory powers of the Government.

It amuses one to note that in 1789 John Jay had felt so insignificant, as Chief Justice, that he abandoned the post to become Governor of New York, however, by 1910 the job had grown so important and desirable that William Haward Taft preferred it to his own job as President of the U.S. While appointing Edward D. White as new Chief Justice, he complained and observed "the one place in the Government which I would have liked to fill myself I am forced to give to another." Interestingly he virtually got his wish fulfilled in 1921, when President Warren G. Harding appointed him- now an ex-president- to the post of Chief Justice (1921-1930).

Judicial "liberals" and "conservatives" : People speak of judges being either "conservative" or "liberals" like politicians. Judicial conservatives are those who tend to argue for judicial restraint. They believe that Judges should not apply the law in ways that go beyond the intent of the legislature, who wrote them. They are strict constructionist. They tend to interpret-or construe the constitution to mean what its words say, and nothing more.

Judicial Liberals, on the other hand, believe that the constitution is a living document. They argue that different historical circumstances call for different interpretations of its words. Liberal's, thus tend to be judicial activists, who interpret the laws in ways in which expound the rights guaranteed in the Constitution, and extend them to new groups of people.

Women in the Court- The first 112 Supreme Court Justices were all men. It appears that it was simply taken for granted that attorneys and Judges- not to mention Supreme Court Justices would be men. Prejudices against women in USA was probably as strong as in Asian countries including India. The prejudice

was so strong that even Liberal Judges were reluctant to hire women as clerks. In 1960, a top law school graduate Ms. Ruth Bader Ginsburg was denied clerkship by the legendary liberal Justice Felix Frankfurter. Interestingly this very woman who had then become an attorney famous for expounding the causes and legal rights of women in 1993 was appointed as Justice of the Supreme Court by the President Bill Clinton. Earlier in 1981 President Ronald Reagan appointed the first woman Sandra Day O'Corner to the Supreme Court.

It may be mentioned here that post of clerks in the court is very important. Unlike India, they are assigned very important works in preparation of court's judgments. They do not do mere clerical work. They are attached to a particular Justice. Once the Court has decided to consider a case, clerks do much of the legal research for their Justices. A clerk is often more familiar with the details of a case than the Justice who relies heavily on his or her advices. It is a general belief that some Justices even let trusted clerks prepare opinions for them, doing little more than making a few changes or corrections themselves.

How the Court works- The vast majority of cases that reach the Supreme Court are by way of petitions asking the courts to review a decision of Federal District Courts or State Appellate Courts. These petitions are filed through experienced Attorneys, who are very expensive. You do not always need to engage an Attorney- you can afford. A citizen can therefore, himself directly approach the Court and file petition. He may even send it by post. Such petitions are called "Paper Petitions" and many of them are sent by convicted criminals who believe that they have been unjustly convicted. Most of these petitions are rejected as also those prepared by high priced Attorneys. After passing of the Judiciary Act of 1925, by Congress the Supreme Court is free to refuse or to hear appeal/ petition not considered important. This is like motion hearing of cases in Supreme Court and High Courts in India.

Once the court decides to hear a case it sends for the record from the lower Courts. A schedule is set for the attorney of both sides to submit written briefs presenting their arguments to the Courts. It is for the Court to decide whether or not the attorneys to make their arguments orally or to rely on the written briefs of the two sides. In a case where oral arguments are permitted, a time limit is always fixed for each side which is usually one and a half hours. It is during this time, an attorney has to conclude his argument. The time limit is strictly controlled. When the red light on the podium signals, the attorney speaking must stop. Occasionally, when the Justices are not satisfied or are caught up in a particular discussion, they give an attorney a little extra time.

Justices pronounce a judgment publicly but they arrive at them in private. They deliverate and ultimately vote alone, without aides and even secretaries to take notes for them. Justices often agree on which way a case should be decided. Without arguing on the reason why that decision is reached. Justices who vote in the majority, but disagree with part of the majority opinion can explain the reason for their vote in separate concurring (agreeing) opinions. Justice who vote against majority can also explain their reasons in separate opinion known as "dissent". This is exactly the same as is prevailing in India.

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युक्तियुक्त सन्देह क्या है?

एम.आर. कसानिया
(जिला एवं सत्र न्यायाधीश)
राज्यपाल के विधि अधिकारी
राज भवन, भोपाल

दाण्डिक विचारण परीकथा के समान नहीं होता है, जिसमें कोई व्यक्ति अपनी कल्पना और विचारों की उड़ान भरने के लिए स्वतंत्र हो। ऐसे विचारण का संबंध इस प्रश्न से होता है कि जिस अभियुक्त को विचारण के लिए न्यायालय में लाया गया है, क्या वह उस अपराध का दोषी है जिसे करने का उस पर आरोप लगाया गया है? अभियुक्त को हर प्रकार के युक्तियुक्त सन्देह का लाभ दिया जाना चाहिए। *कालीराम बनाम हिमाचल प्रदेश राज्य, ए.आई. आर 1973 एस.सी.2773* वाले मामले में यह कहा गया है कि यदि अभियुक्त के दोष के बारे में कोई युक्तियुक्त सन्देह उत्पन्न हो जाए तो उसके लाभ से अभियुक्त को वंचित नहीं किया जा सकता। यदि न्यायालय अभियुक्त को सन्देह का लाभ न दें, तो यह न्यायोचित न होगा, लेकिन दोषमुक्ति से विधि और व्यवस्था की स्थिति पर प्रभाव पड़ सकता है या इससे समाज के ऐसे सदस्यों में एक प्रतिकूल प्रतिक्रिया हो सकती है, जो यह विश्वास करते हैं कि अभियुक्त दोषी है। अभियुक्त के दोष पर इस तथ्य की दृष्टि से विचार नहीं किया जाना चाहिए कि बहुसंख्यक व्यक्ति यह विश्वास करते है कि वह दोषी है, अपितु इस दृष्टि से कि क्या उसका दोष अभिलेख पर लायी गयी साक्ष्य द्वारा सिद्ध कर दिया गया है। वास्तव में, अभियुक्त के रूप में दोषारोपित व्यक्ति के दोष का निर्णय करने के लिए न्यायालयों के पास शायद ही और कोई मापदंड या सामग्री है।

कभी–कभी लोकहित और अभियुक्त के हित के विरोध का उल्लेख किया जाता है। यह निःसन्देह सही है कि गलत दोष–मुक्ति अवांछनीय है और इससे न्याय पद्धति में आम जनता का विश्वास शिथिल पड़ सकता है, तथापि निर्दोष व्यक्ति की गलत दोषसिद्धि इससे कहीं अधिक बुरी है। निर्दोष व्यक्ति की दोषसिद्धि के परिणाम कहीं अधिक गंभीर होते हैं और इसकी प्रतिक्रियाएं अवश्यंभावी रूप से सभ्य समाज में अनुभव की जा सकती हैं। इसलिए *जोगेन्द्रसिंह बनाम हरियाणा राज्य, 1974 क्रि.ला.ज. 117 पंजाब–हरियाणा पैरा–12* वाले मामले में यह मताभिव्यक्ति की गई है कि आरोपी/अभियुक्त के विरूद्ध कितना भी प्रबल संदेह हो और न्यायाधीश का कितना भी प्रबल नैतिक विश्वास एवं निश्चय हो, परन्तु जब तक वैध साक्ष्य तथा अभिलेख की विषय–वस्तु के आधार पर युक्तियुक्त शंका के परे दोषारोप सिद्ध नहीं होता है, तब तक उसे दंडित नहीं किया जा सकता है । समग्र रूप से अभियोजन कथा सत्य हो सकती है, परन्तु "हो सकती है" और "होना चाहिए" के मध्य एक लम्बी दूरी है और आरोपी को वैध विश्वसनीय एवं अकाट्य साक्ष्य के माध्यम से इस दूरी को पार करना अनिवार्य है।

शिवाजी साहब राय व अन्य बनाम महाराष्ट्र राज्य, ए.आई.आर. 1973 एस.सी. 2622 वाले मामले में देश के शिखर न्यायालय ने यह ठहराया है कि निश्चय ही यह एक प्राथमिक सिद्धान्त है कि इससे पहले कि न्यायालय अभियुक्त को दोष सिद्ध कर सके, अभियुक्त दोषी "होना चाहिए" न कि केवल "दोषी हो सकता है"। "हो सकता है", तथा "होना चाहिए" के बीच वास्तविक अन्तर बहुत लम्बा है जो अस्पष्ट अटकलों को निश्चित निष्कर्षों से अलग करता है। *बर्की जोसफ बनाम केरल राज्य, ए.आई.आर. 1993 एस.सी. 1892 पैरा–12* वाले मामले में भी माननीय सर्वोच्च न्यायालय ने यह मताभिव्यक्ति की है कि सन्देह, सबूत का अनुकल्प नहीं है।

"सत्य हो सकता है" और "सत्य होना चाहिए" के बीच काफी दूरी है और अभियोजन पक्ष को अपना पक्ष कथन समस्त युक्तियुक्त सन्देह से परे साबित करने के लिए पूरा प्रयास करना होता है।

आशीश बाथम बनाम म.प्र. राज्य, 2003 (1) एम.पी.एच.टी. 1 एस.सी. वाले मामले में भी हमारे सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि मात्र सन्देह भले ही प्रबल हो, लेकिन वह वैध सबूत के लिए प्रभावी अनुकल्प नहीं है । "सत्य हो सकता है" और "सत्य होना चाहिए" के बीच अत्यधिक बौद्धिक अन्तर है, यह मूल नियम, अनुमानों और पक्के निष्कर्षों के बीच महत्वपूर्ण विभेद को बनाए रखने में सहायक है।

हमें इस बात से अनभिज्ञ नहीं होना चाहिए कि किसी दाण्डिक विचारण में सबूत की कोटि उससे अधिक कड़ी होती है जितनी सिविल कार्यवाहियों में अपेक्षित होती है । किसी दाण्डिक विचारण में मामले के तथ्य और परिस्थितियां चाहे कितनी ही पेचीदा क्यों न हों, फिर भी अभियुक्त के विरूद्ध लगाए गए आरोपों को सभी युक्तियुक्त सन्देहों से परे साबित किया जाना चाहिए और सबूत की अपेक्षा को कल्पनाओं और अनुमानों के आधार पर नहीं छोड़ा जा सकता है। हालांकि न्यायालय की अन्तश्चेतना की इस संबंध में तुष्टि हो जानी चाहिए कि अभियुक्त को ऐसी स्थिति में दोषी अभिनिर्धारित नहीं किया गया है जब अभिकथित अपराधों के संबंध में अभियुक्त के निर्दोष होने के बाबत युक्तियुक्त संदेह है, फिर भी यह ध्यान में रखना चाहिए कि किसी दाण्डिक विचारण में सबूत के लिये कोई पूर्ण स्तरमान नहीं है और यह प्रश्न कि क्या अभियुक्त के विरूद्ध लगाए गए आरोप किसी युक्तियुक्त सन्देह के परे साबित हो गये हैं, *प्रत्येक मामले के तथ्यों और परिस्थितियों पर तथा उस मामले में प्रस्तुत की गयी साक्ष्य की श्रेणी और अभिलेख पर रखी गई सामग्री पर निर्भर करता है।*

गुरूबचन सिंह बनाम सतपाल सिंह व अन्य, ए.आई.आर. 1990 एस.सी. 209 वाले मामले में न्यायाधिपति श्री सव्यसाची मुखर्जी ने (जैसे वे उस समय थे) यह उपदर्शित किया है कि *न्यायालय की अन्तश्चेतना* को किसी नियम द्वारा आबद्ध नहीं किया जा सकता, बल्कि वह स्वयं किसी निर्णय को देने में सत्यता और बुद्धिमत्ता का प्रयोग करते हुए कार्य करती है। युक्तियुक्त सन्देह साधारण तौर पर संदेह की वह श्रेणी है जो किसी न्यायसंगत और युक्तियुक्त व्यक्ति को कोई निष्कर्ष निकालने की अनुमति देगी। संदेह का औचित्य अन्वेषण किये जाने वाले अपराध की प्रकृति के अनुकूल होना चाहिए। *संदेह का लाभ देने के नियम को लागू करने की अत्यधिक लगन ऐसी काल्पनिक शंकाओं अथवा चिरकालिक सन्देहों को प्रोत्साहन न दे जिनके द्वारा सामाजिक प्रतिरक्षा का विनाश हो जाए।* न्याय को इस अभिवाक् पर निष्फल नहीं किया जा सकता है कि किसी निर्दोष को दंड देने की बनिस्बत सैकड़ों दोषी व्यक्तियों को बचकर निकलने देना अधिक अच्छा है । दोषी को बचकर निकलने देना विधि के अनुसार न्याय करना नहीं है।

दाण्डिक विधि विनिश्चायक सबूत की अपेक्षा नहीं करती। वह केवल युक्तियुक्त सन्देह से परे सबूत की अपेक्षा करती है[देखें– उ.प्र. राज्य बनाम रांझा राम आदि, *(1986) 4 एस.सी.सी. 99*] *। के. गोपाल रेड्डी बनाम आन्ध्र प्रदेश राज्य, 1979 उम.नि.प. 893, पैरा–9* वाले मामले में शिखर न्यायालय ने यह कहा है कि युक्तियुक्त सन्देह से किसी भी समय किसी विवाद के बारे में हम में से किसी के दिमाग में उत्पन्न होने वाला कोई तुच्छ, हवाई या सारहीन सन्देह अभिप्रेत नहीं है, इससे ऐसा सन्देह अभिप्रेत नहीं है जो दोषसिद्धि में हिचकिचाहट की भावना से उत्पन्न हुआ है। इससे युक्तियुक्तता पर आधारित वास्तविक सन्देह अभिप्रेत है।

केवल सम्भाव्यताएँ या क्षीण सम्भाव्यताएँ या मात्र सन्देह, जो युक्तियुक्त नहीं है, न्याय के प्रशासन को खतरे में डाले बिना, उस दशा में, अभियुक्त व्यक्ति की दोषमुक्ति का आधार नहीं बन सकते, जब अन्यथा उचित रूप से विश्वसनीय परिसाक्ष्य है (देखे– *खमकरण और अन्य बनाम उ.प्र. राज्य, ए.आई.आर. 1974 एस.सी. 1567)।*

इस क्रम में *इन्दरसिंह व अन्य बनाम दिल्ली प्रशासन, 1979–1 उम.नि.प. 1443* वाले मामले में शिखर न्यायालय ने निम्न मताभिव्यक्ति की है –

> "यह आवश्यक है कि सभी दाण्डिक मामलों में युक्तियुक्त सन्देह से परे सबूत दिया जाना चाहिए, यह आवश्यक नहीं है कि यह परिपूर्ण हो । यदि कोई मामला पूर्ण रूप से साबित कर दिया गया है तो यह दलील दी जाती है कि यह कृत्रिम है। यदि किसी मामले में कुछ दोष रह गये हैं, जो मानव के त्रुटि उन्मुख होने के कारण अनिवार्य है, तो यह दलील दी जाती है कि यह बहुत अपूर्ण है। यह आश्चर्य होता है कि क्या किसी निर्दोष व्यक्ति को सजा दिलाने से बचाने के लिए अत्यधिक तर्क, अतिसंवेदिता में बहुत से दोषी व्यक्तियों को निर्दयता से छूट दे दी जाए। *युक्तियुक्त सन्देह से परे सबूत मार्गदर्शन है न कि कोई जादू टोना"।*

न्यायालय में साक्ष्य देते समय कभी–कभी कोई साक्षी भ्रमित हो जाता है। कोई साक्षी पूर्णतः सत्यवादी होने के बावजूद न्यायालय के वातावरण और बीधने वाली प्रति–परीक्षण से आतंकित हो सकता है। ऐसी असंगतियों को, जो मामले की जड़ तक नहीं पहुंचती और मामले की मूल विशेषताओं को नष्ट नहीं करती, असम्यक महत्व नहीं दिया जा सकता। *अब्दुलगनी बनाम म.प्र. राज्य, ए.आई.आर. 1974 एस.सी. 753* वाले मामले में उच्चतम न्यायालय की ओर से निर्णय देते हुए न्यायाधिपति श्री महाजन ने न्यायालयों की साक्ष्य में फर्क होने की दशा में सारे मामले को झूठा मानकर अस्वीकार करते हुए सुगम मार्ग अपनाने की भर्त्सना की है । न्यायालय का कर्तव्य यह है कि वह वास्तविक सच्चाई का पता लगावे। न्यायाधीश मात्र इसलिए दाण्डिक विचारण में पीठासीन नहीं होता है कि वह यह सुनिश्चित करे कि किसी निर्दोष व्यक्ति को दंडित न किया जाए। न्यायाधीश इसलिए भी पीठासीन होता है– जिससे यह सुनिश्चित किया जा सके कि कोई दोषी व्यक्ति दंडित होने से न बच जाए। दोनों ही महत्वपूर्ण कर्तव्य हैं जिनका न्यायाधीश को पालन करना होता है *(देखें – उ.प्र. राज्य बनाम अनिल सिंह, 1989–1 उम.नि.प. 977)।*

न्याय दर्शन भारतीय दर्शन की धुरी है । इसमें न केवल आर्य विचारधारा प्रभावित हुई, बल्कि जैन, बौद्ध एवं समस्त उपनिषदीय चिंतन का स्वरूप भी निश्चित हुआ। संसार में सत्य केवल साधारण कथन से मान्य नहीं होता है। उसे तर्क आधारित होना पड़ता है । केवल तर्कों से भी कुछ विशेष प्रयोजन सिद्ध नहीं होता। तर्क तो खोपड़ी की खुजलाहट मात्र है, जो बुद्धि के चातुर्य से प्रकट होता है। तर्क से हम दिन को रात व रात को दिन सिद्ध कर सकते हैं। हर तर्क को अपने पक्ष में प्रमाण लाना पड़ता है। शुद्ध ज्ञान तर्कशील प्रमाणों का विवेचन, विश्लेषण है ।

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NATURE, AMBIT AND SCOPE OF SURETY'S LIABILITY

VED PRAKASH
Additional Director

The wave of globalization and liberalisation has infused a new vigour in the business world giving rise to intensified banking activities as well as spurt in transactions on hire purchase basis. Loan transactions, in the shape of industrial loan, house loan, educational loan, vehicle loan, and personal loan have become the order of the day. In such cases the banks, financial institutions or traders, as the case may be, in order to secure safe recovery of the loan or timely repayment of the installments, apart from taking security from the principal debtor, also secure guarantee from a third person under a "contract of guarantee" in the form of collateral security.

Expression "contract of guarantee", as defined in Section 126 of the Indian Contract Act, 1872 (hereinafter referred to as the "Act"), means a contract oral or written to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called "the principal debtor", and the person to whom the guarantee is given is called the "creditor". Thus A contract of guarantee requires concurrence of three parties - the principal debtor, the surety and the creditor - the surety undertaking an obligation at the request express or implied of the principal debtor. The obligation of the surety depends substantially on the principal debtor's default; (see - *Punjab National Bank Ltd. Vs. Sri Bikram Cotton Mills Ltd. and another, AIR 1970 SC 1973*). Like any other contract, a contract of guarantee must be supported by consideration. Any thing done, or any promise made by the creditor for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee; (see- Section127). A guarantee may be either general or continuing. General guarantee covers a single transaction while a continuing guarantee, as provided in Section 129, extends to a series of transactions. A surety in the eyes of law is treated as a "favoured debtor".

Usually, failure of principal debtor to repay the debt results in initiation of judicial proceedings at the instance of creditor. The surety, in such cases, more often than not, tries to extricate himself from the clutches of law. To attain this objective, various sort of objections are raised before the Court including that the creditor should first exhaust all his remedies against the principal debtor, that the debt has become time-barred, that the creditor has been negligent or slow in pursuing his remedy against the principal debtor or that acknowledgement or payment made by the principal debtor was not with the consent of the surety, therefore, the creditor may not have any enforceable right against the surety due to the bar of limitation. It is also pleaded that the creditor has not dealt with the securities cautiously and thus allowed them to be damaged or that the creditor and the principal debtor have, without the consent of the surety, entered into a

new agreement varying the terms of the original contract. In such a situation, the Court is invariably required to deal with such objections in order to determine the liability of the surety. Here is an attempt to deal with the various issues touching such objections, which primarily depend on the nature, ambit, and scope of the surety's liability.

Before proceeding further it would be apposite to have a brief look at the relevant provisions contained in Chapter VIII of the Act. While Section 128 enacts the general rule regarding surety's liability that it is co-extensive with that of principal debtor; Sections 133, 134, 135, 139 and 141 provide regarding situations in which a surety stands discharged from his liability. The situations contemplated in these provisions may be summarised as under: -

(i) Variance in the terms of original contract without the consent of the surety (Section 133).

(ii) Release of principal debtor by any act or omission of the creditor or by contract (Section 134).

(iii) Composition of loan by creditor with principal debtor without surety's consent (Section 135).

(iv) Extension of time by creditor in favour of principal debtor (Section 135).

(v) A promise by creditor to not to sue the principal debtor (Section 135).

(vi) Act or omission on the part of creditor which impairs the surety's remedy (Section 139).

(vii) The creditor losing or parting away with the security in his possession without the consent of the surety (Section 141).

AMBIT & SCOPE:

Outlining the ambit of Surety's liability, Section 128 of the Act provides that such liability is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Interpreting the expression 'unless it is otherwise provided by the contract', as used in Section 128, it has been laid down in *R. Lilawati Vs. Bank of Baroda, AIR 1987 Kant. 2* that this expression also governs remaining provisions of Chapter VIII of the Act and enables the surety to give up his rights under Sections 133, 134, 135, 139 and 141 of the Act, meaning thereby that the parties may contract out of the rights and liabilities set down in these Sections. The Court held that though under section 133 any variance made in the contract between the principal debtor and the creditor without surety's consent, discharges the surety as to the transaction subsequent to the variance, however, he may consent for such variance which may be obtained either at the time of the original contract under which the surety gives the guarantee or subsequently. Thus, where the surety has agreed not to claim any benefit under section 141 it is not open to him to contend that such a clause was either against law or was not enforceable; [see - *R. Lilawati (Supra)*].

The ambit and scope of surety's liability was examined by the Apex Court in *The Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and another, AIR 1969 SC 297 (three-Judge Bench)* in which it was clearly propounded that the liability of the surety being co-extensive with that of the principal debtor, the surety becomes liable to pay the entire amount, the moment there is default by the principal debtor; the liability of the surety being immediate is not deferred until the creditor exhausted his remedies against the principal debtor. The Apex Court further held that it is the duty of the surety to pay the decretal amount. On such amount being paid, he will be subrogated to the rights of the creditor under Section 140 of the Act, and he may then recover the amount from the principal debtor. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. The Apex Court made it clear that where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. The Court further held that to direct postponement of the execution of the decree is neither justified under Order XX Rule 11(1) or under the inherent powers of the Court under Section 151 of the Code of Civil Procedure. Reiterating this view in *State Bank of India Vs. M/s Indexport Registered and others, AIR 1992 SC 1740*, it has been laid down that the guarantor alone may be sued without even suing the principal debtor so long as the creditor satisfies the Court that the principal debtor is in default.

VARIANCE IN CONTRACT:

Section 133 stipulates that any variance made without the surety's consent in the terms of the contract between creditor and principal debtor discharges the surety as to transactions subsequent to the variance. However, as laid down in *M.S. Anirudhan Vs. Thomco's Bank Ltd., AIR 1963 SC 746* an unsubstantial alteration does not discharge the surety from the liability and that an alteration which carried out the intention of the parties already apparent on the face of the deed is not a material alteration.

DISCHARGE OF PRINCIPAL DEBTOR:

Legal position is well settled that where a decree has been passed against the principal debtor as well as the surety but thereafter the principal debtor was relieved of his liability under some debt relief law, surety cannot claim to be absolved. In this respect the pronouncement of the Apex Court in *Maharashtra State Electricity Board Bombay Vs. The Official Liquidator High Court, AIR 1982 S.C. 1497* is quite apposite, wherein it has been held, that discharge which the principal debtor may secure by operation of law in bankruptcy or liquidation proceedings in the case of the company, does not absolve the surety of his liability.

COMPOSITION:

The question whether the liability of surety comes to an end by a compromise decree between the creditor and principal debtor depends upon

the terms of the bond itself. If the terms show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under compromise decree, there can be no discharge of surety, otherwise the surety stands discharged; [see - *Raja Bahadur Dhanraj Giriji Vs. Raja P. Parthsarathy and others, (1963) 3 SCR 921]*

EXTENSION OF TIME BY THE CREDITOR:

Under Section 135 extension of time for the payment of debt in favour of principal debtor without surety's consent discharges the surety. What really constitutes extension of time is that the original contract under which the principal debtor was obliged to pay the creditor was substituted by a new and valid contract without the assent of the surety; (see - *Amrit Lal Goverdhan Lalan (dead) by his legal representative Vs. State Bank of Travancore and others, AIR 1968 SC 1432).* In *Hariprashad Narayanjee Vs. Chandrajirao Sambhajeerao Angre, AIR 1962 M.P. 69* it has been held that Section 135 of the Act, has no application unless there is an initial tripartite agreement between the principal debtor, the surety and the creditor fixing specified dates for payment and inspite of it there is subsequent extension of time by the creditor without reference to the surety. If, however, there is material from which the consent of the surety to the variation of terms of the contract entered into by the debtor with the creditor, the performance of which is granted by the surety, can be inferred, then the surety will be bound by the variation of the terms. Such assent may have been obtained prior to arriving of the altered terms or may even be obtained subsequent thereto by way of rectification.

While promise to give time to principal debtor has the effect of discharge of liability, a mere forbearance on the part of the creditor to sue the principal debtor may not as of itself discharge the surety (Section 135). There is thus a distinction between the creditor simply holding his hands unilaterally and a forbearance springing from an agreement. The former does not operate to destroy the surety's liability the later does.

'ACT OR OMISSION':

An act or omission which impairs surety's remedy has the effect of discharge of surety's liability (Section 134). However, the legal position is well settled that mere failure of the creditor to bring a suit against the principal debtor within the period of limitation is not an act or omission of the nature contemplated by Section 134, and, therefore, will not *ipso facto* discharge the surety from the liability. The reason being such an act does not in any manner impair the remedy of the surety against the principal debtor; refer- *Mahanth Singh Vs. U.Ba Yi.*

LOSS OF SECURITY :

Section 141 of the Act says that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the

contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security .As pointed out by the Apex Court in *State of Madhya Pradesh Vs. Kaluram, AIR 1967 SC 1105* the expression "security" in this Section is not used in any technical sense; it includes all rights which the creditor has against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the principal debtor. The surety is, therefore, on payment of the amount due by the principal debtor entitled to be put in the position of the creditor stood in relation to the principal debtor. In *Amrit Lal Goverdhan Lalan (dead) by his legal representative Vs. State Bank of Travancore and others, AIR 1968 S.C. 1432* the Court was satisfied that there was shortage of goods of the value of Rs. 35,690 brought about by the negligence of the Bank and to that extent there must be deemed to be a loss by the Bank of the securities which the Bank had at the time when the contract of surety was entered into , therefore, it was held that the surety stood discharged of the liability to the Bank to the extent of Rs. 35, 690. But the surety is discharged only when the loss of security has occasioned because of conduct of creditor. Where debtor company was taken over by the Govt. and securities, therefore, on takeover were lost, it was held that surety cannot claim to be discharged; [(see- *Industrial Finance Corpn. of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd., (2002)5 SCC*)]

MORTGAGE DECREE

In *Union Bank of India Vs. Manku Narayana, AIR 1987 SC 1078 (two-judge bench)*, where the decree in execution was a composite decree personally against the principal debtor and the guarantor and also against the mortgaged property, and a portion of the decreed amount was covered by the mortgage, the Court directed the decree-holder Bank to proceed against the mortgaged property first and then against the guarantor. The Court observed as under:-

> "The decree in execution is a composite decree. Personally against the defendants including the respondent and also against the mortgaged property. We do not pause to consider whether the two portions of the decree are severable or not. We are of the view that since a portion of the decreed amount is covered by the mortgage. The decree-holder Bank has to proceed against the mortgaged property first and then proceed against the guarantor".

