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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

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

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice A.K. Patnaik**	Chief Justice & Patron
2.	**Hon'ble Shri Justice Dipak Misra**	Chairman
3.	**Hon'ble Shri Justice S. K. Kulshrestha**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
5.	**Hon'ble Shri Justice K. K. Lahoti**	Member
6.	**Hon'ble Shri Justice Sugandhi Lal Jain**	Member

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EDITOR

Ved Prakash Sharma — Director

SUB-EDITOR

Shailendra Shukla — Addl. Director

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PART-II

(NOTES ON IMPORTANT JUDGMENTS)

We are thankful to the Publishers of SCC AIR SCW, MPLJ, JLJ, MPHT, MPWN, MPJR, for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

Esteemed Readers,

The penultimate issue of JOTI - 2005 is in your hands. We have travelled through the year of Judicial Excellence with a lot of commitment and dedication to the cause of dispensation of quick, qualitative and unpolluted justice. The results are no doubt encouraging. But the demand situation, which still prevails around us, calls for continued efforts. Therefore, the mission spirit with which we have been discharging our duties must continue to guide our future course of action so that we can strengthen the faith of the common man in Judiciary.

While writing this I am reminded of what Chief Justice Warren Burger of Supreme Court of United States said about American Judiciary almost thirty-five years ago. To quote J. Burger:

> "In a democratic society a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society:
>
> That people come to believe that inefficiency and delay will drain even a just judgment of its value;
>
> That people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching:
>
> That people come to believe that Law-in the larger sense-cannot fulfil its primary function to protect them and their families in their homes, at their work, and on the public streets."

The aforesaid statement is quite apposite in the context of Indian Judiciary in view of the ills with which it is seriously afflicted including the major problem of inordinate delay in justice dispensation. It neither requires an elaborate reasoning nor an empirical study to demonstrate that delays in justice dispensation have robbed the system of the confidence which people had in it about forty years back. We cannot shut our eyes to the harsh realities which are very much perceptible in the existing social order. People, out of desperation, many a times take recourse to anti-social elements for redressal of their grievances. Almost 75% cases pending before the Courts in India are on criminal side meaning thereby that on civil side people are reluctant to approach the Courts. In this background, the Judiciary is required to respond in such a manner so that the faith and trust of the people in the efficacy of justice delivery system attains the zenith of past glory. This demands sincere and serious efforts on our part. Therefore, we must continue with same zeal, commitment, dedication and

devotion to the cause of justice which was guiding us hitherto in the Year of Excellence for Judiciary.

The Institute is continuing its efforts to help the judicial officers in exploring new areas which can help in making the legal process an effective tool of justice dispensation. The all round efforts shall no doubt will bring about a radical change. In the past few months we have organized six workshops on Electricity Act, 2003 for Judicial Officers, officers of Electricity Department and Police Officers. Considering that isolated efforts may not be very fruitful in improving the shape of the things, the Institute has planned to undertake training of Prosecutors as well and in the past two months we have organized two training courses for D.P.Os./A.D.P.Os. of the State respectively at Jabalpur and Bhopal. Two more courses shall be conducted in coming months.

The infrastructure of the Institute is also gradually improving. Recently, we have developed a decent spacious library-cum-reading hall where about fifty persons can sit together. A computer lab with sixteen computers has also become operational and training is being imparted to the ministerial staff of the High Court.

With a lot of stress on transparency in democratic governance, the Parliament has enacted Right to Information Act, 2005 which has come into force with effect from 12.10.2005. A brief write-up on this new legislation has been included in Part I of the Journal. Apart that, an article relating to 'Financial issues concerning Judicial Administration' is also there. Part II of the Journal, as usual, is consisting of various latest judicial pronouncements including one relating to core issue about the concept of culpable medical negligence (Note No. 269). The Apex Court's judgment in Salem Advocate Bar Association's case, (2005) 6 SCC 344 (Note No. 276) is also clarifying various doubts, which have been raised regarding the scope and applicability of various amendments incorporated in Civil Procedure Code by the Amending Acts of 1999 and 2002. A Division Bench decision of our own High Court in Brijesh Garg's case (Note No. 334) is also worth noticing which has dispelled the mist surrounding the course of action to be followed while dealing with an application of regular bail by a person on anticipatory bail.

In Part III we are including Information Technology Rules, 2004. Part IV contains latest amendments in Code of Criminal Procedure, 1973 as incorporated by the Code of Criminal Procedure (Amendment) Act, 2005 which has yet to come into force.

We are conscious of our serious but delicate responsibilities and are trying to discharge them with zeal and caution. Still, your valuable suggestions can definitely help us in making the entire exercise more effective, meaningful and result-oriented. All suggestions in this regard are most welcome.

Thank you.