The aforesaid proposition was reconsidered by the Apex Court in *State Bank of India, Vs. M/s Indexport Registered and others, (supra)* and after referring to the observations made in *Damodar Prasad's case (supra)*, the Apex Court expressly overruling this proposition ordained that if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without

any limitation on its execution, the decree holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. Section 128 of the Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract". If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor.

LIMITATION:

As the liability of the surety is co-extensive with that of principal-debtor, it can well be said that such liability will remain enforceable till the liability can be enforced against the principal debtor.

Acknowledgement of a debt by principal debtor under Section 18 of the Limitation Act extends the period of limitation. There appears to be a divergence of opinion as to whether acknowledgment of debt by the principal-debtor will save the limitation against surety as well.

Kerala High Court in *The Wandoor Jupiter Chits (P.) Ltd. (in Liquidation) Vs. K.P. Mathew and another, AIR 1980 Kerala 190* has taken the view that an acknowledgement does not involve variance of original contract, therefore, in such a situation surety cannot stand discharged from his liability and the limitation will stand extended against him also. In *R. Lilawati (Supra),* the Karnataka High Court relying on the pronouncement made in *Dorothy Valentine Burnard v. William Douglas Lysnar , AIR 1929 PC 273* by the Privy Council has taken the view that where surety bond contained the terms which authorized the principal debtor to give consent regarding transaction on behalf of the surety, then an acknowledgement by principal debtor will also be binding upon the surety.

In cases of continuing guarantee the limitation is covered by Article 55 of the Limitation Act, 1963 (Article 115 of the old Act) and commences when the outstanding amount is ultimately settled against the principal-debtor and on his failure the demand is made to the surety and not from the date of transaction. This legal position has been amply made clear by the Apex Court in *Mrs. Margaret Lalita Samuel v. Indo Commercial Bank Ltd., AIR 1979 SC102.*

In *Punjab National Bank Vs. Surendra Prasad Sinha, AIR 1992 S.C. 1815,* the Apex Court laid down that when a debt became time-barred and the FDRs of the surety were lying with the bank, the bank was well entitled to appropriate the FDRs against the outstanding loan because the limitation only bars the remedy and it never extinguishes the right which was there in respect of loan against the surety.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute to all the districts for discussion in the bi-monthly training meeting of June, 2004. The Institute has received various articles relating to these topics. Out of these articles, none of the articles relating to topic No. 4 has been found of requisite standard for being published in JOTI Journal. This topic shall be allotted again to other group of districts for discussion in bi-monthly training to be held in October, 2004. One article each relating to remaining topics is being included in this issue of JOTI Journal:

Q.1 What is the nature and scope of jurisdiction of Court u/s 34 of the Arbitration and Conciliation Act, 1996 for setting aside an arbitration award?
माध्यस्थम् एवं सुलह अधिनियम, 1996 की धारा 34 के अन्तर्गत अवार्ड अपास्त करने के विषय में न्यायालय की अधिकारिता का स्वरूप व विस्तार क्या है?

Q.2 What is the nature and scope of power of Court to grant interest u/s 34 of the Code of Civil Procedure, 1908?
व्यवहार प्रक्रिया संहिता, 1908 की धारा 34 के अन्तर्गत ब्याज स्वीकृत किए जाने के बारे में न्यायालय के अधिकार का स्वरूप व विस्तार क्या है?

Q.3 Whether legal representatives of a deceased decree holder may execute a money decree or award without obtaining succession certificate regarding the same?
क्या मृत आज्ञप्तिधारी के विधिक उत्तराधिकारी, उत्तराधिकार प्रमाणपत्र प्राप्त किए बिना धन आज्ञप्ति या अवार्ड अपने पक्ष में निष्पादित करा सकते हैं ?

Q.4 Whether the Court can impose sentence of imprisonment only, where the offence is punishable with imprisonment and fine?
क्या न्यायालय कारावासीय दण्ड तथा अर्थदण्ड से दण्डनीय अपराध के मामले में केवल कारावासीय दण्ड अधिरोपित कर सकता है?

Q.5 What is the relevant date for deciding the juvenility of an accused?
किस दिनांक के आधार पर अभियुक्त की किशोरवयता निर्धारित की जानी चाहिये?

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माध्यस्थम् एवं सुलह अधिनियम, 1996 की धारा-34 के अंतर्गत अवार्ड अपास्त करने के विषय में न्यायालय की अधिकारिता का स्वरूप व विस्तार

न्यायिक अधिकारीगण
जिला सीहोर

भारत सरकार द्वारा व्यापार के क्षेत्र में लागू की गई नवीन उदारीकरण नीति जिसके कारण भारतवर्ष में उत्तरोत्तर बढ़ते हुए व्यापार तथा शेष विश्व के साथ वाणिज्यिक संबंधों एवं अन्तर्राष्ट्रीय वाणिज्यिक समुदाय का विश्वास अर्जित करने के आशय से भारतीय संसद द्वारा संयुक्त राष्ट्रसंघ के अन्तर्राष्ट्रीय व्यापार, विधि, कमीशन के आधार पर माध्यस्थम्, एवं सुलह अधिनियम, 1996 निर्मित किया जाकर दिनांक 25.1.1996 को इस अधिनियम को लागू किया गया। इस अधिनियम के माध्यम से पक्षकारों के मध्य विवादों के निराकरण के संबंध में प्रभावी उपाय उपबंधित किए गए हैं।

माध्यस्थम् एवं सुलह अधिनियम, 1996 के उपबंधों का प्रमुखतम उद्देश्य यह है कि पक्षकारों के मध्य विवादों का निपटारा यथासंभव त्वरित गति से किया जाना चाहिए जिससे कि मुकदमेबाजी के कारण वाणिज्यिक गतिविधियां प्रभावित न हों । माध्यस्थम् अधिनियम, 1940 के विभिन्न उपबंधों तथा माध्यस्थम् एवं सुलह अधिनियम, 1996 के उपबंधों की तुलना किए जाने पर स्पष्टतया परिलक्षित होता है कि माध्यस्थम् एवं सुलह अधिनियम, 1996 के माध्यम से माध्यस्थ द्वारा विवादों के निराकरण संबंधी प्रक्रिया में न्यायालय के हस्तक्षेप को न्यूनतम करते हुए यह मंशा रही है कि माध्यस्थम् एवं सुलह अधिनियम, 1996 के अंतर्गत स्थापित प्राधिकरण द्वारा पारित किए गए प्रत्येक आदेश की विधि अंतर्गत स्थापित न्यायालयों द्वारा न्यायिक संवीक्षा नहीं की जाना चाहिए । इस अधिनियम के पीछे विधायिका का मुख्य उद्देश्य माध्यस्थम् से संबंधित मामले की प्रक्रिया में न्यायालयों की पर्यवेक्षण संबंधी भूमिका को न्यूनतम करना है।

वर्तमान अधिनियम, 1996 में न्यायालय की शक्तियाँ अत्याधिक घटा दी गई है। जैसा कि अधिनियम की धारा-5 में उल्लेखित किया गया है कि कोई भी न्यायिक प्राधिकारी हस्तक्षेप नहीं कर सकता जब तक तक कि उस बारे में उपबंधित नहीं किया गया हो। इस अधिनियम के निम्न प्रावधान न्यायालयों की अधिकारिता के विषय में हैं,

(1) न्यायालय द्वारा अंतरिम उपाय (धारा-9)
(2) माध्यस्थों की नियुक्ति (धारा-11)
(3) आदेश की समाप्ति और माध्यस्थ का प्रतिस्थापन (धारा-15)
(4) माध्यस्थम् कार्यवाहियों में साक्ष्य ग्रहण करने हेतु न्यायालय की सहायता (धारा-27)
(5) माध्यस्थम् पंचाट अपास्त करना (धारा-34)
(6) अपील (धारा-37)
(7) माध्यस्थम् पंचाट को अधिनिर्णय देने हेतु (धारा-39) में बताई गई परिस्थितियों में निर्देश देना (धारा-39)

वर्तमान अधिनियम की धारा-34 (3) के प्रावधान अनुसार पंचाट को अपास्त कराने के लिए कोई भी आवेदन पत्र उस तिथि से जब कि पक्षकार द्वारा माध्यस्थम् पंचाट प्राप्त किया गया था अथवा धारा-33 के अधीन कोई प्रार्थना की गई थी, तब उस तिथि, जिस तिथि पर यह प्रार्थना माध्यस्थम् न्यायाधिकरण द्वारा निस्तारित की गई के तीन माह की अवधि के भीतर पेश करने की दशा में ही परिपालनीय होगा। तथापि निर्धारित समय के

भीतर आवेदन करने में पर्याप्त कारण से आवेदक वंचित हो गया हो तो ऐसे कारण बताए जाने की दशा में निर्धारित अवधि में 30 दिन की अतिरिक्त अवधि आवेदक को प्राप्त हो सकती है। माध्यस्थम् पंचाट को अपास्त कराने के लिए दिया जाने वाला आवेदन सर्वप्रथम समय सीमा में पेश किया जाना आवश्यक होता है। यही निर्धारित अवधि आत्यांतिक एवं अविस्तारण योग्य होती है। यहां तक की परिसीमा अधिनियम की धारा–5 के प्रावधान भी आकर्षित नहीं होते, अवलोकनीय है– न्याय दृष्टांत *यूनियन ऑफ इंडिया बनाम मेसर्स पापूलर कंस्ट्रक्शन कम्पनी, ए.आई.आर. 2001 एस.सी. 4010.*

समय सीमा में कोई प्रकरण पेश हुआ है अथवा नहीं, इसका निराकरण माध्यस्थ को ही करना होता है, अवलोकनीय है, *न्याय दृष्टांत, पंचू गोपाल बोस बनाम् बोर्ड ऑफ ट्रस्टी फॉर पोर्ट ऑफ कलकत्ता, ए.आई.आर. 1994 एस.सी. 1615, नेशनल डेयरी डवलपमेन्ट बोर्ड आनन्द (गुजरात) बनाम सूरजसिंह, 2002 (2) एम.पी.एल.जे. 72.*

न्याय दृष्टांत *यूनियन ऑफ इंडिया एवं अन्य बनाम सी.सुब्बारेड्डी, ए.आई.आर. 2004 कर्नाटक 210* वाले मामले में एवार्ड को अपास्त किए जाने के संबंध में **समुचित न्यायालय** कौन–सा होगा, इस बिन्दु पर प्रतिपादित विधि सिद्धान्त उल्लेखनीय है। माध्यस्थम एवं सुलह अधिनियम, 1996 की धारा–2 (ई) के माध्यम से **न्यायालय** को परिभाषित करते हुए उल्लेखित किया गया है कि **"न्यायालय"** से आशय जिले की मूल क्षेत्राधिकारिता का प्रमुख सिविल न्यायालय है। जिसमें संबंधित सिविल क्षेत्राधिकार का प्रयोग करते हुए उच्च न्यायालय भी सम्मिलित है लेकिन इस धारान्तर्गत न्यायालय की श्रेणी में प्रमुख सिविल कोर्ट से निम्नश्रेणी का सिविलकोर्ट और लघुवाद न्यायालय सम्मिलित नहीं हैं। अतएव माध्यस्थम्, एवं सुलह अधिनियम, 1996 की धारा–34 के अंतर्गत प्रस्तुत की जानेवाली याचिका जिले की मूल क्षेत्राधिकारिता के प्रमुख सिविल न्यायालय अर्थात् "जिला न्यायालय" में प्रस्तुत की जानी चाहिए।

सामान्यतः जहाँ विवाद की विषय वस्तु तत्समय प्रवृत्त विधि के अधीन माध्यस्थ द्वारा निपटाए जाने योग्य नहीं है, माध्यस्थम् पंचाट भारत में प्रचलित लोक नीति के विरूद्ध है अथवा माध्यस्थम् करार के पक्षकारों में हुई संविदा शर्तों के विपरीत है तब इन आधारों पर ऐसे पंचाट को अपास्त किया जा सकता है। जहां कोई विधि का प्रश्न माध्यस्थम् के समक्ष उठाया गया हो तब उसका निराकरण माध्यस्थम् को ही करना चाहिए और यदि विधि के बिन्दुओं पर दिया गया निर्णय विधि सिद्धान्तों के विपरीत है तो पंचाट हस्तक्षेप योग्य होगा, अवलोकनीय है न्याय दृष्टांत *टाटा हाईड्रो इलेक्ट्रिक पावर सप्लाई कम्पनी लिमिटेड व अन्य बनाम यूनियन ऑफ इन्डिया, ए.आई.आर. 2001 बाम्बे 240.*

न्याय दृष्टांत *अशोक बनाम सुधा, ए.आई.आर. 1987 उच्चतम न्यायालय 841* वाले मामले में यह अभिनिर्धारित किया गया है कि न्यायालयों को एवार्ड को अपास्त किए जाने के संबंध में प्रस्तुत प्रार्थना पत्र जो विशुद्ध रूप से तकनीकी आधार पर प्रस्तुत किया गया हो, को विचार में नहीं लेना चाहिए। उदाहरणार्थ–एवार्ड के अपंजीकृत होने की दशा में यह एवार्ड की वैधानिकता को चुनौती देने का आधार नहीं हो सकता है।

जहां पक्षकारों द्वारा आरबिट्रल एवार्ड की वैधता को चुनौती दिए जाने के संबंध में लंबित प्रार्थना पत्र के दौरान पक्षकारों द्वारा आर्बिट्रल एवार्ड को अमलीजामा पहनाया गया हो तो ऐसी दशा में पक्षकारों को प्रश्नगत एवार्ड को चुनौती दिए जाने से विबंधित किया जावेगा एवं एवार्ड को अपास्त नहीं किया जावेगा। इस संबंध में न्याय दृष्टांत *बृजेन्द्रनाथ बनाम मयंक, ए.आई.आर. 1994 उच्चतम न्यायालय 2562* वाले मामले में प्रतिपादित विधि सिद्धान्त उल्लेखनीय है।

माध्यस्थम् की विषय वस्तु के स्थान का न्यायालय सामान्यतः अधिनियम की धारा–34 के अंतर्गत एवार्ड को अपास्त किए जाने के संबंध में प्रस्तुत किए जाने वाले प्रार्थना पत्रों की सुनवाई करने हेतु सक्षम न्यायालय

है। जहां माध्यस्थम् अनुबंध के अंतर्गत कानपुर जिले के अंतर्गत कार्य किया गया है, दिल्ली न्यायालय को इस संबंध में क्षेत्राधिकार इस आधार पर प्राप्त नहीं हो जाता है कि संबंधित पक्षकार यूनियन ऑफ इंडिया का मुख्यालय दिल्ली में स्थित है अथवा एवार्ड दिल्ली में पारित किया गया। ऐसे मामलों में जहां विवादित संपत्तियां दो न्यायालयों के क्षेत्राधिकारों में विभिन्न स्थानों पर स्थित हैं ऐसी दशा में दोनों न्यायालयों में से किसी भी एक न्यायालय में एवार्ड अपास्त किए जाने विषयक प्रार्थना पत्र प्रस्तुत किया जा सकता है परन्तु जहां एक बार ऐसे न्यायालयों में से एक न्यायालय द्वारा एवार्ड को अपास्त किए जाने हेतु प्रस्तुत किया गया प्रार्थना पत्र स्वयं के क्षेत्राधिकार अंतर्गत होना मान्य करते हुए उस पर विचार प्रारंभ कर दिया गया हो ऐसी दशा में मामले को निराकृत किए जाने हेतु केवल उसी न्यायालय को क्षेत्राधिकार प्राप्त होगा, अन्य न्यायालय को ऐसे मामले का सक्षम क्षेत्राधिकार वाला होना मान्य नहीं किया जा सकता है। ऐसे मामलों में जहां माध्यस्थम् अन्तर्राष्ट्रीय वाणिज्यिक माध्यस्थम् से संबंधित है, न्यूयार्क कन्वेन्शन के पैरा– (1) (ए) आर्टिकल अथवा जिनेवा कन्वेशन के आर्टिकल (iii) को लागू किया जावेगा। इन कन्वेन्शान्स द्वारा उपबंधित किया गया है कि वे देश अथवा वह विधि जिसके अधीन एवार्ड पारित किया गया हो, एवार्ड को अपास्त किए जाने की क्षेत्राधिकारिता रखता है।

माननीय उच्चतम न्यायालय द्वारा न्याय दृष्टांत *आईल एंड नेचुरल गैस लिमिटेड बनाम सॉ पाईप्स लिमिटेड, ए.आई.आर. 2003 एस.सी. 2629* वाले मामले में एवार्ड किन दशाओं में अपास्त किया जा सकता है अर्थात् एवार्ड के संबंध में न्यायालय द्वारा हस्तक्षेप किए जाने की क्षेत्राधिकारिता का विस्तृत रूप से वर्णन किया गया है। इस मामले में अभिनिर्धारित किया गया है कि यदि आर्बिट्रल ट्रिब्यूनल द्वारा धारा–24, 28 अथवा 31 (3) के अंतर्गत विहित आज्ञापक प्रक्रियाएं, जो पक्षकारों के हितों को प्रभावित करती हैं, अनुसरित नहीं किया गया हो तो ऐसी दशा में न्यायालय को एवार्ड में हस्तक्षेप किए जाने का क्षेत्राधिकार प्राप्त हो जाता है। धारा– 28 की उपधारा–1 (ए) के अंतर्गत आर्बिट्रल ट्रिब्यूनल को निर्देशित किया गया है कि भारत में तत्समय प्रवृत्त सब्सटेंटिव विधि के अनुसार विवादों का निराकरण किया जावे। स्वीकृततः सब्सटेंटिव विधि के अन्तर्गत भारतीय संविदा अधिनियम, सम्पत्ति अंतरण अधिनियम तथा इस प्रकार की अन्य विधियां, जो अस्तित्व में हैं, को शामिल किया जावेगा । उदाहरण के तौर पर यदि एक एवार्ड संपत्ति अन्तरण अधिनियम के अंतर्गत उपबंधित व्यवस्थाओं का उल्लघंन करते हुए पाया जावे या भारतीय संविदा अधिनियम के उपबंधों का उल्लंघन करते हुए पारित किया जावे तो प्रश्न यह उत्पन्न होता है कि क्या ऐसे एवार्ड को अपास्त किया जा सकता है? उपधारा–3 के अंतर्गत आर्बिट्रल ट्रिब्यूनल को निर्देशित किया गया है कि वह अनुबंध की दशाओं के अनुसार विवाद का निराकरण करे तथा व्यवसाय के संव्यवहार से संबंधित "यूजेस" को भी विचार में ले। यदि आर्बिट्रल ट्रिब्यूनल अनुबंध की दशाओं अथवा वाणिज्यिक यूजेस को जो संव्यवहार पर लागू होती हैं, की उपेक्षा करता है तो ऐसे एवार्ड में हस्तक्षेप किया जा सकता है। इसी प्रकार यदि एवार्ड नान–स्पीकिंग एवार्ड होकर धारा 31 (3) के उल्लघंन के रूप मे हो तो क्या ऐसे एवार्ड को अपास्त किया जा सकता है? इन सब बिन्दुओं पर माननीय उच्चतम न्यायालय द्वारा विचार प्रस्तुत करते हुए अभिनिर्धारित किया गया है कि माध्यस्थम् एवं सुलह अधिनियम, 1996 की धारा–34 के अन्य उपबंधों को विचार में लेते हुए ऐसा प्रतीत होता है कि विधायिका की यह मंशा नहीं रही है कि यदि एवार्ड में अधिनियम के उपबंधों का उल्लंघन हो फिर भी ऐसे एवार्ड को न्यायालय अपास्त नहीं कर सकता है । यदि यह अभिनिर्धारित कर दिया जावे कि ऐसे एवार्ड में हस्तक्षेप नहीं किया जा सकता है तो यह बात न्याय की आधारभूत अवधारणाओं के विपरीत होगी। यदि आर्बिट्रल ट्रिब्यूनल द्वारा अधिनियम के अन्तर्गत विहित की गई आज्ञात्मक प्रक्रिया का अनुसरण नहीं किया गया तो इसका मतलब यह होगा कि आर्बिट्रल ट्रिब्यूनल द्वारा उसकी क्षेत्राधिकारिता से बाहर जाकर कार्य किया गया, फलस्वरूप इस प्रकार का एवार्ड अवैध होकर धारा–34 के अंतर्गत अपास्त किया जावेगा ।

यहां यह कहना अनुचित नहीं होगा कि यदि माध्यस्थ के द्वारा कोई विधिक अवचार पंचाट के वक्त किया

गया हो तो उसका निराकरण न्यायालय के द्वारा नहीं किया जा सकता है क्योंकि धारा–34 के अधीन ऐसे विधिक अवचार को पंचाट अवैध घोषित करने का आधार उपबंधित नहीं किया गया है, अवलोकनीय है न्याय दृष्टांत *इंडियन कामर्शियल कंपनी लिमिटेड बनाम अमरीश किलाचंद व अन्य, ए.आई.आर. 2002 बाम्बे 391.*

माननीय सर्वोच्च न्यायालय की संवैधानिक खंडपीठ द्वारा *मैसर्स कोंकण रेलवे कार्पोरेशन बनाम रानी कन्स्ट्रक्शन प्रा.लि.,ए.आई.आर. 2002 एस.सी. 778* में अभिनिर्धारित किया गया है कि अन्सिट्राल मॉडल में अनुच्छेद–11 एवं 34 के अनुसार ही अधिनियम, 1996 की धारा–11 एवं 34 नहीं है, इसलिए अन्सिट्राल मॉडल व उसके अनुच्छेदों के आधार पर अधिनियम की धारा–11 एवं 34 का निर्वचन नहीं किया जा सकता है।

धारा–34 के अधीन आवेदन में ऐसा आक्षेप नहीं उठाया जा सकता है कि पंचाट पंजीकृत एवं मुद्रांकित है या नहीं। इस हेतु व्य.प्र.स. की धारा–47 एवं अधिनियम की धारा–36 की कार्यवाही के समय विचार किया जा सकता है। अवलोकनीय है न्याय दृष्टांत *अनुसुईया देवी बगैरह बनाम एम. माणिक रेड्डी, (2003) 8 एस. सी. 565.*

ऑईल एण्ड नेचुरल गैस लिमिटेड बनाम सॉ पाईप लाईन, ए.आई.आर. 2003 एस.सी. 2629 वाले मामले में माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि यदि माध्यस्थ द्वारा अधिनियम, 1996 के आदेशात्मक प्रावधानों का पालन नहीं किया गया हो तो ऐसा कृत्य उसके क्षेत्राधिकार के बाहर का होना माना जायेगा और तब ऐसे पंचाट को इस प्रावधान के अधीन अपास्त किया जा सकता है। जहां पंचाट मूलभूत विधिक प्रावधानों के विरूद्ध हो, पक्षकारों के अधीन हुए करार की शर्तों के विपरीत हो, भारतीय विधि की मूलभूत नीति के विरूद्ध हो, भारत हित के विरूद्ध हो, न्याय या नैतिकता के विरूद्ध हो अथवा स्पष्टतः अवैध हो तो ऐसे पंचाट को अपास्त किया जाना चाहिए।

एच.पी. स्टेट इलेक्ट्रिसिटी बोर्ड बनाम आर.जे.शाह एण्ड कम्पनी, (1999) 4 एस.सी.सी. 214 वाले मामले में माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि माध्यस्थम द्वारा करार में दर्शाई गई राशि से अधिक राशि का पंचाट नहीं दिया जा सकता है और ना ही करार में निषेधित राशि के बारे में पंचाट दिया जा सकता है। यदि माध्यस्थम् ऐसा पंचाट करार के विपरीत पारित करता है तो उसका यह कृत्य क्षेत्राधिकार के बाहर का माना जावेगा।

स्टील अर्थारिटी ऑफ इंडिया लिमिटेड बनाम जे.सी. बुद्धराजा, ए.आई.आर. 1999 एस.सी. 3275 वाले मामले में भी माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि माध्यस्थम् को पंचाट पारित करते समय उन शर्तों को अनदेखा नहीं करना चाहिए जो कि दोनों पक्षों के मध्य हुए करार के अनुसार दोनों पक्षों पर बंधनकारक हैं। यदि माध्यस्थम् ने करार की शर्तों के विपरीत स्वच्छंदतापूर्वक पंचाट पारित कर दिया है तो उसका ऐसा कार्य स्वेच्छाचारी एवं मनमाना होने के कारण क्षेत्राधिकार के बाहर का ही माना जावेगा।

इसी प्रकार मांध्यस्थम् को संविदा की उन शर्तों को अनदेखा नहीं करना चाहिए, जिसके अधीन उसे माध्यस्थ नियुक्त किया गया है। इस संबंध में अवलोकनीय है न्याय दृष्टांत *ग्रिड कार्पोरेशन ऑफ उड़ीसा लिमिटेड व अन्य बनाम बाला सोर टेक्नीकल स्कूल, ए.आई.आर. 1999 एस.सी. 2262.*

इस प्रकार उपरोक्त वर्णित कारण, विधिक सिद्धान्तों के प्रकाश में विधायिका द्वारा वर्तमान अधिनियम में न्यायालय की शक्तियों को सीमित कर दिया गया है फिर भी हम यह कह सकते हैं कि शक्तियाँ भले ही असीमित नहीं हों, किन्तु उन्हें परिसीमित भी नहीं किया जा सकता है अपितु न्याय के उद्देश्य से आवश्यक हो तो विस्तारित किया जा सकता है ।

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LEGAL REPRESENTATIVES' RIGHT TO EXECUTE A MONEY DECREE/AWARD WITHOUT OBTAINING SUCCESSION CERTIFICATE

JUDICIAL OFFICERS
District Rewa

Order 21 Rule 10 of C.P.C. provides that "where the decree holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (If any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court than to such Court or to the proper Officer thereof." Thus Under O.21 R.10 of the Code generally a decree holder has to make an application for execution. In case of death of decree holder his legal representatives get right in decree by succession, inheritance or otherwise, and can execute the decree.

In case of money decree, when the execution proceeding is taken up by the legal representatives (L.Rs.) of deceased decree holder, the provisions of Sec. 214 of Indian Succession Act, 1925 will be attracted. Sec. 214 reads as follows :

> 214. Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons:-
>
> (1) No Court Shall
>
> (a) Pass a decree against a debtor of a deceased person for payment of his debt to person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or (b) Proceed upon an application of a person claiming to be entitled to execute against such a debtor a decree or order for payment of his debt except on the production by the person so claiming, of...
>
> (i), — (ii) x x x x x x
>
> (iii) a succession certificate granted under part x and having the debt specified therein, or
>
> (iv), — (v) x x x x x x
>
> 2. The word "debt" in sub Sec. (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

A debt is a sum of money which is presently payable or will become payable in future by reason of present obligation. In case of *Union of India V/s Raman Iron Foundry, AIR 1974 S.C. 1265,* it is held that when the obligation is to pay sum of money at a future date it is a debt owing, but when the obligation is to pay some money, it is debt due "Hence a money decree in favour of decree holder or his LRs will be treated as "monay due" and comes under the definition of debt. Therefore, Sec. 214 (1) (b) of Indian Succession Act, creates a bar on proceeding in execution of a money decree by legal representative of deceased decree holder, unless they file a succession certificate duly issued under succession Act. In *Tejraj Rajmal Marwadi V/s Rampyari, AIR 1938 Nagpur 528,*

Ganeshmal V/s Smt. Anand Kanwar, AIR 1968 Rajasthan 273, Smt. Ram Murti Devi and another V/s M/s Ralla Ram Tulsi Ram and another, AIR 1987 H.P. 1, Sangappa Mallappa Kuri V/s Special Land Acquisition Officer Bagalkot, AIR 2003 Karanatak 142, Purushottam Lal Mangturam V/s Mst. Joro Bai, AIR 1948 Orissa 202, K.T. Thimme Gowda V/s Shri Thimme Gowda, AIR 1986 Karanatak 204 it is held that when fresh execution application is brought by LRs. of deceased decree holder, then they have to file succession certificate according to Sec. 214 (i) (b) of the Act, otherwise Court will not proceed to execute the decree. Thus this Section prohibits the Court from proceeding to execute the decree unless the succession certificate is produced.

Now a question arises, in a case when the execution proceeding was initiated by a deceased decree holder, subsequently he dies during the pendency of execution, then, whether his LRs. can continue the execution by getting themselves substituted in place of deceased decree holder?

On this point, different High Courts have expressed different views. In *Purshottam Lal Mangturam V/s Mst. Joro Bai,* AIR 1948 Orissa 202, it is held that an execution proceeding unlike a suit, does not abate on the death of the decree holder. The legal representatives of the deceased decree holder can be substituted as rights under the decree are transferred by operation of law. Therefore, they can continue the execution proceeding, and it is not necessary for them to file fresh application for execution. Honourable High Court has considered the scope of Sec. 146 of C.P.C. and has held that execution can be continued by the heirs and legal representatives of deceased decree holder and production of succession certificate is not necessary.

In *Smt. Ram Murti Devi and another V/s M/s Ralla Ram Tulsi Ram and another, AIR 1987 H.P. 1,* it is held that "the production of succession certificate by LRs. invoking Sec. 214 Succession Act, for continuation of execution proceeding is not necessary. The main purpose regarding the production of a succession certificate is to protect the interests of the debtors, but in case the deceased had himself initiated execution proceedings, the persons claiming substitution as LRs. have only to prove that they are the LRs. of the deceased. In fact, there is no execution application on their behalf and they join the proceedings at an intermediary stage. An application for being substituted in place of the decree holder as LRs. can only be treated to be an ancillary application to continue the execution proceedings and not a substantive application". Honourable High Court has expressed the view that provisions of O.22 R.3, 4 & 8 of C.P.C. are not applicable in execution, therefore, under Sec. 146 C.P.C., the LRs. are entitled to continue with the execution proceedings started by the decree holder. Similar views are also taken in *Shrinath Khandelwal V/s Bishwanath, Prasad, AIR 1972 All 321, Ramanatha Reddy V/s K.V. Kuppuswami Mudaliar, AIR 1971 Mad. 419, Benode Chatterjee V/s Purunendu Nath Tagore, AIR 1973 Cal 352, Representatives of Harmanbhai Lallubhai V/s Maganbhai Mathurabhai, AIR 1990 Gujrat 100.*

The contrary view has been expressed by Honourable Nagpur High Court in *Tejraj Rajmal Marwadi V/s Rampyari, AIR 1938 Nag 528.* In this case the execution was initiated by deceased decree holder. After his death his widow

had moved application for substitution. Honourable the High Court held that the words "to be so entitled" used in Sec. 214 (i) (b) of Succession Act means, as is plain from Sec. 214 (i) (a) "to be entitled to any part of the deceased's estate." Therefore, Court cannot proceed with execution unless the succession certificate is produced.

Honourable Rajasthan High Court in *Ganeshmal V/s Smt. Anand Kanwar, AIR 1968 Raj. 273* followed the above principle and reiterated in para (5) that as the use of words "claiming to be so entitled", appearing in clause (b) shows that the legislature meant this clause to read in the context of clause (a). These words were used to avoid repetations of the words "claiming on succession to be entitled to the effects of the deceased person" appearing in clause (a). If clause (b) is read without the context of clause (a) the word "so" would become redundant and meaningless. Therefore, the Court has held that the succession certificate is necessary to continue the execution by LRs. of deceased decree holder.

Our Own High Court in *Mathura Prasad V/s Ghasiram, 1997 (1) MPLJ 187, Tarabai Jain & others V/s Shiv Narayan, 1997 (2) MPLJ 287* has followed the view taken in *AIR 1938 Nag 528* (supra) and held that the legal representatives of deceased decree holder are required to produce succession certificate to enable them to proceed with the execution. This view is followed by Karnataka High Court in *Sangappa Mallappa Kuri Vs. Special Land Acquisition Officer, AIR 2003 Karnataka 142.*

Hence the provision of Sec. 214 (i) (b) of Indian Succession Act, is mandatory. In this Section the word "application" used in clause (b) is not meant to convey the sense of only a fresh application for execution of the decree but it also includes the application for continuation of the pending application for execution presented by deceased decree holder.

It is also argued that the object of Sec. 214 (1) (a) of Succession Act is to safeguard the interest of judgement debtor from vexatious Claims by calling upon the LRs. of deceased plaintiff to file succession certificate. When the execution was instituted by decree holder himself, then the apprehension of vexatious execution does not arise, therefore, on the death of decree holder, the LRs. are not required to file succession certificate.

We don't agree with this contention.

In pending suit under O.22 R.5 of C.P.C. and similarly in execution proceeding under Sec. 47 (3) of C.P.C. the Court has power to make enquiry regarding the LRs. of deceased plaintiff or decree holder. Both enquiries are of summary nature, can be challenged in separate Civil Suit and does not operate as res judicata. Therefore, in pending suit if the production of succession certificate is made necessary to safeguard the interest of dependent, then why the same principle should not be followed in pending execution proceeding also. Actually, it can be inferred that the legislature has substituted the scope of enquiry u/s 47 or O.22 R.5 of C.P.C. by requiring the succession certificate to be filed by LRs. of deceased Plaintiff/ decree holder. Therefore, in both situations the succession certificate is required to proceed with execution of decree.

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अभियुक्त की किशोरवयता निर्धारण हेतु आधार दिनांक

न्यायिक अधिकारीगण

जिला छिंदवाड़ा

किशोरों के मामले में अधिकारिता के विषय में दण्ड प्रकिया संहिता, 1973 निम्नवत् प्रावधित करती है :-

> **धारा 27.** किसी ऐसे अपराध का विचारण, जो मृत्यु या आजीवन कारावास से दंडनीय नहीं है और जो किसी ऐसे व्यक्ति द्वारा किया गया है, जिसकी आयु उस तारीख को, जब वह न्यायालय के समक्ष हाजिर हो या लाया जाये, सोलह वर्ष से कम है, मुख्य न्यायिक मजिस्ट्रेट के न्यायालय द्वारा या किसी ऐसे न्यायालय द्वारा किया जा सकता है, जिसे बालक अधिनियम, 1960 (1960 का 60) या किशोर अपराधियों के उपचार, प्रशिक्षण और पुनर्वास के लिए उपबन्ध करने वाली तत्समय प्रवृत्त किसी अन्य विधि के अधीन विशेष रूप से सशक्त किया गया है।

अतः इस धारा के प्रावधान से स्पष्ट है कि किशोर की आयु के लिए निर्णायक तिथि वह तिथि होगी, जिस तिथि को वह मुख्य न्यायिक मजिस्ट्रेट के न्यायालय के समक्ष अथवा बालक अधिनियम, 1960 के अधीन विशेष रूप से सशक्त किये गये न्यायालय के समक्ष अथवा किशोर अपराधियों के उपचार, प्रशिक्षण और पुनर्वास के लिए उपबन्ध करने वाली तत्समय प्रवृत्त किसी अन्य विधि के अधीन विशेष रूप से सशक्त किये गये न्यायालय के समक्ष हाजिर हो या लाया जाये।

दं.प्र.सं. की धारा–5 भी यहां सुसंगत है जो निम्नवत् है :

> **धारा–5. व्यावृत्ति** – इससे प्रतिकूल किसी विनिर्दिष्ट उपबन्ध के अभाव में इस संहिता की कोई बात तत्समय प्रवृत्त किसी विशेष या स्थानीय विधि पर या तत्समय प्रवृत्त किसी अन्य विधि द्वारा प्रवृत्त किसी विशेष अधिकारिता या शक्ति या उस विधि द्वारा विहित किसी विशेष प्रक्रिया पर प्रभाव नहीं डालेगी।

उक्त प्रावधान से स्पष्ट है कि यदि दं.प्र.सं. लागू होते समय किसी विधि में इसके प्रतिकूल प्रावधान है तो उस सीमा तक उस विधि पर दं.प्र.सं. के प्रावधान अभिभावी होंगे।

दण्ड प्रक्रिया संहिता, 1973, 1 अप्रैल 1974 को पूरे देश में लागू हुई है। अतः 1 अप्रैल 1974 के पूर्व की किसी विधि में प्रतिकूल प्रावधान होने के बावजूद दिनांक 1.4.74 से किशोर की आयु के निर्धारण के लिए निर्णायक तिथि वह होगी, जिस तिथि को किशोर को दं.प्र.सं. की धारा–27 में उल्लिखित न्यायालय के समक्ष प्रस्तुत किया जाय।

किशोरों के द्वारा कारित अपराधों के विचारण के लिए के संसद द्वारा किशोर न्याय अधिनियम–1986 पारित किया गया तथा वर्ष–2000 में उक्त अधिनियम को निरसित करते हुए किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2000 पारित किया गया जो कि भारत के राजपत्र (असाधारण) दिनांक 28.2.01 भाग–दो– एस, 3 (दो) विस्तार भाग–1 (क्रं.–129) के अनुसार दिनांक– 1.4.2001 से प्रवृत्त किया गया। इस अधिनियम की धारा– 69 जो वर्तमान विश्लेषण हेतु सुसंगत है, निम्नवत् है :

धारा –69.

(1) किशोर न्याय अधिनियम, 1986 एतद् द्वारा निरसित किया जाता है ।

(2) ऐसे निरसन के होते हुए भी कथित अधिनियम के अधीन किया गया कोई कार्य या की गई कोई कार्यवाही, इस अधिनियम के तत्सम प्रावधानों के अधीन किया गया या की गई कार्यवाही समझी जायेगी।

अर्थात दिनांक 1.4.2001 से, लम्बित कार्यवाहियों को छोड़कर अन्य कार्यवाहियों के संबंध में किशोर न्याय अधिनियम, 1986 का अस्तित्व समाप्त हो चुका है तथा दिनांक 1.4.2001 से किशोर के द्वारा किये गये अपराध के विचारण के संबंध में किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2000 के प्रावधान ही लागू होंगे। सुविधा की दृष्टि से इसे आगे किशोर न्याय अधिनियम, 2000 से संबोधित किया जायेगा।

चूंकि किशोर न्याय अधिनियम, 1986 तथा 2000 दं.प्र.सं. लागू होने के पश्चात संसद के द्वारा ही पारित किये गये हैं, अतः इनके प्रावधान दं.प्र.सं. की धारा–4 (2) के अनुसार दं.प्र.सं. के प्रावधानों पर अभिभावी होंगे।

किशोर न्याय अधिनियम, 2000 की धारा–2 (के) में किशोर या बालक की परिभाषा दी गई है, जिसके अनुसार किशोर या बालक से अभिप्रेत है एक व्यक्ति जिसने अठारह वर्ष की आयु पूरी नहीं की है। अर्थात अठारह वर्ष से कम आयु के व्यक्ति को किशोर या बालक कहा जायेगा, परन्तु उक्त आयु के निर्धारण के लिए कौन सी तिथि निर्णायक तिथि होगी, इस संबंध में कोई विशिष्ट प्रावधान इस अधिनियम में नहीं दिया गया है। अधिनियम की धारा –7 तथा 49 में इस संबंध में संकेत अवश्य किया गया है। किशोर न्याय अधिनियम, 2000 की धारा–7 (1) के अनुसार :–

> "जब किसी ऐसे मजिस्ट्रेट की जो इस अधिनियम के अधीन बोर्ड की शक्तियों का प्रयोग करने के लिए सशक्त न हो, यह राय हो कि इस अधिनियम के उपबंधों में से किसी के अधीन *उसके समक्ष (साक्ष्य देने के प्रयोजन से अन्यथा) लाया गया व्यक्ति किशोर या बालक है*, तब वह उस राय को बिना किसी विलम्ब के अभिलिखित करेगा और उस किशोर या बालक तथा उस कार्यवाही के अभिलेख को उस कार्यवाही पर अधिकारिता रखने वाले सक्षम प्राधिकारी को भेजेगा।"

इसी प्रकार अधिनियम की धारा–49 (1) के अनुसार :–

> "जहाँ एक सक्षम प्राधिकारी को यह प्रतीत होता है कि इस अधिनियम के किसी भी प्रावधानों के अंतर्गत *उसके समक्ष लाया गया व्यक्ति (साक्ष्य देने के उद्देश्य के अतिरिक्त) एक किशोर या एक बालक है*, तो सक्षम प्राधिकारी उस व्यक्ति की आयु का पता लगाने के लिए अपेक्षित जांच करेंगे और इसके लिए ऐसी साक्ष्य लेंगे, जैसी आवश्यक हो (किन्तु एक शपथ–पत्र नहीं) और उसकी जो भी निकटतम आयु है, उसका उल्लेख करते हुए, अपने इस निष्कर्ष को अभिलिखित करेंगे कि व्यक्ति एक किशोर या एक बालक है या नहीं।"

उक्त प्रावधानों से यही प्रतीत होता है कि किशोर की आयु के निर्धारण के लिए निर्णायक तिथि वह होगी, जिस दिन उसे सक्षम प्राधिकारी के समक्ष अथवा बोर्ड की शक्तियों का प्रयोग करने के लिए सशक्त नहीं किये गये मजिस्ट्रेट के समक्ष लाया जाता है । यद्यपि दो फोरम का उल्लेख होने से यह भ्रम उत्पन्न होता है कि एक ही किशोर की आयु के निर्धारण के लिए दो निर्णायक तिथि–मजिस्ट्रेट के समक्ष उपस्थिति की तिथि तथा सक्षम प्राधिकारी के समक्ष उपस्थिति की तिथि हो सकती है, परन्तु इस भ्रमपूर्ण स्थिति का निराकरण किशोर न्याय अधिनियम–2000 की धारा–7 (2) में किया गया है, जो निम्नवत् है :–

"The Competent Authority to which the proceeding is forwarded under sub-section (1) shall hold the enquiry as if the juvenile or the child had originally been brought before it."

अतः स्पष्ट है कि धारा–7 (1) के अधीन सक्षम प्राधिकारी के समक्ष कार्यवाही भेजने पर यह माना जायेगा कि किशोर या बालक जिस तिथि को मजिस्ट्रेट के समक्ष लाया गया है, वस्तुतः वही तिथि सक्षम प्राधिकारी के समक्ष उपस्थिति की तिथि है ।

माननीय उच्चतम न्यायालय द्वारा भी **अर्नितदास विरूद्ध बिहार राज्य (ए.आई.आर.–2000 सुप्रीम कोर्ट 2264)** के प्रकरण में यह मत प्रतिपादित किया गया है कि इस प्रश्न के निर्धारण के लिए कि कोई व्यक्ति किशोर है या नहीं निर्णायक तिथि वह तिथि होगी, जिस तिथि को वह व्यक्ति सक्षम प्राधिकारी के समक्ष लाया जाता है । निर्णय के पैरा क्रं–13 के अनुसार :–

"An enquiry as to the age of juvenile has to be made only when he is brought or appears before the Competent Authority. A Police Officer or a Magistrate who is not empowered to act or can not act as a competent authority has to merely form an opinion guided by the apparent age of the person and in the event of forming an opinion that he is a juvinile he has to forward him to the Competent Authority at the earliest subject to arrangement for keeping in custody and safety of the person having been made for the duration of time elapsing in between. The Competent Authority shall proceed to hold enquiry as to the age of that person for determining the same by reference to the date when person was brought before it under any of the provisions of the Act. It is irrelevent what was the age of person on the date of commission of the offence. Any other interpretation would not fit in the scheme and phraseology employed by the Parliament drafting the Act."

पुनः निर्णय के पैरा क्रं.–23 के अनुसार :–

"The crucial date for determining the question whether a person is juvenile is the date when he is brought before the Competent Authority."

यद्यपि माननीय उच्चतम न्यायालय द्वारा उपरोक्त मत किशोर न्याय अधिनियम – 1986 की धारा–8 तथा 32 की विवेचना करते हुए प्रतिपादित किया गया है, जो कि किशोर न्याय अधिनियम – 2000 के द्वारा निरसित हो चुका है, परन्तु धारा–8 तथा–32 के तत्सम प्रावधान किशोर न्याय अधिनियम – 2000 की धारा–7 तथा–49 में किये गये हैं। अतः माननीय उच्चतम न्यायालय का उपरोक्त न्याय दृष्टांत वर्तमान किशोर न्याय अधिनियम – 2000 के संबंध में भी यथावत लागू रहेगा।

इसके पूर्व माननीय उच्चतम न्यायालय द्वारा *उमेशचंद्र विरूद्ध राजस्थान राज्य (ए.आई.आर. 1982 एस.सी. 1057)* के प्रकरण में राजस्थान बालक अधिनियम – 1970 के प्रावधानों की विवेचना करते हुए यह मत प्रतिपादित किया गया था कि यदि अपराध कारित करने की तिथि पर कोई व्यक्ति किशोर था, तो उसका विचारण राजस्थान बालक अधिनियम –1970 के अधीन होगा, अर्थात इस न्याय दृष्टांत में किशोर की आयु के निर्धारण के लिए निर्णायक तिथि अपराध कारित होने की तिथि मानी गई, परन्तु निम्न दो कारणों से उपरोक्त मत को वर्तमान संदर्भ में लागू नहीं किया जा सकता :

(1) उपरोक्त प्रकरण में अपराध दिनांक 12.3.73 को कारित हुआ था तथा उस समय राजस्थान बालक अधिनियम –1970 लागू था, परन्तु दिनांक 1.4.74 को दं.प्र.सं. लागू होने के पश्चात किशोर की आयु के निर्धारण के लिए निर्णायक तिथि के संबंध में दं.प्र.सं. की धारा–27 के प्रावधान, दं.प्र.सं. की धारा–5 के अनुसार राजस्थान बालक अधिनियम –1970 के प्रावधानों पर अभिभावी होंगे तथा;

(2) अपराध कारित होने के समय किशोर न्याय अधिनियम–2000 अथवा किशोर न्याय अधिनियम–1986 लागू नहीं था तथा इनके प्रावधानों की व्याख्या नहीं हो पायी थी, जबकि इन अधिनियमों के प्रावधान राजस्थान बालक अधिनियम–1970 के प्रावधानों से भिन्न हैं। किशोर न्याय अधिनियम–1986 के प्रावधानों की व्याख्या *अर्नित दास वि. बिहार राज्य (ए.आई.आर. 2000 एस.सी. 2264)* के प्रकरण में की गई है। अतः वर्तमान संदर्भ में इस प्रकरण में प्रतिपादित सिद्धान्त अधिक सुसंगत है।

धारा–27 दं.प्र.सं. में विशिष्ट रूप से आयु निर्धारण के संबंध में दिनांक का उल्लेख होने से एवं किशोर न्याय अधिनियम – 2000 की धारा–7 एवं–49 में प्रयुक्त किये गये शब्दों को दृष्टिगत रखते हुए तथा *अर्नित दास, वि. बिहार राज्य (ए.आई.आर. 2000 एस.सी.– 2264)* में मानवीय सर्वोच्च न्यायालय द्वारा विशिष्ट रूप से इसी बिंदु पर दिये गये निष्कर्ष को दृष्टिगत रखते हुए निष्कर्ष रूप में यह माना जा सकता है कि इस प्रश्न के निर्धारण के लिए कि कोई व्यक्ति किशोर है अथवा नहीं, निर्णायक तिथि वह तिथि होगी, जिस तिथि को वह व्यक्ति *सक्षम प्राधिकारी के समक्ष* प्रस्तुत किया जाता है।

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THE NATURE AND SCOPE OF POWER OF COURT TO GRANT INTEREST U/S 34 OF THE CODE OF CIVIL PROCEDURE, 1908

JUDICIAL OFFICERS
District Guna

Section 34 is a general provision dealing with the question of interest in a decree for the payment of money. A Court may award interest under this section when the decree is for the payment of money. Section 34, however, is not confined to claim for liquidated damages only; it applies even when the suit is for unliquidated damages. A Suit instituted for claiming damages either in tort or on breach of a contract or for payment of damages by a carrier for non-performance of statutory and other obligations as a bailee, resulting in a decree for damages, is obviously and necessarily computed in terms of money and can also be characterised as a decree for payment of money.

Black's Law Dictionary (*7th Edition*) defines 'interest' inter alia as the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owned to a lender in return for the use of the borrowed money. According to Stroud's Judicial Dictionary of Words and Phrases (*5th edition*) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money. A person deprived of the use of money to which he is legitimately entiled has a right to be compensated for the deprivation. Call it by any name. It may be called interest, compensation or damages. As held by the

Constitution Bench of Supreme Court in *Secretary, Irrigation Department, Government of Orissa Vs. G.C. Roy, AIR 1992 SC 732* and in case of *Central Bank of India Vs. Ravindra and others, AIR 2001 SC 3095.*

Section 34 of the C.P.C. sets out three divisions for grant of interest, as below :

(i) Interest accruing due prior to the institution of the suit on the principal sum adjudged.

(ii) Interest *pendente lite* i.e., interest payable on the principal sum adjudged, from the date of suit to the date of the decree, at such rate as the Court deems reasonable.

(iii) Further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the Court thinks fit, at a rate not exceeding 6 percent per annum.

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six percent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Interest for the period up- to date of the filing of the suit :- Interest for the period prior to the date of the institution of the suit may be awarded if there is an agreement for the payment of interest at fixed rate or if interest is payable by the usage of trade having the force of law, or under the provisions of any substantive law, like Section 80 of the Negotiable Instruments Act, or Section 23 of the Trusts Act. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable by a certain time by virtue of a written contract and there has been a demand in writing. When no rate of interest is specified in a Negotiable instrument, the Court may award interest at the rate of 6 per cent per annum under Section 80, Negotiable Instrument Act.

The Constitution Bench of Supreme Court in case of *Central Bank of India (Supra)* observed that interest for the period anterior to the institution of suit is not a matter or procedure and that pre-suit interest is referable to substantive law. It was further observed that pre-suit interest can be sub-divided into two sub- heads :

1. Where there is a stipulation for the payment of interest at a fixed rate.
2. Where there is no such stipulation.

If there is a stipulation for the rate of interest, the Court must allow that rate up to the date of the suit subject to three exceptions :

(i) Any provision of law applicable to money lending transaction, or usury laws or any other debt law governing the parties and having an over-riding effect on any stipulation for payment of interest voluntarily entered into between the parties;

(ii) If the rate is penal, the Court must award at such rate as it deems reasonable;

(iii) Even if the rate is not penal the Court may reduce if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement.

Section 34 of C.P.C. provides for *pendente lite* and future interest.

Interest from the date of suit to date of decree depends on the descretion of the Court, interest from the date of the decree to the date of payment or any other earlier date appointed by the Court is again in the discretion of the Court and the discretion can be exercised either to award, the sum or not to award as also the rate at which to award.

The Principal sum Adjudged :- In Case of *Central Bank of India (Supra),* the Apex Court held that the principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised. Interest *pendente lite* and furture interest (i.e. interest post-decree not exceeding 6 per cent per annum) shall be awarded on such principal sum i.e. the principal sum adjudged on the date of the suit. It is well settled that the use of the word "may" in Section 34 confers a discretion on the Court to award or not to award interest or to award interest at such rate as it deems fit. Such nterest, so for as future interest is concerned may commence from the date of the decree and may be made to stop running either with payment or with such earlier date as the Court thinks it.

Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest.

Agriculture borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agriculture loans cannot be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

In nutshell and as the Apex Court held in case of *Central Bank of India (Supra)* that award of interest *pendente lite* and post decree is discretionary with the Court as it is essentiality governed by Section 34 of the C.P.C. dehors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest *pendente lite* and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

243. COURT FEES ACT, 1870 - Section 7 (iv)
Suit for cancellation of sale deed executed by holder of power of attorney - Ad-valorem court fees payable.
Purushottam Joshi Vs. Smt. Madhu Sharma
Reported in 2004 (I) MPWN 143

Held :

It is a settled rule of law that if the plaintiff seeks a cancellation of a sale deed to which he himself is a party then he has to pay an *ad valorem* court-fees on the value so mentioned in the sale deed. It is only when he is not a party to a document sought to be cancelled by way of decree, then no *ad valorem* court-fees is payable. The present is a case which falls in a former category and hence, plaintiff can not avoid payment of *ad valorem* court- fees on the plaint while seeking a declaration of its cancellation. As a matter of fact close perusal of plaint shows that plaintiff's son in whose favour the plaintiff had executed a power of attorney to sell the suit property executed the sale deed in favour of defendant. So it is a case where plaintiff himself becomes a party to the impugned sale deed because it was executed by him through his son a power of attorney holder for and on his behalf. It is not the case of plaintiff, that he had cancelled the power of attorney prior to execution of sale deed and hence, he cannot be regarded as party to the sale deed in question. In such case, the position would have been different because then it becomes a case where a sale deed is held executed by a person who was not having an authority on the date of execution of sale deed. In such event, the plaintiff cannot be made to pay *ad valorem* court-fees because he is not a party to the transaction either directly or through his power of attorney holder.