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FAREWELL TO HON'BLE THE CHIEF JUSTICE SHRI R.V. RAVEENDRAN

Hon'ble Shri Justice R.V. Raveendran, who adorned the office of the Chief Justice of High Court of Madhya Pradesh for about 14 months, has been elevated as Judge of the Supreme Court of India.

Born on 15th October, 1946, his Lordship had his schooling at Fort High School and higher education at St. Joseph's College and Government Law College, Bangalore. His Lordship joined legal profession on March 11, 1968 under the able guidance of Late Shri S.G. Sundra Swami, Former Advocate General of Karnataka. His Lordship practiced on civil side in Bangalore and also appeared in several Commissions of Enquiry.

His Lordship was elevated as Judge of the High Court of Karnataka on 22nd February, 1993 and rendered his valuable services for a period of about eleven years. His Lordship was also the Executive

Chairman of Karnataka State Legal Services Authority. His Lordship took keen interest in settlement of large number of cases in Lok Adalat.

His Lordship was appointed as the Chief Justice of the High Court of Madhya Pradesh and took oath of office at Raj Bhawan on 8th July, 2004. During his tenure as Chief Justice of Madhya Pradesh and in his capacity as Patron of the Judicial Officers' Training & Research Institute, his Lordship took keen interest in the academic activities of the Institute and provided all round motivation, support and guidance for diversifying the Institute's academic activities.

On elevation as Judge of Supreme Court, His Lordship was accorded farewell ovation on 7th September, 2005 in the Conference Hall of South Block of High Court of Madhya Pradesh, Jabalpur.

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

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WELCOME TO HON'BLE THE CHIEF JUSTICE SHRI A.K. PATNAIK

Hon'ble Shri Justice Ananga Kumar Patnaik has been appointed as Chief Justice of High Court of Madhya Pradesh.

Born on 3rd June, 1949, his Lordship had his schooling at Rajkumar College, Raipur. Was awarded prize for the "Best All Round Conduct and Leadership" in School. Had higher education from Delhi University with Honours in Political Science and obtained Law Degree from Madhusudan Law College, Cuttack. His Lordship was selected by the Rotary Foundation in Group Study Exchange Programme in 1976 and went to New Jersey, U.S.A. for study of institutions of America and its people.

His Lordship was enrolled with the State Bar Council of Orissa on 28.3.1974. His Lordship practiced in the High Court, Subordinate Courts and Tribunals in Orissa and also appeared many a times before the Supreme Court of India. His Lordship practiced in different

branches of law with specialization in Commercial Law and Constitutional Law. His Lordship was the Standing Counsel for the Orissa State Road Transport Corporation from 02.05.1989 to 01.09.1990 and has been the Senior Standing Counsel for the Commercial Taxes Organization, Government of Orissa from 22.09.1990 to 12.01.1994.

His Lordship was elevated as an Additional Judge of High Court of Orissa on the 13th of January, 1994 and on transfer assumed charge as Additional Judge of Gauhati High Court on 7th of February, 1994. His Lordship became a permanent Judge of the Gauhati High Court in 1995. After rendering valuable services for eight years as a Judge in the Gauhati High Court, His Lordship again assumed charge as a Judge of Orissa High Court on 15.04.2002. His Lordship was the senior most Puisne Judge of the Orissa High Court and was the Executive Chairman of the Orissa State Legal Services Authority. His Lordship was also the Chairman of Orissa Judicial Academy. His Lordship was appointed as Chief Justice of High Court of Chhattisgarh on March 14, 2005.

On appointment as Chief Justice of Madhya Pradesh High Court, His Lordship was administered oath of office at Raj Bhawan, Bhopal by the Governor of Madhya Pradesh on 02nd October, 2005. His Lordship was accorded welcome ovation on 3rd October, 2005 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur

We, on behalf of JOTI Journal welcome his Lordship and wish him a health, happy and prosperous life.

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PART - I

ADDRESS BY HON'BLE SHRI JUSTICE DEEPAK VERMA ADMINISTRATIVE JUDGE, AT THE FAREWELL OVATION OF HON'BLE THE CHIEF JUSTICE HELD ON SEPTEMBER 07, 2005 AT JABALPUR

With tears in eyes and smile on face, we have assembled here to bid good-bye to My Lord Mr. Justice R.V. Raveendran Sahib, who is being elevated to the Supreme Court. Though, he had been with us for little over one year, but the memories and the impression that My Lord has left on all of us cannot be erased in times to come. It is certainly going to be a great loss to this High Court, but a gain to the Supreme Court, where Judges of My Lord's calibre, competence are required.

Mr. Justice Reveendran is well known and recognized for giving patient hearings to Advocates and Litigants. He was always conscious of the fact, that in most of the cases High Court is the last Court of appeal within the State as many a litigants are not able to bear exorbitant, rather prohibitive, cost of litigation in Supreme Court.

My Lord has a great vision and has always been bubbling with ideas. The foremost important agenda for My Lord has been to improve the working of High Court and District Courts, and to provide as much amenities as could be possibly done to the Members of the Subordinate Judiciary. He was greatly concerned not only for Brother Judges, but even for Members of the Subordinate Judiciary. According to my personal assessment, a Judge's greatest achievement is his acceptability by the Advocates, litigants and common men. If they feel and realize that in his Court they shall get full Justice, then, Judge has succeeded to a great extent and he has justified occupying the chair of High Court fully. Mr. Justice Reveendran would fall in that category of Judges.

My Lord has been the Chief Architect and Designer of the Golden Jubilee Celebrations, which are going to commence shortly. Even the minutest details have been finalized by My Lord. I assure My Lord that we would endeavour to do the things in the same fashion and in the same manner as My Lord wanted it to be. I am sure My Lord would then grace the occasion as Judge of the Supreme Court. That would be a most befitting reward to us.

My Lord has taken this Institution to greater heights, even then he bemoans lost opportunities, not for himself, but for the Institution.

To all of us, he has been a true friend, philosopher and guide. He not only acted as our elder Brother, but also commanded an authority for this, to which we all readily bowed.

He has an in-depth knowledge of Law and never shirked from his responsibilities in dispensation of Justice. His knowledge is so vast that he found no diffculty in dealing with any subject of Law – civil, criminal, revenue or taxation. He has been a great Teacher and Preacher to all of us. He has always been ready and willing to show us the right path that a Judge is required to follow.

All through his career as a Judge, he was most uncontroversial and believed only in performing his duties to the best of his ability and knowledge. No-one could have any grievance against him.

Aristotle said :-

I quote,

> "Anyone can become angry–that is easy, but to be angry with the right person, to the right degree, at the right time, for the right purpose and the right way, this is not easy." Unquote.

My Lord has a great quality of controlling his anger even when provoked during course of hearing. Everyone is not possessed of such a sterling quality of controlling anger. Of late, it has been noticed that we Judges have become prone to lose temper. It could be for variety of reasons, but we have to learn from My Lord Mr. Justice R.V. Raveendran, who maintained absolute peace and tranquility even during course of lengthy hearings. I, indeed, wish all of us are endowed with this quality. His humility and kind nature are adorable. A curve of smile on his face is enough to put everything straight.

A Judge in him is fanatically dedicated to the Institution. The sparkling legal acumen at his command aided by an artistic diction elevated him head and shoulders above all. He should be treated as a Role Model, who inspired the whole generation. When he spoke, it is a literature, when he wrote, it is a thesis, when he thought, it is a philosophy. He is possessed of all the good qualities of a Judge. All of us are bound to emulate him.

Judiciary is the only ray of hope for common men for redressal of their grievances and sufferings. Everyday we see how Executive behaves and conducts itself in day to day problems of these persons. Thus, we have to be alive

to deal with such a situation. A Judge is a part of people, for whom, this system exists.

Here, I would like to quote few lines of lecture of Hon. Mr. Justice Rajendra Babu, as he then was, delivered on 19.4.2003 at Allahabad :

I quote,

> "These are traits that can help the public maintain confidence in its Judges. First, the Judge ought to be aware of his power and his limits. The Judge ought to recognize that his power is limited to perform a proper judicial role. He must learn the limits imposed on him as a Judge. He must know that power should not be abused and Judge cannot obtain everything that he wants. Secondly, Judge must recognize and realize his mistakes, like all mortals, Judges may commit errors." Unquote

Looking in retrospect, I find My Lord has strictly adhered to the aforesaid advice.

One does not lose anything in accepting his own mistakes. It only gives a chance for further improvements.

We wish My Lord a glorious career ahead and hope that My Lord would continue to add many more feathers to his cap. We are, indeed, proud of My Lord.

I on my behalf and on behalf of High Court wish him and Dear Bhabhiji best of luck and good health for future in all respects.

Thanking you.

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They may forget what you said, but they will never forget how you made them feel.

CARL BUECHNER

REPLY BY
HON'BLE SHRI JUSTICE R.V. REVEENDRAN TO THE FAREWELL OVATION

I thank all of you for the kind words spoken about me. Harald Medina said –

> "A Judge is surrounded by lawyers and subordinates who keep telling him what a noble, wonderful, wise and knowledgeable person he is. If the Judge starts believing it, he ceases to be Judge."

As I propose to continue as a Judge, I can not certainly believe what you have said. Your kind words only show your affection.

When I took oath, I had said that the Jabalpur Bar is one of the best Bars in the country. That was hearsay. I can now reiterate from my personal experience that this Bar is certainly one of the best, full of co-operation and eruditeness.