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244. CO - OPERATIVE SOCIETIES ACT, 1960 (M.P.) - Section 85 (a)
Award passed by Co-operative Court, execution of - Such award, when forwarded to Civil Court along with certificate, be deemed a decree of Civil Court - Civil Court can execute such award thereafter.
Gujari Bai (Mst.) and others Vs. Bunkar Sahakari Samiti Ltd. and another
Reported in 2004 RN 161 (HC)

Held :

Under section 85 (a), it is provided that on a certificate signed by the Registrar or any person authorised by him in this behalf be deemed to be decree of a Civil Court and shall be executed in the same manner as a decree of such Court. Through sub-sections (b) and (c) provide different mode or recovery/ enforcement of the orders, but for execution of the order as a decree of Civil Court, the procedure is envisaged under Rule 55 which provides that the award

made by Registrar or his nominee shall be forwarded by the Registrar to the Society or the party concerned with instructions that the Society on the party concerned as the case may be should initiage execution proceedings according to the provisions of section 85. If the amount due under the decision or award is not recovered within fourteen days it shall be forwarded to the Registrar with an application for execution along with all information required by the Registrar. The decree holder shall state whether he desires to execute the award by a Civil Court under clause (a) or by the Collector under clause (b) or by Registrar or any person empowered by the Registrar in this behalf under clause (c) of section 85.

The aforesaid provision is very specific which provides that the decree-holder shall state before the competent authority whether he desires to execute the award by a Civil Court and on receipt of such application for execution, the Registrar Shall forward the same to the Civil Court along with the certificate issued by him under sub section (a) of section 85. The aforesaid provision specifies that in this regard, written application for execution by Civil Court is necessary to be filed by the decree-holder before the Registrar. There after on sending the matter to the Civil Court for execution alongwith certificate signed by the Registrar or any person authorised by him in this behalf shall be deemed to be a decree of Civil Court and shall be executed in the same manner as a decreed of Civil Court.

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245. LIMITATION ACT, 1963-Section 3

Limitation not specifically set up as a defence - Court still under obligation to see that suit is within limitation.

Subhas Shrivastava and others Vs. Mst. Gyaso and others

Reported in 2004 RN 196 (HC)

Held :

Before dealing with the rival submissions of learned counsel for the parties, it would be apposite to refer section 3 (1) of the Indian Limitation Act, 1963 which reads as under :

> *"3. Bar of Limitation :* (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.
>
> (Emphasis added).

On going thorugh the aforesaid provision, it is clear like a noon day that if a suit is barred by prescribed period of limitation, irrespective of the fact that the point of limitation has not been set up as a defence it has to be dismissed. Thus, the Legislature has cast a heavy duty upon the Court to examine on the touch stone of the case put forth by the parties and to decide whether the suit is within limitation or not, although, the point of limitation has not been set up as a defence.

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246. CRIMINAL TRIAL :

Appreciation of evidence - Pendency of criminal cases against witness- Effect- This itself not sufficient to discard his testimony - Law explained.

Pintu Sardar @ Jagjit Singh Vs. State of M.P.

Reported in 2004 (1) ANJ 496 (M.P.)

Held :

Learned counsel for the appellants vehemently argued regarding pendency of number of criminal cases against eye-witness PW-30 Shyam Maratha. The pendency of criminal cases by itself is not sufficient to discard his testimony. He was not convicted in any criminal case. The Supreme Court in the judgments of *Arumuga Nadar Vs. State of Tamil Nadu (AIR 1976 SC 2588)* and in the case of *Varghese Thomas vs. State of Kerala (AIR 1977 SC 701)* has placed reliance on the testimony of a witness convicted in a murder case. The question of appreciation of evidence depends upon the facts and circumstances of each case and there is no hard and fast rule that a person who is facing criminal case cannot be relied upon if otherwise his evidence is trustworthy and finds sufficient corroboration from other evidence available on record.

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247. N.D.P.S. ACT, 1985- Section 37

Conditions for grant of bail under Section 37 - Phrase "reasonable grounds" as used in Section 37, meaning of - Phrase "reasonable grounds" means something more than prima facia grounds.

Collector of Customs, New Delhi Vs. Ahmadalieva Nodira

Reported in 2004 (I) ANJ 488 (SC) (Three Judges Bench)= 2004 (3) SCC 549

Held :

As observed by this Court in *Union of India vs. Thamisharasi & Ors. [J.T. 1995 (4) SC 253]* clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are (1) an opportunity to the public prosecutor to oppose the bail application and (2) satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the public prosecutor, the other twin conditions which really have relevance so far the present accused-respondent is concerned, are (1) the satisfaction of the Court that there are reasonable grounds for believing that the accused in not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds.

The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

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248. CIVIL PROCEDURE CODE, 1908- Section 11

Res judicata, principle of - Principle not attracted when order is passed without inherent jurisdiction.

Ashok Leyland Ltd. Vs. State of T.N. and another

Judgment dt. 07.01.2004 by the Supreme Court in Civil Appeal No. 976 of 2001, Reported in (2004) 3 SCC 1

Held :

The principle of res judicata is a procedural provision. A jurisdictional question, if wrongly decided, would not attract the principle of res judicata. When an order is passed without jurisdiction the same becomes a nullity. When an order is a nullity, it cannot be supported by involving the procedural principles like estoppel, waiver or res judicata. This question has since been considered in *Ramnik vallabhadas Madhvani v. Taraben Pravinlal Madhvani (2004) 1 SCC 497* wherein this Court observed in the following terms : (SCC pp. 518-19, pares 55-57)

"55. So far as the question of rate of interest is concerned, it may be noticed that the High Court itself found that the rate of interest should have been determined at 6%. The principles of res judicata which according to the High Court would operate in the case, in our opinion, is not applicable. Principles of res judicata is a procedural provision. The same has no application where there is inherent lack of jurisdiction.

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249. CIVIL PROCEDURE CODE, 1908- O.39 Rr. 1 and 2

Interim injunction, grant of - Infringement of trade mark or copyright- Normally injunction should be granted.

Midas Hygiene Industries (P) Ltd. and another Vs. Sudhir Bhatia and others.

Judgment dt. 22.01.2004 by the Supreme Court in Civil Appeal No. 107 of 2002, Reported in (2004) 3 SCC 90

Held :

The appellants filed a suit for passing off and for infringements of copyright. In the suit an application for interim injunction under the provision of Order 39 Rules 1 and 2 of the Code of Civil Procedure was filed.

...the learned Single Judge granted an interim injunction preventing the respondents, their servants, agents, distributors, stockists or any other person acting on their behalf from manufacturing, marketing, distributing or selling in-

secticides, pesticides as well as insect repellent under the name LAXMAN REKHA as well as packing design having similar colour scheme, get-up background and colour combination as that of the appellant's copyright.

The respondents filed an appeal which has been disposed of by the impugned judgment. The Division Bench in spite of noting the factors which have been set out by the learned Single Judge, has vacated the injunction merely on the ground that there was delay and laches in filing the suit. It has held that such delay and laches disentitled grant of injunction. The respondents were merely directed to file regular accounts of their sales in court.

The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.

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250. INDIAN PENAL CODE, 1860 - Section 304-B

Phrase "soon before" as used in Section 304 - B, meaning and expanse - Phrase "soon before" not synonymous with the phrase "immediately before" - Law explained.

Yashoda and another Vs. State of M.P.

Judgment dt. 04.02.2004 by the Supreme Court in Criminal Appeal No. 431 of 1997, Reported in (2004) 3 SCC 98

Held :

The words "soon before" found in Section 304-B IPC have come up for consideration before this Court in a large number of cases. This Court has consistently held that it is neither possible nor desirable to lay down any straitjacket formula to determine what would constitute "soon before" in the context of Section 304-B IPC . It all depends on the facts and circumstances of the case. Learned counsel for the appellant relied upon a decision of this Court rendered by two learned Judges reported in *Sham Lal v. State of Haryana, (1997) 9 SCC 759* and submitted that as in that case so in the present case, there was no evidence to suggest that after the deceased went to her matrimonial home, she had been subjected to cruelty and harassment before her death. The facts of *Sham Lal* case are clearly distinguishable and they have been so distinguished in the case of *Kans Raj v. State of Punjab, (2000) 5 SCC 207* by a Bench of three learned Judges of this Court. This Court observed: (SCC pp. 222-23, para 15)

> "15. It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon

before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (*a*) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. *If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death.* It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which under the circumstances, be treated as having become stale enough".

(emphasis suplied)

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251. EVIDENCE ACT, 1872 - Section 9
INDIAN PENAL CODE, 1860 - Section 376

(i) Test identification, evidence as to - Such evidence is corroborating- Test identification, when not necessary - Law explained.

(ii) Rape case - Injuries on the body or private parts of prosecutrix- Such injuries not sine qua non to prove a charge of rape.

Dastagir Sab and another Vs. State of Karnataka
Judgment dt. 22.01.2004 by the Supreme Court in Criminal Appeal No. 175 of 2003, reported in (2004) 3 SCC 106

Held :

(i) No law states that non-holding of test identification parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case.

In the facts of this case, holding of TI parade was wholly unnecessary. Had such TI parade been held, the propriety thereof itself would have been questioned before the trial court.

In *State of H.P. v. Lekh Raj, (2000) 1 SCC 247* this Court emphasized the purpose for holding test identification parade in the following terms: (SCC pp. 252-53, para 3)

"3. ..... During the investigation of a crime the police agency is required to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Identification parade may also not be necessary in a case where the accused person are arrested at the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in *Budhsen v. State of U.P., (1970) 2 SCC 128* held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant."

(ii) Injury on the body of the person of the victim is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be the sole criterion for coming to a conclusion that no such offence had taken place.

This Court in *Rafiq v. State of U.P., (1980) 4 SCC 262* observed : *(SCC p. 265, para 5)*

"5. ... The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's lifestyles may fluctuate, and so, rules of prudence relevant in one fact situation may be inapt in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechancially be

extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstance. Indeed, from place to place, from age to age, from varying lifestyles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of presidential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed."

In *SK. Zakir v. State of Bihar, (1983) 4 SCC 10* this Court observed : (SCC p. 18, para 8)

"8.... Insofar as non-production of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable."

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252. INDIAN PENAL CODE, 1860 - Sections 397 and 34
Robbery or dacoity - Word "uses" as used in Section 397, meaning of - Actual use of weapon for cutting, stabbing, shooting not necessary - Section 397 does not create new substantive offence but contemplates individual liability for use of deadly weapon - Section 34 not applicable in such case.
Ashfaq Vs. State (Govt. of NCT of Delhi)
Judgment dt. 10.12.2003 by the Supreme Court in Criminal Appeal No. 1296 of 2002, Reported in (2004) 3 SCC 116

Held :

Thus, what is essential to satisfy the word "uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

The further plea that one accused alone was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, do not create any new substantive offence as such but merely serve as being complementary to Sections 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz. Use of a deadly weapon or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, dehors any reference to Section 34 IPC.

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253. EVIDENCE ACT, 1872 - Section 113-B

Presumption permissible under Section 113 - B, nature and extent of- Prosecution must prove that death occurred within seven years of marriage.

Baljeet Singh and another Vs. State of Haryana

Judgment dt. 24.02.2004 by the Supreme Court in Criminal Appeal No. 1161 of 2003, Reported in (2004) 3 SCC 122

Held :

Section 113-B permits a presumption to be drawn against the accused in regard to dowry death provided the prosecution establishes that soon before her death the woman was subjected to cruelty or harassment.

The explanation to the said section says that the word "dowry death" shall have the same meaning as in Section 304-B IPC which means such death should be otherwise than in normal circumstances and within seven years of marriage. On a conjoint reading of these sections, it is clear that for drawing a presumption under Section 113-B of the Evidence Act firstly, there should be death of a woman otherwise than in normal circumstances, within seven years of marriage and the prosecution having shown that soon before her death she was subjected to cruelty or harassment in connection with any demand for dowry by persons

accused of having committed the offence. Unless and until these preliminary facts are established by the prosecution, it is not open to the courts to draw a presumption against the accused invoking Section 113-B of the Evidence Act.

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254. CIVIL PROCEDURE CODE 1908 - Section 9
SPECIFIC RELIEF ACT, 1963- Sections 6, 37, 38 and O.39 R.1

(i) Relinquishment of claim for relief - Suit claiming relief partly beyond jurisdiction of Civil Court - Plaintiff may be permitted to relinquish such part to bring the suit within jurisdiction of Civil Court.

(ii) Trespasser in "settled possession" - Grant of injunction in favour of such person against true owner - Discretionary remedy of injunction not to be used to protect or to perpetuate a wrong - Law explained.

Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others

Judgment dt. 23.01.2004 by the Supreme Court in Civil Appeal No. 448 of 2004, Reported in (2004) 3 SCC 137

Held :

(i) A reading of the plaint and the reliefs along with the contents of the plaint goes to show that the main dispute relates to the question of continuance of tenancy and the period of tenancy. They are in essence unrelated with the other reliefs regarding enquiry into the affairs of the Trust. Such enquiries can only be undertaken under Section 50 of the Act. For instituting a suit of the nature specified in Section 50, prior consent of the Charity Commissioner is necessary under Section 51. To that extent Mr. Savant is right that the reliefs relatable to Section 50 would require a prior consent in terms of Section 51. If the plaintiffs give up those reliefs claimed in accordance with law, the question would be whether a cause of action for the residual claims/reliefs warrants continuance of the suit. The nature of the dispute is to be resolved by the civil court. The question of tenancy cannot be decided under Section 50 of the Act. Section 51 is applicable only to suits which are filed by a person having interest in the trust. A tenant of the trust does not fall within the category of a person having an interest in the trust. Except relief in para (D) of the plaint, the other reliefs could be claimed before and can be considered and adjudicated by the Civil courts and the bar or impediment in Sections 50 and 51 of the Act will have no relevance or application to the other reliefs. That being so, Sections 50 and 51 of the Act would not have any application to that part of the relief which relates to question of tenancy, the term of tenancy and the period of tenancy. The inevitable conclusion therefore is that courts below were not justified in directing rejection of the plaint. However the adjudication in the suit would be restricted to the question of tenancy, terms of tenancy and the period of tenancy only. For the rest of the reliefs, the plaintiffs shall be permitted within a month from today to make such

application as warranted in law for relinquishing and/or giving up claim for other reliefs.

(ii) There are two different sets of principles which have to be borne in mind regarding course to be adopted in case of forcible dispossession. Taking up the first aspect, it is true that where a person is in settled possession of property, even on the assumption that he has no right to remain in property, he cannot be dispossessed by the owner except by recourse to law. This principle is laid down in Section 6 of the Specific Relief Act, 1963. That section says that

> "If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit."

That a person without title but in "settled" possession- as against mere fugitive possession- can get back possession if forcibly dispossessed or rather, if dispossessed otherwise than by due process of law, has been laid down in several cases. It was so held by this Court in *Lallu Yeshwant Singh v. Rao Jagdish Singh, AIR 1968 SC 620, Krishna Ram Mahale v. Shobha Venkat Rao, (1989) 4 SCC 131 (SCC at p. 136), Ram Rattan v. State of U.P., (1977) 1 SCC 188* and *State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505.* The leading decision quoted in these rulings is the decision of the Bombay High Court in *K.K. Verma v. Union of India, AIR 1954 Bom 358.*

Now the other aspect of the matter needs to be noted, Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek injunction against the true owner? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of innunctions and as to the scope of the exercise of discretion while granting injunction. In *Mahadeo Savlaram Shelke v. Pune Municipal Corpn., (1995) 3 SCC 33* it was held, after referring to Woodroffe: Law Relating to Injunctions; Goyle, L.C.; Law of Injunction; Bean, David : Injunctions; Joyce: Injunctions and other leading articles on the subject that the appellant who was a trespasser in possession could not seek injunction against the true owner. In that context this Court quotee *Shiv Kumar Chadha v. Municipal Corpn. of Delhi (1993) 3 SCC 161* wherein it was observe that injunction is discretionary and that : (SCC p. 175, para 31)

> "Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.

Refence was also made to Dalpat Kumar v. Prahlad singh (1992) 1 SCC 719 in regard to the meaning of the words "prima facie case" and "balance of convenience" and observed in Mahadeo case that (SCC p. 39, para 9).

> "9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession."

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255. SPECIFIC RELIEF ACT, 1963 - Section 14 (b) and 34

Contract of personal service - Such contract cannot be specifically performed, subject to well recognized exceptions - Law stated.

Pearlite Liners (P) Ltd. Vs. Manorama Sirsi

Judgment dt. 6.1.2004 by the Supreme Court in Civil Appeal No. 5348 of 2002, reported in (2004) 3 SCC 172

Held :

Learned counsel for the appellant argued that the prayers in the suit seek reinstatement of the plaintiff as an employee of the defendant Company which really amounts to specific performance of a contract of personal service which is specifically barred under the provisions of the Specific Relief Act. It is a well-settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well-recognised exceptions: (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the industrial law; and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute. [Per *Executive Committee of Vaish Degree College v. Lakshmi Narain, (1976) 2 SCC 58.]*

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256. RENT CONTROL AND EVICTION :

Co-owner's right to file suit on behalf of other co - owners - Right is based on doctrine of agency - Co - owner cannot withdraw his consent midway the suit - Law explained.

India Umbrella Manufacturing Co. and others Vs. Bhagabandei Agarwalla (Dead) by L.Rs. Savitri Agarwalla (Smt.) and others

Judgment dt. 5.1.2004 by the Supreme Court in Civil Appeal No. 5357 of 1996, reported in (2004) 3 SCC 178

Held :

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

reference to the date of institution of the suit; the only exception being when by virtue of a subsequent event the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law.

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257. INDIAN PENAL CODE, 1860 - Sections 304 - B, 307 and 498 - A DOWRY PROHIBITION ACT, 1961 - Section 2

(i) Relationship of husband and wife - For purpose of Sections 304 - B, 307 and 498 - A - Expression "husband" covers a person who contracts marriage ostensibly and cohabits with such woman - Contra view expressed in Ram Narayan Vs. State of M.P., (1998) 3 Crimes 147 (M.P.) overruled.

(ii) Term "Dowry" as used in Section 2, meaning and connotation of- It includes demand of money for a proposed marriage - Law explained.

Reema Aggarwal Vs. Anupam and others.

Judgment dt. 8.1.2004 by the Supreme Court in Criminal Appeal No. 25 of 2004, reported in (2004) 3 SCC 199.

Held :

Before the trial court the accused person put the plea that charge under Section 498-A was thoroughly misconceived as both Sections 304-B and 498-A IPC presuppose valid marriage of the alleged victim woman with the offender husband. It was required to be shown that the victim woman was the legally married wife of the accused. Since it was admitted that the appellant had married during the lifetime of the wife of Respondent 1, what happened to his first marriage remained a mystery. The posecution has failed to establish that it stood dissolved legally. The prosecution having failed to bring any material record in that regard, Section 498-A had no application. Reliance was placed on a decision of the Madhya Pradesh High Court in *Ramnarayan v. State of M.P., (1998) 3 Crimes 147 (M.P.)* The trial Court held that the accusations, so far as Section 307 is concerned, were not established and in view of the legal position highlighted by the accused person vis-a-vis Section 498-A, the charge in that regard was also not established. Accordingly, the accused persons were acquitted.

The marriages contracted between Hindus are now statutorily made monogamous. A sanctity has been attributed to the first marriage as being that which was contracted from a sense of duty and not merely for personal gratification. When the fact of clebration of marriage is established it will be presumed in the absence of evidence to the contrary that all the rites and ceremonies to constitute a valid marriage have been gone through. As was said as long back an in 1869 "when once you get to this viz, that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law". (See *Inderun Valungypooly Taver v. Ramaswamy Pandia Talaver, (1869) 13 Moo IA 141 Moo IA p. 158.*) So also where a man and woman have been proved to have lived together as husband and wife, the law will presume, until contrary be clearly

proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. (See *Sastry Velaider v. Sembecutty, (1881) 6 AC 364* following *De Thoren v. Attorney General, (1876) 1 AC 686 (HL)* and *Piers v. Piers, (1849) 2 HL Cas 331.*) Where a marriage is accepted as valied by relations, friends and others for a long time, it cannot be declared as invalid.

It would be appropriate to construe the expression "husband" to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any of the purposes enumerated in the relevant provisions- Sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498-A and 304-B IPC. Such an interpretation, Known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as "husband" is no ground to exclude them from the purview of Section 304-B or 498-A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.

(ii) The definition of the expression "dowry" contained in Section 2 of the Dowry Act cannot be confined merely to be "demand" of money, property or valuable security made at or after the performance of marriage. The legislature has in its wisdom while providing for the definition of "dowry" emphasized that any money, property or valuable security given, as a consideration for marriage, "before, at or after" the marriage would be covered by the expression "dowry" and this definition as contained in Section 2 has to be read wherever the expression "dowry" occurs in the Act. Meaning of the expression "dowry" as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4, mere demand of "dowry" is sufficient to bring home the offence to an accused. Thus, any "demand" of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of "dowry" under the Act where such demand is not property referable to any legally recognized claim and is relatable only to the consideration of marriage. Marriage in this context would include a proposed marriage also, more particularly where the non-fulfilment of the "demand of dowry" leads to the ugly consequence of the marriage not taking place at all. The expression "dowry" under the Dowry Act has to be interpreted in the sense which the statute wishes to attribute to it. The definition given in the statute is the determinative factor. The Dowry Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made before or at the time or after the marriage where such demand is referable to the consideration of marriage. Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and

relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression "dowry" made punishable under the Dowry Act.

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258. CIVIL PROCEDURE CODE, 1908 - O.41 R. 22

Cross-objections, maintainability of - Cross-objection is maintainable if filed within limitation subject to maintainability of appeal - Law explained.

Municipal Corporation of Delhi and others Vs. International Security & Intelligence Agency Ltd.

Judgment dt. 6.2.2003 by the Supreme Court in Civil Appeal No. 1062 of 2003. reported in (2004) 3 SCC 250

Held :

What happens to cross-objections if the appeal itself is found to be incompetent or not maintainable? Sub-rule (4) of Order 41 Rule 22 of the Civil Procedure Code provides for only two situations in which the cross-objection may be heard in spite of the original appeal having not been heard on marits. These situations are two: (i) the original appeal being dismissed as withdrawn, and (ii) the original appeal being dismissed for default (default in appearance or any other default). Just as the enabling provisions of cross-objection contained in sub-rule (1) of Order 41 Rule 22 CPC are applicable to appeals under Section 39 of the Act the disabling provision contained in sub-rule (4) too would apply to appeals under Section 39 of the Act in view of the generality of the provisions contained in Section 41 of the Act. To put it briefly, if the appellate court forms an opinion that the original appeal itself was incompetent or not maintainable as it was filed against an order not falling within one of clauses (i) to (vi) of sub-section (1) of Section 39 then the cross-objection shall also fall to the ground and cannot be adjudicated upon on merits. It has to be remembered that law of limitation operates with all its rigour and equitable considerations are out of place in applying the law of limitation. The cross-objector ought to have filed appeal within the prescribed period of limitation calculated from the date of the order if he wished to do so. Having allowed that opportunity to lapse he gets another extended period of limitation commencing from the date of service of the notice of the appeal enabling him putting in issue for consideration of the appellate court the same grounds which he could have otherwise done by way of filing an appeal. This extended period of limitation commences from the date of service of the notice of appeal and such notice ought to be in a valid or competent appeal.

If the appeal cannot be heard on merits for the reason that it was no appeal in the eye of the law, service of notice in such appeal would not furnish cause for commencement of a new period of limitation for filing appeal in the form of

cross-objection. The only exception in which the cross-objection can still be heard is one where the memo of cross-objection can be said to have been filed within the period prescribed for filing an original appeal against the impugned order and the memo also independently satisfies all the requirements of a memo of appeal. Just as a belated or time-barred memo of cross-appeal can be treated- and taken up for consideration- as cross-objection subject to its satisfying the requirements of cross-objection memo so also a cross-objection can be treated as cross-appeal and heard as such subject to its satisfying the requirements as to maintainability of an appeal with regard to limitation and otherwise.

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259. MOTOR VEHICLES ACT, 1988 - Section 166

Determination of quantum of compensation - Appropriate multiplier vis - a - vis age of the deceased/claimants applied in two different cases - Law discussed.

Malla Prakasarao Vs. Malla Janaki and others

Judgment dt. 6.8.2002 by the Supreme Court in Civil Appeal No. 1613 of 1996, reported in (2004) 3 SCC 343

Held :

Learned counsel appearing for the appellants urged that the multiplier applied by the High Court was erroneous and, in fact, the multiplier of 16 ought to have been applied in the present case. Learned counsel, in support of his argument, relied upon the decision of this Court in *U.P. S.R.T.C. v. Trilok Chandra (1996) 4 SCC 362.* It is not disputed that the appellant was 38 years of age and was earning a sum of Rs. 40,000 annually. In view of the facts and circumstances of the case, we are of the view that the multiplier of 14 was correctly applied while awarding compensation.

We have perused the record and find that the multiplier of 9 applied by the High Court in determining the compensation to the claimants was not appropriate. It is not disputed that the deceased was a bank employee and was 46 years of age at the time of accident. It is also not disputed that after deduction of 1/3rd of the amount, total loss of dependency was Rs. 4000 per month. It is also not disputed that the age of superannuation of the deceased employee was 60 years and 14 years of service were still left to serve. In view of the facts and circumstances of this case, we are of the view that in the present case the mulitplier of 12 ought to have been applied by the High Court. On application of multiplier of 12 the total amount of compensation comes to Rs. 5,76,000. The respondent Company has already deposited its share of compensation at the rate awarded by the High Court. Since the liability of the Insurance Company is 40 per cent of the enhanced amount, the respondent Company shall pay the balance amount along with the interest at the rate of 7 per cent on the enhanced amount from the date of this order.

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260. EVIDENCE ACT, 1872- Section 81

Newspaper reports, evidentiary value of - Such reports per-se are not legally acceptable evidence.

Dr. B. Singh Vs. Union of India and others

Judgment dt. 11.3.2004 by the Supreme Court in Writ Petition (C) No. 122 of 2004, reported in (2004) 3 SCC 363

Held :

It is too much to attribute authenticity or credibility to any information or fact merely because it found publication in a newspaper or journal or magazine or any other form of communication, as though it is gospel truth. It needs no reiteration that newspaper reports per se do not constitute legally acceptable evidence.

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261. LIMITATION ACT, 1963-Art. 65

ADVERSE POSSESSION :

Adverse Possession against a life tenant will not bar the reversioner/ reminderman from succeeding to the estate - Law stated.

Vasantiben Prahladji Nayak and others Vs. Somnath Muljibhai Nayak and others

Judgment dt. 9.3.2004 by the Supreme Court in Civil Appeal No. 6432 of 1998, reported in (2004) 3 SCC 376

Held :

We do not find merit in the above argument advanced on behalf of the appellants. In the case of *Ram Kristo Mandal v. Dhankisto Mandal, AIR 1969 SC 204* it has been held by this Court that the right of the reversioner to recover possession of the property within twelve years from the death of the widow is not only based on provisions of the Limitation Act but on the principles of Hindu law and the general principles that the right of a reversioner is in the nature of *spes successionis* (estate in expectancy) and such reversioner does not trace his title through the widow. Under the common law, there are two types of estates, namely, estates in possession and estates in expectancy. Estates in remainder/reversion are estates in expectancy as opposed to estates in possession. Consequently, adverse possession against a life tenant will not bar the reversioner/remainderman from succeeding to the estate on the demise of the life tenant. This is the reason for enacting Explanation (a) to Article 65 of the said Act, which has no application to the facts of this case.

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262. CIVIL PROCEDURE CODE, 1908- O.6 R. 17

Amendment in pleadings - Proposed amendment barred by limitation on the date of application - As a general rule, such amendment not to be allowed.

T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board and others

Judgment dt. 12.2.2004 by the Supreme Court in Civil Appeal No. 7615 of 2002, reported in (2004) 3 SCC 392.

Held :

The law as regards permitting amendment to the plaint, is well settled. In *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co. AIR 1957 SC 375* it was 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 to order it.

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263. SERVICE LAW :

Correction of date of birth through intervention of Court - Generally, the Court/ Tribunal must be slow in granting relief - Factors to be considered, discussed.

State of Punjab and others Vs. S.C. Chadha

Judgment dt. 9.2.2004 by the Supreme Court in Civil Appeal No. 854 of 2004, reported in (2004) 3 SCC 394

Held :

An application for correction of the date of birth should not be dealt with by the Courts, tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion forever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever

any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service-book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service-books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief or (sic of) continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed underserved benefit of extended service and thereby caused injustice to his immediate junior.

The position was succinctly stated by this Court in the above terms in *Secy. and Conmr. Home Deptt. v. R. Kirubakaran 1994 Supp (1) SCC 155.*

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264. SC/ST (PREVENTION OF ATROCITIES) ACT, 1989- 2 (1) (c) Parent's conversion to Christianity/ change of religion - Effect on the status of a person as a member of SC/ST - Factors to be seen - Law explained.

State of Kerala and another Vs. Chandramohanan

Judgment dt. 28.1.2004 by the Supreme Court in Criminal Appeal No. 240 of 1997, reported in (2004) 3 SCC 429

Held :

The question as to whether a person is a member of the tribe or has been accepted as such, despite his conversion to another religion, is essentially a question of fact. A member of tribe despite his change in the religion may remain a member of the tribe if he continues to follow the tribal traits and customs.

> In *N.E. Horo v. Jahanara Jaipal Singh, (1972) 1 SCC 771* a question arose as to whether a Ceyloness lady marrying a member of the Scheduled Tribe would become a member of that tribe by marriage or not. This Court held that only by reason of marriage a woman does not become a member of the tribe, but only in the event, she is accepted as such by the other members of the tribe and approved by the Panchayat, she may be considered to be a member thereof.

We, therefore, are of the opinion that although as a broad proposition of law it cannot be accepted that merely by change of religion a person ceases to be a member of the Scheduled Tribe, but the question as to whether he ceases to be a member thereof or not must be determined by the appropriate court as such a question would depend upon the facts of each case. In such a situation, it has to be established that a person who has embraced another religion is still suffering from social disability and also following the customs and traditions of the community which he earlier belonged to.

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265. N.D.P.S. ACT, 1985 - Section 50

Search of the luggage - Section 50 not applicable.

State of Punjab Vs. Makhan Chand

Judgment dt. 27.2.2004 by the Supreme Court in Criminal Appeal No. 714 of 1997, reported in (2004) 3 SCC 453

Held :

As to the circumstances when the provisions of Section 50 of the Act would apply, the issue is no longer *res integra.* A Constitution Bench of this Court in *State of Punjab v. Baldev Singh, (1999) 6 SCC 172 at p. 190, para 12* says this:

> "12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

Following this judgment, another Bench of this Court in *Bharatbhai Bhagwanjibhai v. State of Gujarat (2002) 8 SCC 327* took the view that Section 50 categorically lays down that if the search is to be conducted by an officer duly authorised under Section 42 and the search is about to be conducted under the provisions of Sections 41, 42 or 43, the officer concerned does owe a duty to intimate the person to be searched that he has the option to be taken to the nearest gazetted officer/Magistrate for the purpose of carrying out the search. But in the event of a situation otherwise, there is no such obligation. It was pointed out that, if an accused person, on seeing a patrolling police party, starts running, which excites the suspicion of the police party, as a result of which, he is apprehended and searched, the question of compliance with the safeguards prescribed under Section 50 of the Act would not arise.

Apart from the aforesaid question, we are also of the view that Section 50 of the Act would not apply to a situation where the search undertaken is not of the person of the accused but of something carried in his hand. See in this connection, the observations of the Constitution Bench of this Court in *Baldev Singh* case, the judgment of this Court in *Gurbax Singh v. State of Haryana, (2001) 3 SCC 28, SCC at pp. 30-32 (paras 4 to 8)* and in *Kalema Tumba v. State of Maharashtra, (1999) 8 SCC 257.*

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266. LIMITATION ACT, 1963 - Section 14

Scope and applicability of Section 14 - Law explained.

Union of India and others Vs. West Coast Paper Mills Ltd. and another

Judgment dt. 25.2.2004 by the Supreme Court in Civil Appeal No. 1061 of 1998, reported in (2004) 3 SCC 458

Held :

In the submission of Mr. Malhotra, placing reliance on *CST v. Parson Tools and Plants, (1975) 4 SCC 22* to attract the applicability of Section 14 of the Limitation Act, the following requirements must be specified : (SCC p. 25, para 6)

> "6. (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party :
>
> (2) the prior proceedings had been prosecuted with due diligence and in good faith;
>
> (3) the failure of the prior proceedings was due to a defect of jurisdiction or other cause of a like nature;
>
> (4) both the proceedings are proceedings in a court."

In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be "defect of jurisdiction or other cause of a like nature" within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression "other cause of like nature" came up for the consideration of this Court in *Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi, (1975) 4 SCC 628* and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.

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267. CONSTITUTION OF INDIA - Art. 226

Writ Jurisdiction under Article 226, ambit and scope of - In appropriate cases petition involving disputed questions of facts may be entertained - Law explained.

ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others

Judgment dt. 18.12.2003 by the Supreme Court in Civil Appeal No. 5409 of 1998, reported in (2004) 3 SCC 553

Held :

Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of

the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur, (1969) 3 SCC 769* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

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268. TRANSFER OF PROPERTY ACT, 1882 - Section 105
INDIAN EASEMENTS ACT, 1882 - Section 52
Lease or licence- Distinction between - Law explained.
C.M. Beena and another Vs. P.N. Ramachandra Rao
Judgment dt. 22.3.2004 by the Supreme Court in Civil Appeal No. 1548 of 1999, reported in (2004) 3 SCC 595

Held :

The crucial issue for determination is as to whether there is a lease or licence existing between the parties. Though a deed of licence may have been executed it is open for the parties to the document to show that the relationship which was agreed upon by the parties and was really intended to be brought into existence was that of a landlord and tenant though it was outwardly styled as a deed of licence to act as a camouflage on the rent control legislation. "Lease" is defined in Section 105 of the Transfer of Property Act, 1882 while "licence" is defined in Section 52 of the Indian Easements Act, 1882. Generally speaking, the difference between a "lease" and "licence" is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (see *Associated Hotels of India Ltd. v.R.N. Kapoor AIR 1959 SC 1262.* The decided cases on the point are legion. For our purpose it would suffice to refer to a recent decision of this Court in *Corpn. of Calicut v. K. Sreenivasan (2002) 5 SCC 361.*

A few principles are well settled. User of the terms like "lease" or "licence", "lessor" or "licensor", "rent" or "licence fee" is not by itself decisive of the nature of the right created by the document. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

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269. INDIAN PENAL CODE, 1860 - Sections 375, 376 and 511

Definition of rape - Ejaculation without penetration does not constitute rape - Attempt to commit an offence - Legal requirements to constitute "attempt".

Koppula Venkat Rao Vs. State of A.P.

Judgment dt. 10.3.2004 by the Supreme Court in Criminal Appeal No. 84 of 1998, reported in (2004) 3 SCC 602

Held :

An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercouse" and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view.

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270. N.D.P.S. ACT, 1985 - Section 41 (1)

Classification regarding cases pending in an appeal and pending in trial Court as contemplated in Section 41 (1) regarding sentence - Classification not ultra virus - Contra view expressed in Ramesh vs. State of Madhya Pradesh, Writ Petition No. 537 of 2003 decided on 25.04.2003 referred in 2004 JOTI 29 (Note 29), expressly overruled.

Basheer @ N.P. Basheer Vs. State of Kerala

Judgment dt. 9.2.2004 by the Supreme Court in Criminal Appeal No. 1334 of 2002, reported in (2004) 3 SCC 609

Held :

Thus, in our view, the Rubicon indicated by Parliament is the conclusion of the trial and pendency of appeal. In the cases of pending trials, and cases pending investigation, the trial is yet to conclude; hence, the retrospective mol-

lification of the rigour of punishment has been made applicable. In the cases where the trials are concluded and appeals are pending, the application of the amended Act appears to have been excluded so as to preclude the possible contingency of reopening concluded trials. In our judgment, the classification is very much rational and based on clearly intelligible differentia, which has rational nexus with one of the objectives to be achieved by the classification. There is one exceptional situation, however, which may produce an anomalous result. If the trial had just concluded before 2-10-2001, but the appeal is filed after 2-10-2001, it cannot be said that the appeal was pending as on the date of the coming into force of the amending Act, and the amendment would be applicable even in such cases. The observations of this Court in *Nallamilli case, (2001) 7 SCC 708* would apply to such a case. The possibility of such a fortuitous case would not be a strong enough reason to attract the wrath of Article 14 and its constitutional consequences. Hence, we are unable to accept the contention that the proviso to Section 41 of the amending Act is his by Article 14.

We are also unable to agree with the view taken in the judgments of the Division Benches of the Punjab and Haryana High Court and the Madhya Pradesh High Court, which have been cited before us. In our view, these judgments have proceeded on an erroneous basis on the constitutional issue and have declared the relevant proviso to be unconstitutional. The two judgments are, therefore, overruled. The reliance upon the judgment of this Court in *State v. Gian Singh (1999) 9 SCC 312 Rattan Lal, AIR 1965 SC 444 and T. Barai, (1983) 1 SCC 177* is of no avail to the appellants for these cases merely emphasise the permissibility of *ex post facto* legislation for reducing the severity of the punishment.

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271. CRIMINAL TRIAL :

Defective investigation, effect of - Court has to be circumspect in evaluating the evidence but defective investigation itself not a ground to acquit the accused.

Dhanaj Singh @ Shera and others Vs. State of Punjab
Judgment dt. 10.3.2004 by the Supreme Court in Criminal Appeal No. 941 of 2003, reported in (2004) 3 SCC 654

Held :

In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. *(See Karnel Singh v. State of M.P., (1995) 5 SCC 518)*

In *Paras Yadav v. State of Bihar (1999) 2 SCC 126* it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated

conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

As was observed in *Ram Bihari Yadav v. State of Bihar (1998), 4 SCC 517* if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh v. Balwinder Singh, (2003) 2 SCC 518.* As noted in *Amar Singh case* it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the I.O. cannot affect the credibility of the prosecution version.

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272. CONSTITUTION OF INDIA - Art. 227

Supervisory jurisdiction under Article 227, ambit and scope of - Law explained.

Ranjeet Singh Vs. Ravi Prakash

Judgment dt. 18.3.2004 by the Supreme Court in Civil Appeal No. 1685 of 2004, reported in (2004) 3 SCC 682

Held :

In *Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675* this Court has ruled that to be amenable to correction in certiorari jurisdiction, the error committed by the court or authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging in a long-drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari, If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in *Surya Dev Rai* that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal.

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273. CIVIL PROCEDURE CODE, 1908 - O.7 R.11

Objection as to jurisdiction - To decide such objection, only the allegations contained in plaint should be seen.

Exphar Sa and another Vs. Eupharma Laboratories Ltd. and another.

Judgment dt. 20.2.2004 by the Supreme Court in Civil Appeal No. 1189 of 2004, reported in (2004) 3 SCC 688

Held :

Besides when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. However, the Division Bench examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry on business within the jurisdiction of the Delhi High Court.

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274. INDIAN PENAL CODE, 1860 - Section 201

Criminal liability under Section 201 r/w/s 306 - Mere presence at the cremation ground or mere relationship with husband would not attract Section 201 - Necessary requirements to constitute an offence under Section 201 - Law explained.

Wattan Singh and others Vs. State of Punjab

Judgment dt. 4.2.2004 by the Supreme Court in Criminal Appeal No. 151 of 1997, reported in (2004) 3 SCC 700

Held :

Baldev Singh has been convicted and the appellants acquitted of offence under Section 306 IPC, namely, "abetment of suicide". The appellants have been found guilty of offence under Section 201 IPC. For conviction under the said offence, the prosecution was required to prove that the appellants had knowledge or had reason to believe that an offence under Section 306 had been committed by Baldev Singh and with such knowledge or belief they caused evidence of commission of the offence to disappear either with the intention of screening the offender from legal punishment or with that intention gave any information respecting the offence which they knew or believed to be false.

The only finding recorded against the appellants is that they are family members of Baldev Singh. In respect of Harpal Singh, the only finding is that he was a family friend. Further finding recorded is that they were present at the house where the body of Manmohan Kaur had been kept and also at the cremation ground. The mere presence of the accused at the house or at the cremation ground or their relationship with her husband would not attract the provision of Section 201 IPC.

Presumption that the appellants had the knowledge of commission of offence cannot be drawn from their mere presence at the house or cremation ground or on account of relationship. There is no other finding except as above noticed against the appellants. We have also perused the record. There is no evidence to prove the guilt of the appellants for offence under Section 201 IPC. It cannot be held that the appellants knew or had reason to believe that offence

had been committed and participated in cremation to conceal and dispose of the dead body.

In absence of evidence, it cannot be assumed on suspicion alone that the appellants must have known or must have reason to believe that Baldev Singh abetted in commission of offence and, by being present at the cremation ground, they caused the evidence of commission of the offence to disappear with intention to screen Baldev Singh from legal punishment.

This Court in *Palvinder Kaur v. State of Punjab, AIR 1952 SC 354* had held that in order to establish the charge under Section 201 IPC, it is essential to prove that an offence has been committed; mere suspicion that it has been committed is not sufficient. It has to be proved that the accused knew or had reason to believe that such offence had been committed, and with the requisite knowledge and with the intent to screen the offender from legal punishment caused the evidence thereof to disappear or gave false information respecting such offence knowing or having reason to believe the same to be false. *Palvinder Kaur* decision has been followed in various later decisions (*Suleman Rahiman Mulani v. State of Maharashtra, AIR 1968 SC 829 Nathu v. State of U.P., (1979) 3 SCC 574 and V.L. Tresa v. State of Kerala (2001) 3 SCC 549).*

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275. TRANSFER OF PROPERTY ACT, 1882 - Section 55

Rights and liabilities of buyer and seller - Buyer's charge contemplated under Section 55 regarding purchase money/earnest money - Law explained.

Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and others Judgment dt. 19.12.2003 by the Supreme Court in Civil Appeal No. 10135 of 2003, reported in (2004) 3 SCC 711

Held :

We have carefully considered the submissions of the learned counsel appearing on either side. It would be necessary to set out the relevant portions of Section 55 to the extent necessary for appreciating the contentions of the parties on either side:

> *"55. Rights and liabilities of buyer and seller :-* In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (6) The buyer is entitled—
>
> (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;
>
> (b) unless he has improperly declined to accept delivery of the

property to a charge on the property, as against the seller and all person claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission".

The buyer's charge engrafted in clause (b) of sub-section (6) of Section 55 of the Transfer of Property Act would extend and enure to the purchase monay or earnest money paid before the title passes and property has been delivered by the seller to the purchaser, on the seller's interest in the property unless the purchaser has improperly declined to accept delivery of property or when he properly declines to accept delivery- including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter. The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under Section 55 (4) (b). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form by proceeding against the substituted security, since none claiming under the seller including a third-party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of the purchaser's own default or his improper refusal to accept delivery. So far as payment of interest is concerned, the section specifically envisages payment of interest upon the purchase money/ price prepaid, though not so specifically on the earnest money deposit, apparently for the reason that an amount paid as earnest money simpliciter, as mere security for due performance does not become repayble till the contract or agreement gets terminated and it is shown that the purchaser has not failed to carry out his part of the contract, and the termination was brought about not due to his fault, the claim of the purchaser for refund of earnest money deposit will not arise for being asserted.

The further aspect that requires to be noticed is as to the nature and character of earnest money deposit and in that context the distinguishing features, which help to delineate the difference, if any. The matter is not, at any rate, *res integra.* In *(Kunwar) Chiranjit Singh v. Har Swarup, AIR 1926 PC1* it was held that the earnest money is part of the purchase price when the transaction goes

forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. This statement of law had the approval of this Court in *Maula Bux v. Union of India (1969) 2 SCC 554.* Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as "a deposit or earnest money" may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part- payment of the purchase money and security for the performances of the contract by the party concerned, who paid it.

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276. PREVENTION OF CORRUPTION ACT, 1988 - Section 20 (1)
Presumption under Section 20 (1), nature and scope of - Section 20 (1) is identical to Section 4 (1) of the Act of 1947 - It is obligatory on Court to raise presumption if requisite conditions are satisfied - Law explained.
T. Shankar Prasad Vs. State of A.P.
Judgment dt. 12.1.2004 by the Supreme Court in Criminal Appeal No. 909 of 1997, reported in (2004) 3 SCC 753

Held :

For appreciating rival stands it would be proper to quote Section 20 (1) of the Act, which in essence and substance is the same as Section 4 (1) of the previous Act of 1947 and which read as follows :

> *"4 (1) Presumption where public servant accepts gratification other than legal remuneration :-* (1) Where in any trial for an offence punishable under Section 161 or Section 165 of the Indian Penal Code, or of an offence referred to in clause (a) or clause (b) of sub-section (1) of Section 5 of this Act punishable undre sub-section (2) thereof, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said Section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

In *C.I. Emden v. State of U.P., AIR 1960 SC 548* and *V.D. Jhingan v. State of U.P., AIR 1966 SC 1762* it was observed that if any money is received and no convincing, credible and acceptable explanation is offered by the accused as to how it came to be received by him, the presumption under Section 4 of the 1947

Act is available. When the receipt is admitted it is for the accused to prove as to how the presumption is not available as perforce the presumption arises and becomes operative.

These aspects were highlighted recently in *State of A.P. v. V. Vasudeva Rao, (2004) 9 SCC 319.*

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277. INDIAN PENAL CODE, 1860 - Sections 34 and 307

(i) Common intention as used in Section 34, meaning of - It does not mean "the common intention of all" or "intention common to all" - Proof of overt act, not sine qua non to fasten liability under Section 34.

(ii) Attempt to murder - Requirements for constituting offence under Section 307 - Law explained.

Girija Shankar Vs. State of U.P.
Judgment dt. 4.2.2004 by the Supreme Court in Criminal Appeal No. 1034 of 1997, reported in (2004) 3 SCC 793

Held :

(i) The section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy v. State of A.P., AIR 1993 SC 1899 Section 34* is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

(ii) Section 307 IPC reads :

> "307. Whoever does any act with such intention or knwoledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature

of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assualted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

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278. CRIMINAL TRIAL :

Destruction of record - If original record is not available due to destruction on account of natural or unnatural calamity, Court should direct for reconstruction of record - Accused persons cannot be acquitted for non - availability of record - If reconstruction not practicable then retrial may serve the interest of justice - Law explained.

State of U.P. Vs. Abhai Raj Singh and another

Judgment dt. 08.03.2004 by the Supreme Court in Criminal Appeal Nos. 1243-44 of 1997, reported in (2004) 4 SCC 6

Held :

It has been the consistent view taken by several High Courts that when records are destroyed b fire or on account of natural or unnatural calamities, reconstruction should be ordered. In *Queen Empress v. Khimat Singh, 1889 AWN 55* the view taken was that the provisions of Section 423 (1) of the Criminal Procedure Code, 1898 (in short "the old Code") made it obligatory for the court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for reconstruction. The said view was reiterated more than six decades back in *Sevugaperumal Re, AIR 1943 Mad 391 (2).* The view has been reiterated by several High Courts as well, even thereafter.

The High Court did not keep the relevant aspects and considerations in view and came to the abrupt conclusion that reconstruction was not possible merely because there was no response from the Sessions Judge. The order for reconstruction was on 1-11-1993 and the judgement of the High Court is in Criminal Appeal No. 1970 of 1979 dated 25.2-1994. The order was followed in Criminal Appeal No. 1962 of 1979 disposed of on 16.8.1995. It is not clear as to

why the High Court did not require the Sessions Court to furnish the information about reconstruction of records; and/or itself take initiative by issuing positive directions as to the manner, method and nature of attempts, efforts and exercise to be undertaken to effectively achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse, inaction or inappropriate or perfunctory action, in this regard; particularly when no action was taken by the High Court to pass necessary orders for about a decade when it received information about destruction of record. The course adopted by the High Court, if approved, would encourage dubious persons and detractors of justice by allowing undeserved premium to violators of law by acting hand in glove with those anti-social elements coming to hold sway, behind the screen, in the ordinary and normal course of justice.

We, therefore, set aside the order of the High Court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. Om Pal has died during the pendency of the appeal before this Court. The High Court shall direct reconstruction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the prosecuting agency as well as the defending parties and their respective counsel. If it is possible to have the records reconstructed to enable the High Court itself to hear and dispose of the appeals in the manner envisaged under Section 386 of the Code, rehear the appeals and dispose of the same on their own merits and in accordance with law. If it finds that reconstruction is not practicable but by ordering retrial interest of justice could be better served- adopt that course and direct retrial- and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the Sessions Court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgment shall operate and the matter shall stand closed. The appeals are accordingly disposed of.

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279. EVIDENCE ACT, 1872 - Section 113 - B
INDIAN PENAL CODE, 1860 - Section 304 - B
Expression "soon before her death" as used in Section 113 - B, meaning of - It contemplates existence of proximate and live link between effect of cruelty and the death.
Kunhiabdulla and another Vs. State of Kerala
Judgment dt. 09.03.2004 by the Supreme Court in Criminal Appeal No. 419 of 1997, reported in (2004) 4 SCC 13

Held :

As per the definition of "dowry death" in Section 304-B IPC and the wording in the presumptive Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the woman concerned

must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry". Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

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

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

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

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

A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case the presumption operates. Evidence in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presusmption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of thé Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods "soon after the theft", is either the thief, or has received the goods knowing them to be stolen, unless he can account for its possession. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon fact and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on

dowry demand and the death concerned. If alleged incident of cruelly is remote in time and has become stale enough not to distrub the mental equilibrium of the woman concerned, it would be of no consequence.

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280. CIVIL PROCEDURE CODE, 1908 - O.43 R.1 (u) & Section 100
Misc. Appeal under O.43 R.1 (u) against order remanding a case - Such appeal should be heard only on the grounds enumerated under Section 100 - Law explained.
Narayanan Vs. Kumaran and others
Judgment dt. 16.03.2004 by the Supreme Court in Civil Appeal No. 820 of 1999, reported in (2004) 4 SCC 26

Held :

..... learned Senior Counsel for the respondent cited no contrary law. He, however, reiterated that Section 100 is confined to second appeals against decrees and, therefore, cannot be invoked in an appeal against an order. It is, of course, true that Section 100 in terms applies only to appeals second to decrees, but the contention of Mr. Krishnamoorthy cannot be accepted on account of language of Order 43 Rule I clause (u). It reads as follows :

> *"43. (1) Appeals from orders :—* An appeal shall lie from the following orders under the provisions of Section 104, namely —
>
> (a)- (t)
>
> (u) an order under Rule 23 or Rule 23-A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate court."

It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the ground enumerated in Section 100.

We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant under an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate court.

The High Court of Rajasthan in *Abdul Gani v. Devi Lal, AIR 1960 Raj 77* held that the appeal under this clause should be heard only on the grounds enumerated in Section 100 and not on question of facts as in the case of first appeal.

In *Seshammal v. Kuppanaiyyangar, AIR 1926 mad 475* the Court held as under (AIR p. 476)

> "Although the civil appeal has taken the form of a civil miscellancous appeal against an order of remand the Subordinate Judge is a final judge of fact and the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal".

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281. WORDS & PHRASES :

"Confiscation" and "Forfeiture", difference between - Confiscation envisages civil liability whereas forfeiture is preceded by conviction.
State of W.B. and others Vs. Sujit Kumar Rana
Judgment dt. 20.01.2004 by the Supreme Court in Criminal Appeal No. 453 of 1997, reported in (2004) 4 SCC 129

Held :

A confiscation envisages a civil liability whereas an order of forfeiture of the forest produce must be preceded by a judgment of conviction. Although indisputably having regard to the phraseology used in sub-section (2) of Section 59-A, there cannot be any doubt whatsoever that commission of a forest offence is one of the requisite ingredients for passing an order of confiscation; but the question as to whether the order of acquittal has been passed on that ground and what weight should be attached thereto is a matter which, in our opinion, should not be gone into at this stage.

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282. CRIMINAL TRIAL :

CRIMINAL PROCEDURE CODE, 1973 - Section 311

(i) Fair trial - What constitutes fair trial

(ii) Summoning of witness under Section 311, ambit and scope of - Provisions though expressed in the widest possible terms, discretion should be exercised judicially and with circumspection - Power when can be exercised to examine the witness again - Law explained.

Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others
Judgment dt. 12.04.2004 by the Supreme Court in Criminal Appeal No. 446 of 2004, reported in (2004) 4 SCC 158

Held :

(i) The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recorse to the courts of law. It has to be unimistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly

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

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

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

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

(ii) The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory protion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India, 1991 Supp (1) SCC 271* this Court has obseved, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any

stage", or "any enquiry or trial or other proceedings", "any person", and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brough in.

Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

In the case of a defective investigation the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh v. State of M.P., (1995) 5 SCC 518.*

In *Paras Yadav v. State of Bihar, (1999) 2 SCC 126,* it was held that if the lapse or omission is committed by the investigating agency designedly or because of negligence, the posecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty.

As was observed in *Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517* if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice in the hands of courts. The view was again reiterated in *Amar Singh v. Balwinder Singh, (2003) 2 SCC 518.*

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283. INDIAN PENAL CODE, 1860 - Sections 149 and 34
Difference between "common intention" and "common object" - Proof of an overt act is not a sine qua non to fasten liability under Section 149.
Charan Singh and others Vs. State of U.P.
Judgment dt. 10.03.2004 by the Supreme Court in Criminal Appeal No. 1115 of 2003, reported in (2004) 4 SCC 205

Held :

Section 149 IPC has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt

act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

"Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot eo instanti.

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284. FAMILY COURTS ACT, 1984 - Section 7 (1)

Declaration regarding legitimacy or illegitimacy of a child - Family Court has jurisdiction to grant declaration about legitimacy but declaratory relief regarding illegitimacy cannot be granted - Law explained.

Renubala Moharana and another Vs. Mina Mohanty and others Judgment dt. 23.03.2004 by the Supreme Court in Civil Appeal No. 1792 of 2004, reported in (2004) 4 SCC 215

Held :

Under Section 7 (1) read with clause (e) of the Explanation, a suit or proceeding for a declaration "as to the legitimacy of any person" is within the jurisdiction of the Family Court. According to the appellants, the child was born on account of extramarital relationship of Respondent 1 with their son, the late Samuel Maharana. Accepting the case of the appellants, the child cannot obviously be treated as a legitimate child of Samuel and Mina Mohanty (R-1). The question of status of the child in relation to the parties to the petition can be incidentally gone into by the Family Court if necessary while deciding the guardianship petition. That liberty has been granted to the Family Court. However, as rightly held by the Family Court and the High Court, the declaratory relief as regards the illegitimacy of the child cannot be granted. In effect, that is what the appellants want under prayer (a).

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285. CRIMINAL PROCEDURE CODE, 1973 - Section 202

Inquiry under Section 202, Scope of - Accused's right to participate in such inquiry and cross - examine any prosecution witness - Held, accused has no such right - Further held statement recorded u/s 202 cannot be used under Section 33 or Section 157 of Evidence Act - Law explained.

Sashi Jena and others Vs. Khadal Swain and another Judgment dt. 10.02.2004 by the Supreme Court in Criminal Appeal No. 697 of 2003, reported in (2004) 4 SCC 236

Held :

The crucial question to be examined in this case is as to whether the statement of PW1 recorded during the course of inquiry under Section 202 of the Code is relevant and admissible in the case on hand so as to form basis of conviction of the accused persons. It has been submitted on behalf of the appellants that such a statement is not admissible under Section 33 of the Evidence Act, 1872 ("the Act" for short) as the accused had neither any right nor opportunity to cross-examine PW 1 during the course of inquiry. It may be useful to refer to Section 33 of the Act which runs thus:

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated :- Evidence given by a

witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:

Provided -

that the proceeding was between the same parties or their representatives-in-interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation:- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

(emphasis added)

From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorised to take it is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three prerequisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are : (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding had the right and opportunity to cross- examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three prerequisites aforestated, Section 33 of the Act would not be attracted. This Court had occasion to consider this question in the case of *V.M. Mathew v. V.S. Sharma, (1995) 6 SCC 122,* in which it was laid down that in view of the second proviso, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross-examine the witness. The Court observed thus at AIR pp. 110 and 111 : (SCC p. 125, para 8)

"8. The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross-examine the witness in the previous proceeding.... *the proviso lays down the acid test that statement of a particular witness should have*

been tested by both parties by examination and cross- examination in order to make it admissible in the later proceeding."

(emphasis added)

Thus, the question to be considered is as to whether an accused has any right to cross-examine a prosecution witness examined during the course of inquiry under Section 202 of the Code. It is well settled that the scope of inquiry under Section 202 of the Code is a very limited one and that is to find out whether there are sufficient grounds for proceeding against the accused who has no right to participate therein much less a right to cross- examine any witness examined by the prosecution, but he may remain present only with a view to be informed of what is going on. This question is no longer res integra having been specifically answered by a four-Judge Bench decision of this Court in the case of *Chandra Deo Singh v. Prokash Chandra Bose, AIR 1963 SC 1430* wherein this Court categorically laid down that an accused during the course of inquiry under Section 202 of the Code of Criminal Procedure, 1898, has no right at all to cross- examine any witness examined on behalf of the prosecution. It was observed thus at AIR p. 1432, para 7:

> "7. Taking the first ground, it seems to us clear from the entire scheme of Chapter XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. this does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, *he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to putany question to witnesses at the instance of the person named as accused but against whom process has not been issued;* nor can he examine any witnesses at the instance of such a person."
>
> (emphasis added)

Thus, we have no difficulty in holding that as during the course of inquiry under Section 202 of the Code an accused has no right much less opportunity to cross- examine a prosecution witness, statement of such a witness recorded during the course of the inquiry is not admissible in evidence under Section 33 of the Act and, consequently, the same cannot form the basis of conviction of an accused.

Next question that arises in the case on hand is as to whether the statement of PW 1 recorded during the course of inquiry under Section 202 of the Code can be proved under Section 157 of the Act to corroborate evidence of other witnesses viz. PWs 2, 3, 4 and 5 examined during trial. Language of Section 157 of the Act is very clear and the same lays down that:

"157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved".

A plain reading of the section would show that previous statement of a particular witness can be used to corroborate only his own evidence during trial and not evidence of other witnesses. In the case of *Moti Singh v. State of U.P., AIR 1964 SC 900* similar question had arisen before a four-Judge Bench of this Court wherein though the evidence in court of two witnesses, namely, Ram Shankar and Jageshwar, during trial was disbelieved in relation to the manner of occurrence by the trial court as well as the High Court, their statements made before a Magistrate under Section 164 of the Code were relied upon to corroborate the other evidence adduced by the prosecution during trial. The aforesaid procedure was deprecated by this Court and it was laid down that such previous statement could be used to corroborate the evidence of that very witness examined during the course of trial and not evidence of other witnesses examined before the trial court. In that case, this Court set aside the conviction of the accused persons observing thus at AIR p. 901, para 5:

"Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in court. If those witnesses were not to be believed, their previous statements could not be used as independent evidence in support of the other prosecution evidence."

In view of the foregoing discussion, we are of the opinion that the statement of PW 1 recorded during the course of enquiry under Section 202 of the Code cannot be used against the accused for any purpose as the same is not admissible either under Section 33 or Section 157 of the Act.

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286. INDIAN PENAL CODE, 1860 - Section 354

Offence under Section 354 I.P.C., Essential ingredients of - Modesty of a woman, meaning of - Knowledge that modesty is likely to be outraged sufficient to constitute the offence - Law explained.

Raju Pandurang Mahale Vs. State of Maharashtra and another

Judgment dt. 11.02.2004 by the Supreme Court in Criminal Appeal No. 616 of 2003, reported in (2004) 4 SCC 371

Held :

Coming to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force on a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:

(a) That the assault must be on a woman.

(b) That the accused must have used criminal force on her.

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

What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word "modesty" in relation to a woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste".

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287. INDIAN PENAL CODE, 1860 - Section 376

Rape - Penetration is sine qua non for rape - Law explained.

Aman Kumar and another Vs. State of Haryana

Judgment dt. 10.02.2004 by the Supreme Court in Criminal Appeal No. 1016 of 1997, reported in (2004) 4 SCC 379

Held :

Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines, IC&K 893*).

To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under section 376 IPC.

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288. WORDS & PHRASES :

Expression "Proof of fact", meaning and connotation of - It is unsafe to use one presumption to draw yet another presumption unless there is statutory compulsion - Presumption and applicability of maxim res ipsa loquitur in a criminal case - Law explained.

State of A.P. Vs. C. Uma Maheswara Rao and another

Judgment dt. 31.03.2004 by the Supreme Court in Criminal Appeal No. 468 of 1998, reported in (2004) 4 SCC 399

Held :

Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. Fletcher Moulton, L.J., in *Hawkins v. Powells Tillery Steam Coal Co. Ltd. (1911) 1 KB 988* observed as follows:

> "Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion."

The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumptions in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks is likely to have happened. In that process the court may have regard to common course of natural events, human conduct, public or private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act.

Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a procees of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.

For the purpose of reaching one conclusion the court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted the court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statuary compulsion. This Court has indicated so in *Suresh Budharmal Kalani v. State of Maharashtra, (1998) 7 SCC 337 (SCC p. 339. para 5)*

> "A presumption can be drawn only from facts- and not from other presumptions- by a process of probable and logical reasoning."

Illustration (a) to Section 114 of the Evidence Act says that the court may presume that

> "a man who is in the prossesion of stolen goods soon after the theft is either the theif or has received the goods knowing them to be stolen, unless he can account for his possesion".

That illustration can profitably be used in the present context as well when the prosecution brought reliable materials that there was recovery of monay from the accused. In fact the receipt and recovery is accepted. The other factor

is the acceptability of the plea of loan, which the High Court itself has not held cogent or credible.

We may note that a three-Judge Bench in *Raghubir Singh v. State of Haryana, (1974) 4 SCC 560* held that the very fact that the accused was in possession of the marked currency notes against an allegation that he demanded and received the amount is *"res ipsa loquitur"*.

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289. CRIMINAL PROCEDURE CODE, 1973 - Sections 190 (a), 200 & 204
Grounds for taking cognizance - Magistrate may take cognizance not - withstanding contra opinion of the investigating agency - Adequacy of evidence for conviction not to be seen at that stage - No reasons required to be recorded at the stage of issuing the process.
Jagdish Ram Vs. State of Rajasthan and another
Judgment dt. 09.03.2004 by the Supreme Court in Criminal Appeal No. 357 of 1997, reported in (2004) 4 SCC 432

Held :

It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (Dy. *Chief Controller of Imports & Exports v. Roshanlal Agarwal, (2003) 4 SCC 139*)

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290. FOREST ACT, 1927 - Section 52
Confiscation under Section 52 - Power is independent of criminal prosecution - Criminal prosecution and confiscation proceedings are separate and distinct proceedings - Law stated.
State of M.P. Vs. S.P. Sales Agencies and others
Judgment dt. 29.03.2004 by the Supreme Court in Criminal Appeal No. 259 of 1997, reported in (2004) 4 SCC 448

Held :

The next question that arises in the present case is as to whether confiscation proceeding can be initiated under Section 52 of the Act only after launching of criminal prosecution or it is open to the Forest Authorities upon seizure of forest product to initiate both or either. Under Section 52 of the Act when a forest officer or a police officer has reasons to believe that a forest offence has been commited in respect of any forest produce, he may seize the same whereupon confiscation proceeding can be initiated ."Forest offence" has been defined

under Section 2(3) of the Act to mean an offence punishable under this Act or any rule framed thereunder. Section 41 empowers the State Government to frame rules for regulating transit of forest produce. Section 42 further empowers the State Government to frame rules prescribing thereunder penalties for breach of the Rules framed under Section 41 of the Act. Section 76 confers additional powers upon the State Government to make rules, inter alia, for carrying out provisions of the Act. Purporting to act under Sections 41, 42 and 76 of the Act, the Government of Madhya Pradesh framed the Transit Rules referred to above, Rule 3 whereof lays down that no forest produce shall be moved either within the State of Madhya Pradesh or beyond its territory without obtaining a transit pass. Sub-rule (1) of Rule 29 lays down that whosoever contravenes any of the provisions of these Rules shall be liable to be punished with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both.

In the present case, the allegations are that by committing breach of Rule 3 a forest offence within the meaning of Section 2 (3) of the Act has been committed for which a criminal prosecution under Rule 29 of the Transit Rules as well as a confiscation proceeding under Section 52 of the Act could be initiated. From the scheme of the Act, it would appear that for contravention of Rule 3, two independent actions are postulated- one, criminal prosecution and the other, confiscation proceeding. The power of confiscation, exercisable under Section 52 of the Act, cannot be said to be in any manner dependent upon launching of criminal prosecution as it has nowhere been provided therein that the forest produce seized can be confiscated only after criminal prosecution is launched, but the condition precedent for initiating a confiscation proceeding is commission of forest offence, which, in the case on hand, is alleged to have been commited. Reference in this connection may be made to a decision of this Court in the case of *Divisional Forest Officer v. G.V. Sudhakar Rao, (1985) 4 SCC 573* wherein it has been clearly laid down that the two proceedings are quite separate and distinct and initiation of confiscation proceeding is not dependent upon launching of criminal prosecution. In the said case, the Court observed thus: (SCC p. 583, para 12).

> "The conferral of power of confiscation of seized timber or forest produce and the implements etc. on the authorized officer under sub-section (2-A) of Section 44 of the Act on his being satisfied that a forest offence had been committed in respect thereof, is not dependent upon whether a criminal prosecution for commission of a forest offence has been launched against the offender or not. It is a separate and distinct proceeding from that of a trial before the court for commission of an offence. Under sub-section (2-A) of Section 44 of the Act, where a Forest Officer makes a report of seizure of any timber or forest produce and produces the seized timber before the authorized officer along with a report under Section 44 (2), the authorized officer can direct confiscation to Government of such timber

or forest produce and the implements etc. if he is satisfied that a forest offence has been committed, irrespective of the fact whether the accused is facing a trial before a Magistrate for the commission of a forest offence under Section 20 or 29 of the Act".

In the case of *State of W.B. v. Gopal Sarkar, (2002) 1 SCC 495* while noticing the view taken in the case of *G.V. Sudhakar Rao, (1985) 4 SCC 573* this Court has reiterated that the power of confiscation is independent of any criminal prosecution for the forest offence committed. This being the position, in our view, the High Court has committed an error in holding that initiation of confiscation proceeding relating to *kattha* was unwarranted as no criminal prosecution was launched.

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291. WORDS & PHRASES :

Voluntary retirement and resignation, distinction between - Resignation may be unilateral but voluntary retirement is bilateral.
Jaipal Singh Vs. Sumitra Mahajan (Smt) and another
Judgment dt. 01.04.2004 by the Supreme Court in Civil Appeal No. 3749 of 2003, reported in (2004) 4 SCC 522

Held :

In the case of *Reserve Bank of India v. Cecil Dennis Solomon, (2004) 9 SCC 461* this Court has laid down that in service jurisprudence there is a difference between "voluntary retirement" and "resignation" as they convey different connotations. It has been held that voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service and though both involve voluntary acts, they operate differently. One of the basic distinctions between the two is that in the case of resignation, it can be tendered at any time but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. In the case of resignation a prior permission is not mandatory while in the case of voluntary retirement, permission of the employer concerned is a requisite condition. Under Rule 16 of the 1958 Rules, an employee who seeks voluntary retirement has to give three months notice to enable the employer to complete the designated mode of acceptance (See *Halsbury's Laws of England, 4th Edn., Vol. 9, p. 133*) Lastly, in a given case, the appointing authority may refuse to waive the said notice period which shows that resignation may be unilateral whereas voluntary retirement is bilateral. A similar question came up before this Court in the case of *UCO Bank v. Sanwar Mal, (2004) 4 SCC 412* in which this Court has inter alia held that in the case of "resignation", the relationship of employer and employee terminates on acceptance of resignation whereas in the case of "retirement", voluntary or on superannuation, the relationship continues for the purposes of payment of retiral benefits. In the case of retirement, there is a nexus between such retirement and retiral benefits.

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292. INDIAN PENAL CODE, 1860 - Sections 149 and 302
Constructive liability under Section 149 - Accused charged only under Section 302 I.P.C. - Ingredients relating to charge under Section 149 not incorporated in the charge - Accused persons cannot be convicted under Section 302 read with section 149.
Bala Seetharamaiah Vs. Perike S. Rao and others
Judgment dt. 16.03.2004 by the Supreme Court in Criminal Appeal No. 1107 of 1997, reported in (2004) 4 SCC 557

Held :

Unfortunately, the Sessions Judge did not frame charge against the accused persons for offence punishable under Section 302 IPC read with Section 149 IPC. It is also important to note that the relevant prosecution allegations so as to bring in the ingredients of the offence punishable under Section 302 IPC read with Section 149 IPC also were not incorporated in the charge framed by the Sessions Judge. The accused were not told that they had to face charges of being members of an unlawful assembly and the common object of such assembly was to commit murder of the deceased and in furtherance of that common object murder was committed and thereby they had a constructive liability and thus they committed the offence punishable under Section 302 IPC read with Section 149 IPC. Of course the mere omission to mention Section 149 may be considered as an irregularity, but failure to mention the nature of the offence committed by them cannot be said to be a mere irregularity. Had this mistake been noticed at the trial stage, the Sessions Judge could have corrected the charge at any time before the delivery of the judgment. In the instant case, the accused were told to face a charge punishable under Section 302 simpliciter and there was no charge under Section 302 IPC read with Section 149 IPC.

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293. PREVENTION OF FOOD ADULTERATION RULES, 1955 - Rule 18
Sending of memorandum and specimen impression of seal to Public Analyst - Both should be sent separately - Expression 'separately', meaning and connotation of - Law explained.
State of H.P. Vs. Narendra Kumar and another
Judgment dt. 16.02.2004 by the Supreme Court in Criminal Appeal No. 1109 of 1997, reported in (2004) 4 SCC 567

Held :

The rule has been amended by GSR No. 293 (E) dated 23-3-1985 with effect from 24-9-1985. Rule 18 before amendment read as follows :

> "18. *Memorandum and impression of seal to be sent separately*:- A copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the Public Analyst separately by registered post and delivered to him or to any person authorised by him."

After amendment it reads as follows :

> *"18. Memorandum and impression of seal to be sent separately:-* A copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent, in a sealed packet separately to the Public Analyst by any suitable means immediately but not later than the succeeding working day".

The new rule makes the following changes :

> (i) The copy of the memorandm and specimen impression of the seal are now required to be sent in a sealed packet separately, which was not a requirement under the old rule.
>
> (ii) The mode of sending now is by 'any suitable means", whereas under the old rule it was by registered post or hand delivery.
>
> (iii) The time for sending the packet is now prescribed as "immediately but not later than the succeeding working day", but there was no such prescription of time under the old rule.

Rule 18 requires the Food Inspector : (i) to send (a) a copy of the memorandum ; and (b) specimen impression of the seal used to seal in a sealed packet to the Public Analyst; (ii) to send this sealed packet separately by any suitable means; and (iii) to send the same immediately but not later than the succeeding working day. The expression "separately" has to be understood on a conjoint reading of Rules 7, 17 and 18. Rule 7 postulates that the Public Analyst on receipt of the packet containing the sample for analysis has to compare the seals on the container and the outer cover with the specimen impression received separately and has to note the condition of the seals thereon. Reading Rules 17 and 18 together, it is clear that the word "separately" used in Rule 18 has been intended to convey the sense that the copy of the memorandum and the specimen impression of the seal have to be sent independently of the articles that are required to be sent under Rule 17. In this connection, reference can be made to the observations made by this Court in *Rajkaran case, 1987 Supp. SCC 183* wherein it was observed that it is mandatory that the materials referred in Rules 17 and 18 are to be separately sent to the Public Analyst. The object of Rule 18 is to ensure the accuracy of the seal on the sample sent to the Public Analyst by comparison with the specimen impression of the seal sent by the Food Inspector separately. The report of the Public Analyst in terms of Rule 7 (3) marked as Ext. PJ shows that he found the same intact and unbroken. The seal fixed on the container and on the outer cover of the sample tallied with the specimen impression of the seal separately sent by the Food Inspector. A presumption can be drawn that requirements of Rule 18 have been complied with. The presumption under Section 114 of the Indian Evidence Act, 1872 (in short "the Evidence Act") in relation to regular performance of official acts applies to the report of a Public Analyst. However, this preumption is rebuttable. No effort was made by the accused to dislodge this presumpton. There was even no suggestion to the Food Inspector (PW1) who exhibited the report that there

is any untruth in the recital by the Public Analyst. It is relevant to note that under sub-section (5) of Section 13 of the Act any document purporting to be a report signed by a Public Analyst unless it has been superseded under sub-section (3) of the said section or any document purporting to be a certificate to be signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under the Act. It is urged that the memorandum and the specimen impression of the seal were to be sent separately in different packets. On a plain reading of Rule 18, what is required is that a copy of the memorandum and specimen impression of the seal used to seal the packet shall be *sent in a sealed packet* (underlined for emphasis) separately to the Public Analyst. As indicated above, the word "separately" refers to separate dispatch of articles indicated in Rule 17 and Rule 18. The expression "in a sealed packet" refers to both the copy of memorandum and the specimen impression of the seal. They are both required to be sent in a sealed packet. Plurality of packets is not provided for and obligated. What is required is that the copy of memorandum and specimen impression of the seal used to seal the packet are to be sent in a sealed packet separately and not with the articles required to be sent under Rule 17.

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294. PREVENTION OF CORRUPTION ACT, 1988 - Section 13 (2)
Applicability of law relating to probation - Benefit of probation law, not to be extended in cases of conviction under Section 13 (2).
State through SP, New Delhi Vs. Ratan Lal Arora
Judgment dt. 26.04.2004 by the Supreme Court in Criminal Appeal No. 532 of 2004, reported in (2004) 4 SCC 590

Held :

Consequently, for the conviction under Section 13 (2) of the Act the principles enunciated under the Probation Act cannot be extended at all in view of the mandate contained in Section 18 of the said Act. So far as Section 360 of the Code is concerned, on and from the date of extension and enforcement of the provisions of the Probation Act to Delhi, powers under Section 562 of the old Code and after its repeal and replacement powers under Section 360 of the Code, cannot be invoked or applied at all, as has been done in the case on hand. The view taken to the contra is not legally sustainable and cannot have our approval.

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295. CRIMINAL PROCEDURE CODE, 1973 - Section 193
Whether Special Court can take cognizance under SC/ST (Prevention of Atrocities) Act without committal of case? - No. Law reiterated.
Moly and another Vs. State of Kerala
Judgment dt. 23.03.2004 by the Supreme Court in Criminal Appeal No. 730 of 1998, reported in (2004) 4 SCC 584

Held :

Pristine question to be considered is whether the Special Judge could take cognizance of the offence straight away without the case being committed to him. If the Special Court is a Court of Session, the interdict contained in Section 193 of the Code of Criminal Procedure, 1973 (for short "the Code") would stand in the way. It reads thus:

> *"193. Cognizance of offences by Courts of Session.-* Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

So the first aspect to be considered is whether the Special Court is a Court of Session. Chapter II of the Code deals with "Constitution of Criminal Courts and Offices". Section 6 which falls thereunder says that :

"6. ... there shall be, in every State, the following classes of criminal courts, namely :

(i) Courts of Session;"

The other classes of criminal courts enumerated thereunder are not relevant in this case and need not be extracted.

Section 14 of the Act says that :

> "14. For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

So it is for trial of the offences under the Act that a particular Court of Session in each district is sought to be specified as a Special Court. Though the word "trial" is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. The word "inquiry" is defined in Section 2 (*g*) of the Code as "every inquiry, other than a trial, conducted under this Code by a Magistrate or court". So the trial is distinct from inquiry and inquiry must always be a forerunner to the trial. The Act contemplates only the trial to be conducted by the Special Court. The added reason for specifying a Court of Session as a special Court is to ensure speed for such trial. "Special Court" is defined in the Act as "a Court of Session specified as a Special Court in Section 14" [vide Section 2 (1) (*d*)].

Thus the Court of Session is specified to conduct a trial and no other court can conduct the trial of offences under the Act. Why did Parliament provide that only a Court of Session can be specified as a Special Court? Evidently, the legislature wanted the Special Court to be a Court of Session. Hence the particular Court of Session, even after being specified as a Special Court, would

continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. The trial in such a court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for "trial before a Court of Session".

Section 193 of the Code has to be understood in the aforesaid backdrop. The Section imposes an interdict on all Courts of Session against taking cognizance of any offence as a court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a Magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is, when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate.

Neither in the Code nor in the Act is there any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a court of original jurisdiction without the case being committed to it by a Magistrate. If that be so, there is no reason to think that the charge-sheet or a complaint can straight away be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of criminal courts that the Court of Session is given a superior and special status. Hence we think that the legislature would have thoughtfully relieved the Court of Session from the work of performing all the preliminary formalities which Magistrates have to do until the case is committed to the Court of Session.

A reading of the provisions concerned makes it clear that subject to the provisions in other enactments all offences under other laws shall also be investigated, inquired into, tried and otherwise dealt with under the provisions of the Code. This means that if another enactment contains any provision which is contrary to the provisions of the Code, such other provision would apply in place of the particular provision of the Code. If there is no such contrary provision in other laws, then provisions of the Code would apply to the matters covered thereby. This aspect has been emphasized by a Constitution Bench of this Court in para 16 of the decision in *A.R. Antulay v. Ramdas Sriniwas Nayak, (1984) 2 SCC 500.* It reads thus: *(SCC p. 517)*

"Section 4(2) provides for offences under other law which may be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal Procedure is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations".

Section 5 of the Code cannot be brought in aid for supporting the view that the Court of Session specified under the Act obviates the interdict contained in Section 193 of the Code so long as there is no provision in the Act empowering the Special Court to take cognizance of the offence as a court of original Jurisdiction. Section 5 of the Code reads thus:

> *"5. Saving.*- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

This Court in *Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440* on a reading of Section 5 in juxtaposition with Section 4 (2) of the Code, held as follows : (SCC p. 479, para 128)

> "[I]t only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code".

Hence, we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act. We are reiterating the view taken by this Court in *Gangula Ashok v. State of A.P., (2000) 2 SCC 504* and in *Vidyadharan v. State of Kerala, (2004) 1 SCC 215* in above terms with which we are in respectful agreement. The Sessions Court in the case at hand, undisputedly has acted as one of original jurisdiction, and the requirements of Section 193 of the Code were not met.

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296. PREVENTION OF CORRUPTION ACT, 1988 - Section 19

Sanction for prosecution, grant of - Sanctioning Authority not required to wait for the report of the experts - Actual production of the tapes, etc. before Sanctioning Authority, not necessary - Duty of sanctioning authority - Law explained.

State (Anti-corruption Branch), Govt. of NCT of Delhi and another Vs. Dr.R.C. Anand and another

Judgment dt. 15.04.2004 by the Supreme Court in Criminal Appeal No. 478 of 2004, reported in (2004) 4 SCC 615

Held :

In *Kalpnath Rai v. State, (1997) 8 SCC 732* it was clearly observed by this Court that the sanctioning authority is not required to wait for the report of the experts. The sanctioning authority has only to see whether the facts disclosed in the complaint prima facie disclose commission of an offence or not. The actual production of the tapes, etc. are matters for proof during trial and are not necessarily to be undertaken at this stage. It is true as contended by learned counsel for Respondent 1, grant of sanction is not an empty formality.

The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence including the transcript of the tape record have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. [(*See Jaswant Singh v. State of Punjab, AIR 1958 SC 124 and state of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222].*

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297. SPECIFIC RELIEF ACT, 1963 - Section 6

Possessory relief under Section 6 - Action under Section 6 is confined to finding out question of possession and dispossession within six months before institution of suit - question of title "immaterial".

Sanjay Kumar Pandey and others Vs. Gulbahar Sheikh and others

Judgment dt. 2.04.2004 by the Supreme Court in Civil Appeal No. 2040 of 2004, reported in (2004) 4 SCC 664

Held :

A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to

file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well-settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code.

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298. CIVIL PRACTICE :

Jurisdiction of Civil Court - Two Courts having concurrent jurisdiction- Parties by agreement can limit the jurisdiction to one Court.
New Moga Transport Co. through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and others
Judgment dt. 23.04.2004 by the Supreme Court in Civil Appeal No. 2645 of 2004, reported in (2004) 4 SCC 677

Held :

By a long series of decisions it has been held that where two courts or more have jurisdiction under CPC to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two courts. But by an agreement parties cannot confer jurisdiction on a court which otherwise does not have jurisdiction to deal with a matter. [See *Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286 and Shriram City Union Finance Corpn. Ltd. v. Rama Mishra, (2002) 9 SCC 613]*

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299. RENT CONTROL AND EVICTION :

Tenancy - Person inheriting tenancy inherits it with rights and obligations.
Parvinder Singh Vs. Renu Gautam and others
Judgment dt. 22.04.2004 by the Supreme Court in Civil Appeal No. 1680 of 1999, reported in (2004) 4 SCC 794

Held :

Tenancy is a heritable right unless a legal bar operating against heritability is shown to exist. Thus, the one who inherits tenancy rights also inherits the obligations incurred by the deceased tenant along with the rights which he had. It is difficult to accept a proposition that on death of the tenant his heirs inherit only rights and not obligations. If that be so, then the heirs would not be liable to pay any arrears of rent which were not paid by the deceased tenant.

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300. M.P. MUNICIPAL CORPORATION ACT, 1956 - Section 308-A

Unauthorized construction i.e. construction without sanction or beyond sanction - Such construction may be regularized by the Municipal Authorities and need not necessarily be demolished - Law explained.

Kamdhenu Housing Co-operative Society, Bhopal Vs. Nagar Nigam, Bhopal

Reported in 2004 (3) MPLJ 240

Held :

Section 308-A of the Act provides for compounding of offences of construction of buildings without permission. This Section has been introduced in the Act in the year 1994. Even before this specific provision, the compounding of offences of construction of buildings without permission was being done by the Municipal Corporation.

The Supreme Court has observed in *Syed Muzaffar Ali vs. Municipal Corporation of Delhi, 1995 Supp (4) SCC 426* that the mere departure from the authorised plan or putting up a construction without sanction does not ipso facto and without more necessarily and inevitably justify demolition of the structure. There are cases and cases of such unauthorised constructions. Some are amenable to compounding and some may not be. There may be cases of grave and serious breaches of the licensing provisions or building regulations that may call for the extreme step of demolition.

These are matters for the authorities to consider having regard to the nature of the transgressions. It is open to the petitioners in the present case to move the authorities for such relief as may be available to them at law. The petitioners may, if so advised, file a plan indicating the nature and extent of the unauthorised constructions carried out and seek regularization, if such regularisation is permissible. The dismissal of the petitions challenging the demolition orders in the present case, will not stand in the way of the authorities from examining and granting such relief as the petitioners may be entitled to under law.

The decision of this Court in *Mahadeo Prasad vs. Municipal Corporation, Jabalpur, 2000 (3) MPHT 210* also lays down that the Corporation is created for the welfare of its citizens and notwithstanding, failure on its part to communicate to the petitioners their right to file application for fresh sanction or for compounding, shall invalidate its action but it is expected from the Corporation that before pulling down the structure, citizens are apprised of their right. This will build public confidence and create credibility for the institution.

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301. CRIMINAL TRIAL :

Appreciation of evidence - Dowry death- Relatives of the family of the victim are best witnesses - Absence of independent evidence inconsequential.

Kailash Vs. State of M.P.

Reported in 2004 (3) MPLJ 249

Held :

Learned Senior Counsel for the appellant has further contended that the prosecution has not examined any independent witness of the locality and, therefore, evidence of interested witnesses should not be believed. The contention cannot be accepted. In case of dowry death, the relations of the family of the victim are the best witnesses. Only they can depose what was the treatment given to the victim. The deceased herself on more than one occasion complained to her relatives regarding ill treatment by accused. Normally, such complaints are not made to the neighbours. Therefore, the absence of independent evidence will not cause any dent in the prosecution case.

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302. ARBITRATION ACT, 1940 :

Pendente lite interest, grant of - Arbitrator can grant such interest.
Union of India Vs. Jai Forging and Stampings Private Ltd.
Reported in 2004 (3) MPLJ 263

Held :

The question whether Arbitrator can grant pendente lite interest is settled by a decision of the Apex Court in *Secretary, Irrigation Department Govt. of Orissa and others vs. Ragunath Mohapatra, AIR 1992 SC 732* in which the Apex Court has laid down that it is open to the Arbitrator to award pendente lite interest and the decision in *Executive Engineer, Irrigation, Galimala and others vs. Abnaduta Jena, AIR 1988 SC 1520* has been overruled. Thus, in our opinion, it is permissible for the Arbitrator to award pendente lite interest.

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303. MOTOR VEHICLES ACT, 1988 - Section 147

Insurer's liability regarding person travelling in the capacity of owner of the goods in goods vehicle - Insurer is liable in respect of such persons- Liability is statutory.
Kandhi @ Kanhaiyalal Sahu and another Vs. Govind Singh Dhruve and another
Reported in 2004 (3) MPLJ 277

Held :

Thus, there is statutory liability enjoined upon the insurer under section 147 of the Motor Vehicles Act, 1988 as section 147 of the Motor Vehicles Act, 1988 covers liability of person who is travelling on goods vehicle as the owner of the goods. We are fortified in our view by the decision of the Apex Court in *National Insurance Company Limited vs. Baljit Kaur and ors., 2004 (2) MPLJ 4*, in which it has been laid down thus:

> "17. By reason of the 1994 Amendment what was added is 'including the owner of the goods or his authorised representative carried in the vehicle'. The liability of the owner of the vehicle to insure it compulsority, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides of the third parties. The intention of the Parliament,

therefore, could not have been that the words 'any person' occurring in section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention there was no necessity of the Parliament to carry out an amendment inasmuch as expression 'any person' contained in sub-clause (i) of Clause (b) of sub-section (1) of section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

18. The observations made in this connection by the Court in *Asha Rani case,* (2003) 2 SCC 223 to which one of us, Sinha, J., was a party, however, bear repetition:

> "26. In view of the changes in the relevant provisions in the 1988 Act vis-a-vis the 1939 Act, we are of the opinion that the meaning of the words 'any person' must also be attributed having regard to the context in which they have been used i.e., a 'third party'. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor."

19. In *Asha Rani, (2003) 2 SCC 223,* it has been noticed that sub-clause (i) of Clause (b) of sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risk of the passengers travelling in the vehicle. The premium in view of the 1994 Amendment would only cover a third party as also the owner of the goods or his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in section 147 with respect to person other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

Thus, we are of the opinion that the injured/deceased persons were travelling with their goods in the capacity of owner of the goods at the time of accident, insurer cannot escape from the liability. Question of examining insurance

policy does not arise at all as the liability is statutory. Policy is subservient to the statutory provision.

Thus, in our opinion, firstly as liability is statutorily covered under section 147 of Act, the large number of persons travelling with their goods as owner is not relevant in the instant case. Even if number of passengers has exceeded than provided in insurance policy insurer cannot escape the liability in view of the above quoted decisions. In our opinion, the driver, owner and insurer are liable jointly and severally to make payment of compensation in each of the case.

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304. MOTOR VEHICLES ACT, 1988 - Sections 2 (10), 2 (47) and Sections 10 and 147

Effective driving licence, meaning of with reference to transport vehicle - Expression "transport vehicle" is included in the definition of light motor vehicle - Driver holding driving licence for light motor vehicle not transport vehicle - Such driving licence is effective for transport vehicle - Contrary view expressed in New Indian Assurance Co. Ltd. Vs. Shailesh Yadav and others, 1988 ACJ 755 expressly overruled - Law explained.

New India Assurance Company Limited Vs. Smt. Rekha and others
Reported in 2004 (3) MPLJ 291

Held :

Light Motor Vehicle has been defined in section 2 (21) to mean that the weight of a transport vehicle or omnibus does not exceed 7500 Kgs. The word transport vehicle has been further defined under section 2(47) to mean that a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

Under section 10 it is provided that driving licence shall be expressed as entitling holder to drive a motor vehicle of the king of vehicle mentioned under section 10(2). The word "transport vehicle" itself is included in the definition of light motor vehicle. Coming to the facts of the case it is clear that vehicle in question was a Jeep, which is admitedly a light motor vehicle. It is submitted that it was used as a taxi at the relevant time. hence there should have been an endorsement to drive public service vehicle, which has been defined under section 2 (35) of the Act. It is conceded that no different tests have been prescribed for driving the private light motor vehicle or motor vehicle used for carrying passengers. The transport vehicle itself covers private service vehicle and public service vehicle both in its ambit as defined in section 2(47) of the Motor Vehicles Act. The Apex Court in *Ashok Gangadhar Maratha vs. Oriental Insurance Compay Ltd., AIR 1999 SC 3181.* in the backdrop of the fact that light motor vehicle a Swaraj Mazda truck was insured, vehicle was damaged in the accident. A plea was taken that driver did not possess the valid driving licence. He possessed the licence to drive the light motor vehicle but not a transport vehicle.

The Apex Court has considered section 3 and expressed opinion as to interpretation of section 3 thus :-

"5. This section uses two expressions, namely, "motor vehicle" and "effective driving licence". "Effective" would mean a valid licence both as regards the period and type of vehicle. We are not considering here otherwise any incapacity of the person holding a driving licence. "Driving licence", "Motor Vehicle" or "Vehicle", "transport vehicle", "light motor vehicle", "goods carriage", "heavy goods vehicle" and "medium goods vehicle" have been defined in section 2 of the Act as under :

"driving licence" (clause 10) means the licence issued by a competent authority under Chapter II authorizing the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description; "motor vehicle" or "vehicle" [clause (28)] means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an extenral or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclose premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimeters; "transport vehicle" [clause (47)] means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle; "light motor vehicle: [clause (21) means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which does not exceed 7500 kilograms; "goods carriage" [clause (14)] means any motor vehicle constructed or adopted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods; "heavy goods vehicle" [clause (16)] means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms; and "medium goods vehicle" [clause (23)]

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305. PROVINCIAL INSOLVENCY ACT, 1920 - Section 17
Death of debtor - Proceedings be continued against legal representatives of the deceased debtor by bringing them on record.
Sushiladevi and others Vs. Sheetalprasad and others
Reported in 2004 (3) MPLJ 312

Held :

Moot question that now remains to be considered is whether in insolvency proceedings after death of one of debtors, his legal representatives would be entitled to be joined as one of the respondents or not. Section 17 deals with regard to continuation of proceedings on death of debtor. Said section reads as under :

17. Continuance of proceedings on death of debtor.- If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless te Court otherwise orders, be

continued so far as may be necessary for the realisation and distribution of the property of the debtor.

A bare perusal of aforesaid section makes it clear that on death of debtor, proceedings shall not be abated and shall neither come to an end and adjudication with regard to insolvency of a debtor shall be continued till it comes to a logical end. Obvious reason appears to be behind this section is that proceedings relating to matter of realisation and distribution cannot be conducted unlses there is person in whom the property is vested, which vesting will take place only on adjudication. Thus, in any case, since the proceedings would not stand abated even after death of debtor, the final order of adjudication has been passed.

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306. M.P. FAMILY COURT RULES, 2002 - R.14

Representation of parties by lawyer - Where case is complicated, discretion should be exercised in favour of party seeking representation through the lawyer.

Priyanka d/o Abhay Agarwal and another Vs. Abhay Agarwal

Reported in 2004 (3) MPLJ 393

Held :

The present case is of such nature in which the parties cannot put forward their case before the Family Court without the assistance of the counsel. Therefore, the Family Cout will permit both the parties to be represented through advocates. In such complicated cases normally the Family Courts should permit the advocates to represent the parties so that there are no chances of of any injustice to the parties. In this connection the decision of the Division Bench of Bombay High Court in *Leela Mahadeo Joshi vs. Mahadeo Sitaram Joshi, 1990 Mh. L.J. 1267= AIR 1991 Bombay 105* should be referred to. Certain portions of paras 17 to 19 of this judgment are reproduced as under :-

> "17.... A perusal of section 13 of the Act indicates that a party to a proceeding before the Family Court shall not be entitled as of right to be represented by a legal pracitioner. It is necessary to clarify that section 13 does not prescribe a total bar to representation by a legal practitioner which bar would itself be unconstitutional. The intentment of the Legislature obviously was that the problems or grounds for matrimonial break-down or dispute being essentially of a personal nature, that it may be advisable to adjudicate these issues as far as possible by hearing the parties themselves and seeking assistance from Counsellors. The section also makes provision for a situation whereby the Court may seek the assistance of a legal expert as amicus curiae. It is a well- known fact that the adjudication of a complicated or highly contested matrimonial dispute in the light of the law and interpretation of provisions by different Courts over a period of time, would require in given cases assistance from a legally trained mind and for this purpose, the Court has been empowered to seek the assistance of a legal expert."

"18... It would, therefore, be a healthy practice for the Family Court at the scrutiny stage itself, to ascertain as to whether the parties desire to be represented by their lawyer and if such a desire is expressed at this or any subsequent stage of the proceedings, that the permission be granted if the Court is satisfied that the litigant requires such assistance and would be handicapped if the case is not permitted. We are conscious of the fact that an appeal from the Family Court lies to the Division Bench of the High Court and a situation should not arise whereby at the appeal stage when the parties are represented by Advocate, that it is disclosed that the evidence or pleadings have not been in consonance with the legal requirements or that the replies or cross-examination are inadequate. It is too much to expect of lay litigants to be able to study the laws, rules acquaint themselves with Court procedures and to conduct a trial of their own and at the same time be able to place before the Court the relevant case law."

"19. We are fortified in this view by another aspect which is peculiar to matrimonial proceedings, namely, the fact that as far as issues such as custody of children, visiting rights, maintenance, alimony, apportionment of property etc., are concerned that the parties may not be in a position to protect their own interest or that they may not be in a position to visualize future problems or requirements and would, therefore, either give up their rights or not be in a position to agitate or safeguard them. The inevitable consequences would be either undue hardship or future litigation, both of which deserve to be avoided. We are, therefore, inclined to agree with the grievance made before us that the Family Court ought to give due credence to the desire of litigants where legal representation is concerned. In fact, Rule 37 of the Family Courts (Court) Rules, 1988 reads as follows :-

> *"37. Permission for Representation by a Lawyer.-* The Court may permit the parties to be represented by a lawyer in Court. Such permission may be granted if the case involves complicated questions of law or fact, if the Court is of the view that the party in person will not be in a position to conduct his or her case adequately or for any other reasons. The reason for granting permission shall be recorded in the order. Permission so granted may be revoked by the Court at any stage of the proceedings if the Court considers it just and necessary".

It is, therefore, patently clear that reading section 13 with Rule 37 that adequate provision has been made for legal representation and in the absence of convincing reasons, such permission ought not to be turned down".

Rule 14 of the Madhya Pradesh Family Court Rules, 2002 is as under :-

> *"14. Permission for representation by a lawyer.-* The Court may permit the parties to be represented by a lawyer in Court. Such permission may be granted if the case involves complicated question of law or fact and if the Court is of the view that the party in person is not in a

position to conduct his or her case adequately or for any other reasons. The reason for granting permission shall be recorded in the order. Permission so granted may be revoked by the Court at any stage of the proceedings if the Court considers it just and necessary."

This rule is substantially the same as Rule 37 of the Family Courts (Court) Rules, 1988 quoted above.

We respectfully agree with the observations of the Bombay High Court in the above case. The Family Courts will follow the law laid down in the above case.

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307. SERVICE LAW :

Departmental enquiry - Imposition of penalty - Non - supply of enquiry report to delinquent - Order of punishment not vitiated ipso facto - Law explained.

Ramesh Kumar Nigam Vs. State of M.P. and another

Reported in 2004 (3) MPLJ 418

Held :

The next argument relates to non-supply of enquiry report. It is admitted by the respondents that the Enquiry report was not supplied. The heart of the matter is whether any prejudice has been caused to the petitioner because of non-supply of enquiry report. In the meantime, the enquiry report has been served. The petitioner has not pleaded how prejudice has been caused. In the case of *Managing Director, ECIL vs. B. Karunakar, AIR 1994 SC 1074,* the Apex Court has held as under :

> "Hence in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non- supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/ Tribunal should not interfere with the order of punishment. The Court/ Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The Courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which apply adjudical mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not internal appellate or revisional authority), there would be neither a breach of principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court, Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Thereafter following the above procedure, the Court Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of

the employee with liberty to the authority/management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from the stage of furnishing him with the report".

In view of the aforesaid pronouncement of law, it cannot, be said that non-service of Enquiry Report, ipso facto, could be treated to be prejudical vitiating the order of punishment.

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308. M.P. PUBLIC TRUSTS ACT, 1951 - Sections 26 and 27
Jurisdiction of Court under Sections 26 and 27 - Jurisdiction is wide enough to embrace nearly all the reliefs relating to the management and administration - Law explained.
Rambha Pansarin Trust, Radha Krishna Mandir, Jabalpur and others Vs. the Nagar Kesharwani Viashya Sabha and others
Reported in 2004 (3) MPHT 1 (NOC)

Held :

According to Section 26 of the Act if the Registrar is satisfied that "(b) the trust property is not being properly managed or administered; or (c) the direction of the Court is necessary for the administration of the Public Trust, he may direct the working trustee to apply to the Court for direction and if the trustee so directed fails to make an application as required or if there is no trustee of the public trust or for any other reason, the Registrar considers it expedient to do so, he shall himself make an application to the Court. A Division Bench of this Court has held in *Temple Achaleshwar Vs. Achaleshwar Public Trust, 1998 (II) MPJR 335,* that Section 26 is very comprehensive. It is wide enough to embrace within its fold nearly all the reliefs which may be sought with respect to a public trust. It covers everything relating to the "managing and administration" of the public trust. Section 27 empowers the Court to pass appropriate order and such order is deemed to be a decree. A finality has been given to such order and any suit under Section 92, CPC in such a matter is barred. It has been further held : "no suit can be filed with respect to a public trust under Section 92, CPC on a matter with respect to which an application can be made under Section 26".

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309. CRIMINAL PROCEDURE CODE, 1973 - Section 438
Second application for grant of anticipatory bail, maintainability of - Such application is maintainable.
Yuvraj Gaud Vs. State of Madhya Pradesh and another
Reported in 2004 (3) MPHT 111

Held :

As regards the objection raised by learned Panel Lawyer for the State that second application for grant of anticipatory bail is not maintainable under the law, in fact this contention has already been negatived by the Supreme Court in the case of *Baboo Singh (1978 Cr.L.J. 651)* and Division Bench of this High Court in the case of *Imratlal Vishwakarma Vs. State of M.P., reported in 1996 JLJ 642.* This Court after considering the various decisions has held that the second

application for anticipatory bail under Section 438, Cr.PC is maintainable. The second application filed under Section 438, Cr.PC has to be decided on its merits even if earlier application was also dismissed on merits. No such fetters can be put or applied on the second petition that it can only be considered when it was withdrawn or was rejected having been not pressed. It shall, however, be open for the Court to reject it even summarily on the ground that the said second petition is nothing but a repetition of the earlier petiiton and no new ground has been discolsed in the second petition. It was considered that in *Baboo Singh's* case (supra), the Supreme Court was considering a second application after one such application was earlier rejected. It was then ruled that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, and further development. It was also held that the Court is not barred from its second consideration at a later stage and that an interim direction is not a conclusive adjudication and that an updated reconsideration is not overturning an earlier negation. Second application was entertained. It was considered that in view of the aforesaid dictum the second application for grant of anticipatory bail under Section 438 was maintainable and it was held that the earlier rejection is not conclusive. The Court may consider the second bail application on account of subsequent events and developments.

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310. CRIMINAL PROCEDURE CODE,1973 - Section 306

Pardon, tender of to accomplice - Such person not complying with the conditions of pardon - Procedure to be followed - Law explained.
State of Madhya Pradesh Vs Dinesh and others
Reported in 2004(3) MPHT132

Held:

Now after receiving the case on commital by the learned Addl. Sessions Judge at the first instance before framing of charge he should have decided the status of co-accused Baboolal who was granted pardon by the learned Addl. Chief Judicial Magistrate as per provision under section 306 of the Code and recorded his statement. But, the learned the then Second Additional Sessions Judge, failed to decide this question and framed the charge against Baboolal alongwith other acused persons for the offence punishable under Sections 302, 202 and 120-B of the Indian Penal Code. The order sheets of the sessions trial are clearly revealing the fact that he had not at all looked into the matter in view of the provisions of Sections 306 of the Code regarding tender of pardon to accomplice. Even if accused Baboolal filed an application for not becoming prosecution witness once pardon was granted to him by the learned Committal Court and the case was committed to the Court of Sessions, he must have been examined again under Sections 306(4) (a) of the Code. The language of the provision of this section is clearly showing its mandatory nature.

The learned Public Prosecutor also failed to point out this provision to the Court and also failed to examine Baboolal as witness before the Trial Court. As per provision under Sectionn 306(4)(a) the prosecution should have examined Baboolal before the Trial Court and only thereafter if he had not supported his

earlier version or wilfully concealed anything essential or by giving false evidence, he could have given certificate as per provision under Section 308 of the Code and only thereafter, he could have prayed before the Court for his prosecution for the offence of giving false evidence and for that purpose as per provision under Section 308(Proviso), he could be tried for the offence of giving false evidence only after the sanction granted by the High Court.

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311 M.P. LAND REVENUE CODE, 1959-Sections 110 and 164 TRANSFER OF PROPERTY ACT, 1882 - Section 53 - A

(i) Mutation - Mutation neither creates nor extinguishes a title - It is only for fiscal purpose - Law explained.

(ii) Part performance, benefit of - Intending purchaser not found ready and willing to perform his part of the contract - Such person is not entitled to protection under Section 53 - A. Subhash Chandra and others Vs Smt. Manjul and another Reported in 2004 (3) MPHT 159

Held:

(i) Learned Counsel for the appellent submitted that the Courts below have erred in dismissing the plaintiff's suit on the ground that the land is not recorded in the name of plaintiff. Kunwarbai is the mother of the plaintiff and after her death the property has devolved on the plaintiff as per the provisions of Section 164 of the M.P.Land Revenue Code (hereinafter referred to as the 'Code') and, therefor even in absence of mutation in the name of plaintiff, it can not be said that the plaintiff has no right to sale the property.For this purpose Shri Agrawal, relied on the judgment of Apex Court in the case of *Smt. Sawarni Vs Smt. Inder Kaur and others, (1996) 6 SCC 223,* in which the Apex Court has held that the mutation does not create or extinguish the title nor has any presumptive value on title. The mutation of property is only for the purpose of paying the land revenue. Shri Agrawal, also relied on the judgment of this Court in the case of *Asha Lamba (Smt.) and others Vs Board of Revenue and others, 1999 Revenue Nirnaya 401,* in which it is held that mutation in favour of a person does not effect the rights of the true owner. The mutation is only for a fiscal purpose.

In view of the judgments referred above I find that the argument advanced by Shri Nigam have no force. Plaintiff has acquired title to the suit property under section 164 of the Code and mere absence of mutation will not extinguish his rights accrued to him under Section 164 of the Code as the property has devolved in the plaintiff after the death of Kunwarbai who was the Bhumiswami.

(ii) Counsel for the appellant has also relied on the judgment in case of *Mohanlal Vs. Mira Abdul Gaffar and another , AIR 1996 SC 910,* in which the Apex Court has held that a party who is in possession of the suit property in pursuance of an agreement to sale is entitled to the protection under Section 53-A of the Act only if he is willing to perform his part of the contract. Similar view is taken by the Apex Court in the case of *Ram Kumar Agarwal and another Vs. Thawar Das, AIR 1999 SC 3248.* In that case the purchaser had filed the suit

for the specific performance which was dismissed on the ground that the same is filed after 9 years of the execution of the agreement and the Apex Court has held that this show that the purchaser was not ready and willing to perform his part of the contract and, therefore, he is not entitled to protection of his possession under Section 53-A of the Act. Another judgment cited by Counsel for appellant is in the case of *Sunder Bai (Smt.) and others Vs. Mohit Ram, 2002(2) Vidhi Bhasvar 277.* In that case this Court has held that defence under Section 53-A of the Act is not available to the intending purchaser who is neither performing his part of the contract nor even replying the notices served by the seller. In that case this Court has held that the intending purchaser has not taken any steps for execution of the registered sale deed nor has paid the balance amount of the price, hence it can not be said that the intending purchaser is entitled to protection under Section 53-A of the Act and a decree for possession can be passed against such intending purchaser.

In the present case also the defendants have paid only an amount of Rs. 21000/- out of Rs. 40000/-. He is enjoying the possession for more than 30 years without paying the balance amount of price. He has not filed any suit for specific performance nor even replied to the notice addressed by the plaintiff. He has not taken any steps for execution of registered sale deed and is avoiding the registry merely on the false pretext that there is no mutation in the name of the plaintiff particularly when there is no such term in the agreement. Thus, mere statement of the defendants thet they are always ready and willing to perform their part of the contract provided that the plaintiff gets the land mutated in his name is not sufficient to prove their readiness and willingness to perform the contract.

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312. CIVIL PROCEDURE CODE,1908-O.41 R.3-A (1)
Limitation in appeal -Question of limitation in appeal should be decided before decision on merits -Dismissal of application under Section 5 of the Limitation Act and consequenially an order dismissing the appeal is not a decree- Law explained.
Shaligram Vs. Nagar Palika, Vidisha
Reported in 2004 (3) MPHT 185 (DB)

Held:

Order XLI Rule 3-A (1) has been inserted in CPC to put an end to the practice of admitting an appeal subject to the decision on the question of limitation at the time of final adjudication. Scope of the provision inserted by amending Act of 1976 in order to prescribe the procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. Condonation of delay is not a matter of right.

Question of dismissal of an application was considered by this Court in the case of *Bal Kishan Vs. Tulsa Bai (AIR 1987 MP 120)* and in another case it is held that when the Appellate Court dismisses the appeal under Order XLI Rule 3-A read with Section 5 of Limitaion Act, consequent appeal is not competent, even if decree is drawn up after the dismissal. Thus, intention of legislature is to

decide the application for limitation at the final stage before proceeding furthur to decide the appeal on merits. Legislative mandate is that the appeal should not be heard unless Court is satisfied that sufficient cause is made out for condoning the delay in filing the appeal. Question of limitation can not be adjourned till the final decision of appeal. Thus, consequence of rejection of an application results into dismissal of appeal as barred by limitation. Therefor, the contention of Counsel for the appellant that the revision will be maintaintable as the application under Order XLI Rule 3-A is dismissed and the appeal is not heard on merits. Division Bench of this Court in the case of *Ajitsingh and another Vs. Ghagwanlal Master and others (AIR 1989 MP 302)* has held that the definition of Sections 2(2) of the Code and does not control new Rule 3-A of Order XLI, CPC, which prescribes the mode of procedure for preferring appeal. The procedure contemplates that the question of limitation shall be decided first and also "finally" if the presentation of the appeal is found to be beyond the period of limitation. There would be no justification in the Court to deal in any manner with "rights of parties" agitated in the appeal as sub-rule (3) debars even stay of execution of the impugned decree. Therefore, there will be no jurisdiction with the Court even to draw up any "decree" in as mush as the Court can not "decide to hear the appeal", albeit on merits, after "finally" deciding against the appellant the question of limitation. The provision of Rule 3-A(2) mandates that courts of appeal shall not proceed to deal with the appeal under Rule 11 or 13 of Order XLI without "finally" deciding the question of limitation that would be an express bar and the Appellate Court would be deemed not "authorised " to hear the appeal under Section 96 or 100. Merely because a "decree" passed in the Appellate Court, in which an appeal is presented against such decree can not be said to possess jurisdiction in virtue of the presentation of the appeal to deal therewith and "authorised " to hear and dispose of the appeal and considering the scope of Rule 3-A it is held that the order rejecting the application under Section 5 of Limitation Act read with Order XLI Rule 3-A, CPC is not appealable as no decree is drawn.

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313 M.P.LAND REVENUE CODE, 1959 - Section 117
Khasra entries, evidentiary value of - Such entries have corroborative value.
Vishnu Sharan and others Vs. Ajuddhibai and others
Reported in 2004 (3) MPHT 193

Held:

Coming to the first substantial question of law, it can be very well said that khasra entries are having only presumptive value of its correctness under Section 117 of the M.P. Land Revenue Code. In a case based on title if the source of title is not produced, in my opinion, merely on the basis of khasra entries, it can not be held that plaintiff is the Bhumiswami of the suit property specially when the defendants have seriously raised objection of the title of the plaintiff. Khasra entries may be piece of corroborative evidence but in the peculiar facts and circumstances of the case, merely on its basis, a suit which is based on title can not be decreed.

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314. HINDU MARRIAGE ACT, 1955 - Section 13 (1) (iii)
Divorce on the ground of unsoundness of mind - Requisite degree of unsoundness - It must be of such degree that spouse seeking relief cannot reasonably be expected to live with the other.
Smt. Seema Arora Vs. Dinesh Kumar Arora
Reported in 2004 (3) MPHT 40 (DB)

Held:

In the case of *Ramnarayan Gupta*, (1988) 4 SCC 247 in Para 20 Their Lordships of Supreme Court held as under :-

> "The context in which the ideas of unsoundness of mind and mental disorder occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the mental disorder. Its degree must be such that the spouse seeking relief can not reasonably be expected to live with the other. All mental abnoramlities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriage would, indeed survive in law."

On going through the aforesaid decision of the Apex Court, it is clear like a noon day, that merely unsoundness of mind and mental disorder would not suffice for a ground for dissolution of marriage unless and until it is proved that it is of so high degree that spouse seeking relief can not be reasonably expected to live with the other.

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315. SERVICE LAW:
Habitual absence for long periods - Delinquent found incorrigible - Dismissal not unjustified.
Moinuddin Vs.State of M.P. and others
Reported in 2004 (3) MPHT 47 (DB)

Held:

Supreme Court, while relying on its earlier judgment *State of Punjab and others Vs. Ram singh,* reported in *(1992) 4 SCC 54,* held that order of dismissal in given facts and circumstances of the case would neither be harsh nor should prick judicial conscious. In *Maan singh, (2003) 3 SCC 464* it has been held that even after taking lenient view for making an improvement, however, there does not appear to be any signs of improvement and only punishment that can be imposed by disciplinary authority is dismissal from service. It has been held:-

> "If the delinquent officer is proved to be incorrigible and found completely unfit to remain in service then in order to maintain discipline in the service appropriate punishments can be given. Therefore,when the charge against the appellants in each of these cases is habitual absence for long periods on several occasions unauthorisedly, the view taken by the disciplinary authority is justified."

In the light of said ratio, view taken by disciplinary authority that it was a fit case where only punishable that could have been awarded to petitioner was removal from service, appears to be proper.

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316. CIVIL PROCEDURE CODE, 1908 - Section 89
COURT FEES ACT, 1870 - Section 16
Settlement of appeal through one of the modes provided under Section 89 (Mediation)- Refund of Court fees - Appeal being continuation of suit, Court fees must be refunded - Law explained.
Vallabh Das Gupta and others Vs. Smt. Geeta Bai
Reported in 2004 (3) MPHT 89 (DB)

Held :

This case was referred under Section 89 to Shri T.C. Singhal, Advocate to mediate and help the parties to arrive at an amicable solution. After reference mediator arranged mediation talks between the parties and after the mediation sittings parties had settled their case in all the three appeals. Section 89 in the Code of Civil Procedure was inserted in the Code of Civil Procedure. Provision of Section 16 also inserted in the Court Fees Act by virtue of Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 1.7.2002. This amendment has been inserted by Act No. 46 of 1999 under Section 34 and it came into force when the amended Code of Civil Procedure and Section 89 came into force.

Only question in this case is whether the Court fee can be refunded in the appeal.

Considering the facts of the case and the fact that appeal is continuation of suit and intention of legislature is to promote settlement outside the Court, we hold that since the appeal is continuation of suit and parties had settled at appellate stage, provisions of Section 89 are applicable to appeal.

This Notification under Section 35 further provides that in case of settlement of a case pending before a Competent Court is made through the instrumentality of Lok Adalat filed before a Court of competent jurisdiction, then entire Court fees paid shall be remitted to the parties. Section 89 (1) (c) provides that any settlement under this Section shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.

In the light of the aforesaid provisions of Section 89 and the Notification of the State Government referred above, the appellant is entitled for refund of Court fees.

●

317. MOTOR VEHICLES ACT, 1988 - Section 168
Compensation, determination of - Family pension not being an advantage accruing due to death, not deductible.
Oriental Insurance Co. Ltd. Vs. Smt. Gyatri
Reported in 2004 (II) MPWN 17

Held :

Then, it is found dictated in *Union Bank of India v. Vijaysundari reported in 1991 MPLJ 784 and Kashmiran Mathur's case, reported in 1983 JLJ 113= 1982 MPLJ 803 and the case of Prabhavati Sharma reported in 1990 ACJ 399* that "the deduction on account of family pension is not permissible if that is not proved as a benefit accruing to the claimants in the form of advantage resulting from the death"

and in this case the receipt of pension amount is not found to have been proved as benefit accruing to the claimants in the form of advantage resulting from the death, therefore, the Tribunal is found to have committed no error in not taking into account amount of family pension while calculating the annual dependency of the deceased, and hence, we do not find any substance in this appeal.

●

318. CRIMINAL TRIAL :

Appreciation of evidence - Interested witness not necessarily a false witness.

Dayaram Vs. State of M.P.

Reported in 2004 (II) MPWN 24

Held :

But the law is settled now that interested witnesses are not necessarily false witnesses though the fact that those witnesses have personal interest must put the Court on its guard that the evidence of such witnesses must be subjected to close scrutiny and the Court must assess the testimony of each important witness and that no evidence should at once be discarded simply because it came from an interested person.

●

319. CRIMINAL PROCEDURE CODE, 1973 - Section 167

Default bail under Section 167 - Delay in the investigation resulting in default bail held to be condemnable - Further held, Supervising Officer to see that such lapses are not committed.

Jagdish Vs. State of M.P.

Reported in 2004 (II) MPWN 31

Held :

It is disgusting that the co-accused Raju, Manglia and Budia who have taken the active part in the murder of deceased Jagdish were released on bail on account of the negligence of the Investigating Officer in not completing the investigation within 90 days. The Legislature has enacted the provisions of 167 CrPC in order to see that the investigation is completed as early as possible and in a serious offence the investigation is positively completed by the Police within 90 days. The Investigating Officer has violated the legislature intention by not completing the investigation within 90 days and on account of his negligence, the bail to the accused Raju, Manglia and Budia was granted which was rejected by the Courts. In such a serious offence, the delay in the investigation is condemnable and it is the duty of the Supervising Officer to see that such lapses are not committed and the accused who are not otherwise entitled for the bail are not released on the bail on account of the default of the Investigating Officer.

The learned counsel for the State has assured that the appropriate action will be taken against the Investigating Officer so that such lapses are not repeated by the Police during the investigation. A copy of this order be sent to the Director General Prosecution and I.G. Indore region for the appropriate action against the Investigating Officer and the officer supervising the investigation. The strategy should be laid down by to check such lapses during the investigation.

●

PART - III

CIRCULARS/NOTIFICATIONS

A. K. Selot
Registrar General
High Court of Madhya Pradesh
JABALPUR

Bungalow No. C-2,
South Civil Lines
JABALPUR (M.P.) - 482 001
Phone : 2621259 (O)
2321365 (R)
Fax : 0761-2626859

D.O.No. 502/Confdl./2004 **Dated 15th September, 2004.**

Dear District Judges,

It has been observed by the High Court that Judicial Officers are spending substantial time in Protocol duties like attending Railway Station, Airport, Circuit House during Court hours and also requesting for hospitality from other departments. This apart Judicial Officers are visiting Hon'ble Judges without seeking appointments. These practices adversely affect the disposal of cases and also causes inconvenience to the litigant public and Their Lordships.

To avoid loss of working hours and inconvenience to others, I am, directed to issue following instructions for strict compliance :-

1. Whenever a Judicial Officer visits Jabalpur/ Gwalior/Indore to meet any Hon'ble Judge, he should do so only after intimating the Registry unless called by any Hon'ble Judge.
2. No Judicial Officer shall attend the Circuit House, Railway Station or Airport during Court hours. This will not apply to the District & Sessions Judge during the visit of Hon'ble Portfolio Judge/ Chief-Justice/ Supreme Court Judge.
3. No Judicial Officer may indent upon the hospitality of the other departments.
4. No District Judge, Chief Judicial Magistrate, Judicial Magistrate or any other Judicial Officer will go to the boundary of the District for the purpose of receiving, piloting or seeing off any dignitary.

As directed please circulate the letter amongst all Judicial Officers working under your control and also ensure strict compliance of the aforesaid directions by all Judicial Officers.

With regards.

Your's Sincerely

(A.K. SELOT)

HIGH COURT OF MADHYA PRADESH : JABALPUR

GAURI SHANKAR DUBE D.O. No. 770/IV-3-1/65

ADDITIONAL REGISTRAR Jabalpur, Dt. 16 Aug. 2004

Sub :- Regarding filling up the vacancies in the cadre of Class-III, Class-IV and Contingent Paid Employees in District Court Establishments.

Ref :- Registry memo No. B/4714 dt. 14/10/99, D.O. No. 1402 dt. 12/12/02, Endt. No. A/2764 dt. 25/6/03, memo No. A/ 4655 dt. 8/9/03, memo No. C/4485 dt. 8/10/03, memo No. A/5203 dt. 20/10/03, memo No. 8/5852 dt. 16.12.03, memo No. C/715 dt. 10/2/04, Memo. No. C/54 Dt. 4.1.95.

In supresession of all previous Circulars/Directions I am directed to issue the following directions for the purpose of recruitment of Class-III, Class- IV and Contingent Paid Employees in District Establishments.

(1) That prior permission of the Registry be sought in respect of filling up the vacancies in the cadre of Class-III, Class-IV and Contingent Paid Employees. While seeking the permission to fill up the vacancies the details as to how the post has fallen vacant be informed to the Registry.

(2) That the Selection Committee be comprised of Senior Judicial Officers available at District Headquarter.

(3) That directions/Instructions issued from time to time by the State Government in respect of age, qualification, condition in respect of the bonafide certificate pertaining to SC/ST/OBC candidates be followed.

(4) That appointment for 89 days be not made without prior permission and approval of the High Court.

(5) That promotions of eligible junior employees be considered before initiating the process of recruitment as per rules.

(6) That provisions of "Anusuchit Jati, Anusuchit Janjati Aur Anya Pichhada Varg Ke Liya Arakshan Adhiniyam, 1994" and the provisions of "Anusuchit Jati, Anusuchit Janjati Aur Anya Pichhada Varg Ke Liye Arakshan Niyam, 1998 should strictly be followed in recruitment.

(7) That the post of Steno-typist, Execution Clerk, Deposition Writer,Process Writer, Sale Amin be filled by the candidates having certificate/ diploma in Computer Application from University/ Institution/ Board recognized by the Central Government/ State Government.

(8) That the qualification of passing Hindi Typing and Stenography with 80 w.p.m. from recognized Board shall be necessary for the recruitment on the post of Class- III (Assistant Grade-III, Process Writer, Sale Amin, Execution Cleark, Deposition Writer)

(9) That the vacancies in Class-III cadre must be published in "Rojgar Aur Nirman" Bhopal. The number of the posts available as per the roster should be indicated in the advertisement.

(10) That the vacancies of Class-IV and contingent Paid Servants can be filled from the list obtained from the Local Employment Exchange and also from the application submitted directly.

(11) That a composite advertisement be published taking into account all vacancies likely to be generated in a particular year.

(12) Following details be transmitted to the Registry while sending the select list for approval :-

(a) Number of candidates appeared in the Written Examinataion/Interview.

(b) Details list indicating names, full addresses, date of birth, educational qualifications, caste, detail of domicile, marks obtained in Written and Oral Examination.

(c) Attested copies of all the certificates.

(d) The detail of the roster followed.

GAURI SHANKAR DUBEY
Additional Registrar (D.E.)

●

मध्यप्रदेश शासन सामान्य प्रशासन विभाग

क्रमांक एफ 2–21/93/9/1 भोपाल, दिनांक 4–10–93

प्रति,

शासन के समस्त विभाग,
समस्त संभागीय आयुक्त,
समस्त जिलाध्यक्ष,
समस्त विभागाध्यक्ष,
मध्यप्रदेश।

विषय :– शासकीय पत्र व्यवहार में दूरभाष क्रमांक अंकित किये जाने बाबत्।

वर्तमान में शासकीय पत्र व्यवहार में पत्र के अंत में पत्र लिखने वाले अधिकारी का नाम व पदनाम लिखे जाने की प्रथा प्रचलित है । अब यह निर्णय लिया गया है कि सभी पत्रों में नाम व पदनाम के अतिरिक्त संबंधित अधिकारी का दूरभाष क्रमांक भी पदनाम के नीचे अंकित किया जाय। ऐसा करने से संबंधित अधिकारी से यदि दूरभाष पर चर्चा करनी हो तो दूरभाष क्रमांक तत्काल उपलब्ध रहेगा और प्रकरणों के निराकरण में भी गति आ सकेगी। कृपया उपर्युक्त निर्देशों के पालन में यह सुनिश्चित करें कि अब समस्त शासकीय पत्र व्यवहार में पत्र लिखने वाले अधिकारी का दूरभाष क्रमांक भी पत्र के अंत में पदनाम के नीचे अंकित किया जाय।

सही/–
(एम.एम. श्रीवास्तव)
उप सचिव,
मध्यप्रदेश शासन,
सामान्य प्रशासन विभाग,
दूरभाष : 551313

मध्यप्रदेश शासन सामान्य प्रशासन विभाग

क्रमांक एफ 2–3/2004/1/9 भोपाल, दिनांक 19–04–2004

प्रति,

समस्त प्रमुख सचिव/सचिव,
मध्यप्रदेश शासन,
शासन के समस्त विभाग,
समस्त विभागाध्यक्ष,
समस्त संभागीय आयुक्त,
समस्त कलेक्टर,
समस्त मुख्य कार्यपालन अधिकारी, जिला पंचायत ।
मध्यप्रदेश।

विषय :– शासकीय पत्र व्यवहार में दूरभाष क्रमांक अंकित किये जाने बावत्।

संदर्भ :– इस विभाग का ज्ञाप क्रमांक एफ 2–21/93/9/1, दिनांक 04.10.93

उपर्युक्त विषयक संदर्भित ज्ञाप द्वारा शासकीय पत्र व्यवहार में दूरभाष अंकित करने का निवेदन किया गया था । प्राय: देखने में आया है कि शासकीय पत्र व्यवहार में दूरभाष अंकित नहीं किया जा रहा है जिससे संबंधित अधिकारी से आवश्यकता रहने पर दूरभाष पर संपर्क करने में अत्यन्त कठिनाई हो रही है।

अत: अनुरोध है कि शासकीय पत्र व्यवहार में पत्र में लिखने वाल अधिकारी का (एस.टी.डी. कोड सहित पदनाम के नीचे दूरभाष क्रमांक तथा मोबाईल क्रमांक (यदि हो तो) निश्चित रूप से अंकित करें ताकि उनसे दूरभाष पर संपर्क किया जाना सुविधाजनक हो।

2. कृपया उक्त निर्देशों का पालन सुनश्चित किया जावे।

सही/–

(एस.एस. वानखेड़े)

सचिव,
म.प्र. शासन, सामान्य प्रशासन विभाग
दूरभाष क्रमांक 2441452
भोपाल, दिनांक 19.4.2004

उच्च न्यायालय मध्यप्रदेश : जबलपुर

पृष्ठांकन कमांक दो–15–35/63 भाग–दो जबलपुर, दिनांक 20/ जुलाई/ 2004

प्रतिलिपि :–

4. जिला एवं सत्र न्यायाधीश.....(म.प्र.)

की ओर विचाराधीन पत्र दिनांक 4.10.93 एवं 19.04.04 की प्रतिलिपि इस अनुरोध के साथ कि शासकीय पत्र व्यवहार (उच्च न्यायालय से पत्र व्यवहार) में पत्र लिखने वाले के अधिकारी का एस.टी.डी. कोड सहित पदनाम के नीचे दूरभाष क्रमांक तथा मोबाईल क्रमांक (यदि हो तो) निश्चित रूप से अंकित करने हेतु सूचनार्थ एवं आवश्यक कार्यवाही हेतु अग्रेषित ।

(अरविन्द कुमार शुक्ला)

एडीशनल रजिस्ट्रार

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MADHYA PRADESH DOWRY PROHIBITION RULES, 2004

No. F-10-9-2003-L-2. - In exercise of the powers conferred by sub-section (1) and (2) of Section 10 read with clause (d) of sub-section (2) of Section 8-B of the Dowry Prohibition Act, 1961 (No. 28 of 1961), and in rescission of the Madhya Pradesh Dowry Prohibition Rules, 1999, published in the "Madhya Pradesh Gazette" (Extra-ordinary), dated 16th March, 1999, the State Government hereby make the following Rules for carrying out the purposes of the said Act, namely :-

RULES

1. Short title and commencement.— (i) These rules may be called the Madhya Pradesh Dowry Prohibition Rules, 2004.

(ii) They shall come into force on the date of their publication in the official Gazette.

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

(a) "Act" means the Dowry Prohibition Act, 1961 (No. 28 of 1961);

(b) "Advisory board" means an advisory board constituted in accordance with sub-section (4) of Section 8-B of the Act, to advise and assist Dowry Prohibition Officers;

(c) "Chief Dowry Prohibition Officer" means an officer of the State Government entrusted with the duties and responsibilities under these rules;

(d) "Dowry Prohibition Officer" means an officer appointed as such by the State Government under Section 8-B of the Act;

(e) "Probation Officer" means a Probation Officer appointed under the Probation of Offenders Act, 1958 (No. 20. of 1958);

(f) "Police Officer" means an officer in the State Police Department;

(g) "Recognised Welfare Institution or Organization" means an institution or organization recognised as such under explanation to sub-section (1) of Section 7 of the Act;

(h) "District Magistrate" and "Complaint" shall have the same meaning as respectively assigned to them and defined under the Code of Criminal Procedure, 1973 (2 of 1974);

(i) The words and expressions used in these rules but not defined shall have the same meanings as respectively assigned to them in the Act.

3. Jurisdiction of Dowry Prohibition officer.— The area in respect of which the Dowry Prohibition Officer has to exercise jurisdiction and power under sub-section (1) of Section 8-B of the Act shall be the area specified for the purpose by a notification of the State Government in the Official Gazette.

4. Procedure for filing complaints.— A complaint may be filed by any aggrieved person or parents or other relative of such person or by any recognised welfare institution or organization in writing to Dowry Prohibition Officer, either in person or through a messenger or by post.

5. Additional functions to be performed by the Dowry Prohibition Officer.— The Dowry Prohibition Officer shall perform the following additional functions, namely :-

(i) He shall endeavour to create awareness among the public by organizing camps, publicity through Public Relation Department, Panchayat Samiti and other madia against Dowry and to involve local people for prevention of Dowry.

(ii) He shall conduct surprise checks and discreet enquiries to ascertain whether there has been any violation of the provisions of the Act or the rules made there under :

(iii) He shall receive complaints for any offence under the Act from any of the parties to a marriage of person aggrieved or any other person or organization;

(iv) He shall maintain a register for the purpose of the Act to record all complaints, enquiries and results thereof and other relevant information connected therewith in the prescribed Form-1. He shall also maintain separate files with relevant records for each individual case;

(v) He shall act as the Member Secretary/Convenor of the Board. He shall maintain regular contact with the members of the Advisory Board for necessary advice and assistance from them. He shall inform the District Magistrate or any other person authorized by the State Government for the purpose, about all the affairs relating to operation of the Act, as and when necessary;

(vi) He shall keep in his custody all the lists of presents submitted by any of the parties to a marriage and make entries relating thereto in a register to be maintained for the purpose. He shall also examine these lists and ensure compliance of the provisions of the Dowry Prohibition (Maintenance of Lists of Presents to the ride and Bridegroom) Rules, 1985;

(vii) He shall discharge his duties with due care, decorum, privacy and in a manner to uphold the dignity and harmony of family relationships;

(viii) His approach shall be primarily preventive and remedial and prosecution shall be recommended or resorted to only if all other measures and directions are found ineffective or parties fail to comply with the orders or directions within the stipulated time;

(ix) Every such complaint received by him shall be serially numbered and duly registered in a register if Form No. 2 annexed to these rules;

(x) He shall scrutinize the complaint and if it is found that the nature and the contents of the complaint is such apparently coming within the purview of Section 3 or 4 or 4A or 5 or 6 of the Act, he will immediately conduct an enquiry to collect such evidence from the parties as to the genuineness of complaint;

(xi) He shall send quarterly report of the Chief Dowry Prohibition Officer as to the number of complaints received under the Act and the action taken or the nature of settlement of the issue in Form No. 2 annexed to these rules. He shall send such details or reports, as may be required by Chief Dowry Prohibition Officer or the State Government from time to time;

(xii) He shall conduct an on the spot investigation and can collect such evidence either oral or in writing from the parties or witnesses or he can fix up a hearing of the parties and witnesses in his office or in a place convenient to him without causing much inconvenience or hardship to the parties;

(xiii) He shall intimate or serve notices to the parties and witnesses of the date, time and place of hearing of the complaints in Form-3 annexed to these rules.

(xiv) Every petition shall be enquired into and heard and come to a finding within a month from the date of its receipt;

(xv) Where on the date fixed for hearing of the complaint or petition or on any other date to which such hearing may be adjourned, the complainant or petitioner does not appear, the Dowry Prohibition Officer, may, in its discretion, either dismiss the complaint or petition for default or hear and come to a finding as to its merit, which shall be recorded in the case file.

(xvi) He may utilize the services of Probation Officer of the area for collecting information or conducting enquiries or assisting in any stage of enquiries or proceedings relating to a complaint, petition or application under the Act;

(xvii) On receipt of requisition from the Dowry Prohibition Officer, the Probation Officer shall conduct necessary enquiries, collect information and furnish such details, and report promptly as requested by him;

(xviii) Where any dowry is received by any person other than the woman and complaint is received in respect of non-transfer of such dowry to the woman who is entitled to it in accordance with Section 6 of the Act, he shall issue directions to parties to transfer the same within the stipulated time;

(xix) He shall specifically make it clear that marriages performed within his jurisdiction are likely to be visited by him or his staff alongwith police officers to see that the provisions of the Act are not contravened;

(xx) He shall make necessary enquiries regarding non-observance of the provisions of the Act in respect of the marriages held or proposed to be held within his jurisdiction;

(xxi) He shall ascertain and confirm by suitable means in respect of as many number of marriages as are held within his jurisdiction as to whether the provisions of the Act are being followed and are not being contravened;

(xxii) While making enquiries under the Act or attending any marriage for the purposes of making enquiries he may take the assistance of any police officer or other officers to assist him in the performance of his functions and it shall be the duty of the police officer to render all assistance required by him;

(xxiii) He shall render assistance to the police in investigating the complaint filed under the Act and the Court in the trial of the case;

(xxiv) He shall seek the guidance of Advisory Board in matters relating to his functioning under the Act;

(xxy) He shall send a copy of the proceeding of each meeting of the Advisory Board, within a fortnight from the date of meeting to the District Magistrate with a copy to the State Government for information and necessary action; and

(xxvi) He shall also perform such other duties as may be assigned in this regard by the State Government.

6. Method of appointment, duties and functions of Chief Dowry Prohibition Officer.— (1) The State Government shall designate the senior officer of the concerned Department as the Chief Dowry Prohibition Officer to administer and co-ordinate the work relating to dowry prohibition throughout the State.

(2) The Chief Dowry Prohibition Officer shall co-ordinate the work of Dowry Prohibition Officers and shall be responsible for creating consciousness and awareness to prevent dowry system among the public and to set out programmes with a view to uproot the evil of dowry system.

(3) The Chief Dowry Prohibition Officer shall be responsible for the preparation and submission of an annual report on the progress of implementation of the Act and related matters and of such statistics, as may from time to time be required by State Government.

(4) The Chief Dowry Prohibition Officer shall issue instructions to all the Departments of the State Government of the following effect :-

(i) Every Government Servant shall after his marriage furnish a declara-

tion stating that he has not taken any dowry to Head of the Department. The declaration shall be signed by the wife, father and father-in-law.

(ii) One specified day in a year to be observed as Dowry Prohibition Day; and

(iii) Pledge to be administered to the students in schools and colleges and other institutions not to give or take dowry.

7. Submission of list of presents by any of the parties to a marriage.- Any of the parties to a marriage or any of the parents or either of them shall furnish to the concerned Dowry Prohibition Officer within one month from the date of marriage, a copy of the list of presents prepared in accordance with the Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985.

8. Procedure for prosecution of offenders.- In all cases of complaints investigated by Dowry Prohibition officers, when there is a prime-facie finding as to the commission of an offence, the report shall be submitted to the competent Magistrate for prosecuting the offenders alongwith the statement recorded, all other connected documents of the proceedings and a brief account of his findings. This report shall be deemed to be a report under Section 173 of Code of Criminal Procedure, 1973 (No. 2 of 1974).

9. Recognition of Welfare Institutions.- (1) A Welfare Institution or Organisation primarily devoted to any of the following kinds of work and has rendered remarkable service in the field for a period of not less than three years shall be eligible for seeking recognition under explanation to sub-section (1) of Section 7 of the Act, namely :-

(i) Social Welfare including care, protection and training of women;

(ii) Society or Organisation of women at State level or all India level;

(iii) Social Defence including care and protection of destitutes, rescue women and children; and

(iv) Any Organisation of Lawyers interested in eradicating social evils.

(2) Any Welfare Institution or Organization eligible under sub-rule (1) and desiring recognition shall make an application to the State Government in Form-4 annexed to these rules together with a copy of each of the Rules, Bye-laws, Articles of association, lists of its members and office bearers and report regarding its activities and Past record of social or community service.

(3) The State Government may, after making enquiry by a senior officer of the concerned department and after considering the report as to the nature and past record of service of such organization or institution, which has presented the application in this regard, grant recognition for a period of five years, which can be renewed after submitting a renewed application.

(4) An application for renewal of certificate of recognition shall be submitted in Form-5 annexed to these rules in the manner prescribed in sub-rule (2) of rule 9, which shall be processed as per the procedure laid down in sub-