Lawyers expect courtesy, understanding and patient hearing from Judges. Judges also expect courtesy, understanding, brevity and clarity from Lawyers. It is not always possible for a Judge to measure up to the expectations of Bar. Nor is it always possible for a particular lawyer to measure up to the expectations of the Bench. Though all are deemed equal, all are not really equal. You have to accept the Bench, and we have to accept the Bar, as it is. If there is such acceptance, the Bar and the Bench will be able to co-operate with each other fully, in the service of the litigant and the public for whose benefit the Courts, the Judges and the Lawyers exist.

I thankfully acknowledge the overwhelming support and co-operation, I and my brother Judges got in conducting Lok Adalats every other Saturday and during the special disposal drive in the first week of Summer Vacation.

In my anxiety to get things moving, there might have been occasions when I had sopken harshly to the members of the Bar. Let me assure all of you that it was only a pretense to get the best out of the younger sections of the Bar.

The entire Registry, in particular my personal staff, have been very good and they have extended their best possible assistance in the discharge of my duties. It is traditional to thank the personal staff individually on such occasions. But as Chief Justice, I am of the view that I should not name only a few, lest others feel left out. The entire Registry is one family and as head of the family, my appreciation is to one and all.

I however beg the forgiveness of the members of the Bar and the Members of Registry, if I had hurt the feelings of any one, at any point of time due to my over enthusiasm or impatience.

I have also been extremely fortunate to have the wonderful Brother and Sister Judges. Whatever we have been able to achieve in this one year is on account of the unstinting support, commitment, zeal, team work and co-operation extended by the Brother and Sister Judges.

We are in the middle of Year of Excellence for Judiciary. We are hardly one and half months away from the beginning of the Golden Jubilee Year. Providing access to justice, providing speedy justice and providing affordable justice and building the trust and confidence of the people in the judiciary should be the goal and motive of the Bench and the Bar not only during this period, but in all the years to come.

I take the liberty of borrowing the following words of Shri Iqbal Chagla in describing this count:–

> "It is indeed heartening for the citizens and must be a sobering reflection for every administration, every bureaucrat and every official, to know that this Court like some brooding spirit is there, whenever necessary in public interest, to call to account, to admonish and to remedy any deviation from the path of righteousness".

I will always cherish the wonderful time spent in Madhya Pradesh. I have only two regrets. One is not learning Hindi. Second is not doing more for the High Court, for the Bar, for the H.C. staff and for the litigant public. I take leave, again thanking my Brother and Sister Judges, the members of the Bar and the members of the Registry for their affection, goodwill and cooperation.

I wish you all happiness, peace and prosperity.

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As laws are necessary that good manners may be preserved, so good manners are necessary that laws may be maintained.

MACHIAVELLI

ADDRESS BY

HON'BLE SHRI JUSTICE DEEPAK VERMA, ADMINISTRATIVE JUDGE, AT THE WELCOME OVATION OF HON'BLE THE CHIEF JUSTICE HELD ON OCTOBER 03, 2005 AT JABALPUR

It is a happy occasion, when we all have assembled to welcome My Lord Mr. Justice A.K. Patnaik, who has been appointed as the Chief Justice of this High Court. Sir, we welcome You with our open arms and smile on our faces. I have already been informed about great qualities of Your Lordship. By all, Your Lordship has been described as:

> **"a great Judge, a great citizen and above all, a great human being"**

We do not expect more than the qualities Your Lordship already possess. I am confident with Your Lordship's qualities, You would be able to bring more laurels to this Institution. I am aware of administrative skills and competence of Your Lordship due to which You have been able to accelerate taking off, of fledgling High Court of Chhattisgarh, which is now about to touch the sky. Fortunately, this High Court is already in its zenith and only needs to be maintained at that height. I am sure Your Lordship would be able to take it to still greater heights.

This High Court has a long line of distinguished Chief Justices and has very high traditions as one of the premier High Courts of India. Needless to say, Your Lordship would endeavour to maintain those traditions and would try to revive those which are diminishing.

Since, I have practised here for about 22 years, before my elevation; I know the temperament of the Advocates. By and large, they are advocates of great competence and believe in maintaining dignity, decorum and etiquettes towards all Courts. On their behalf, I assure You, that they would render all possible help and cooperation in achieving the goal.

Recent untoward incident between Members of the Bar Association and Police has not left a palatable taste. Such situations should be avoided. Portfolio Judge would always be available to sort out such trivial issues. Going on a lightening strikes causing impediments in smooth functioning of Courts is not appreciated by common men, for whom we are suppose to work.

I on my behalf and on behalf of all my learned Brother Judges assure Your Lordship our full co-operation. Your Lordship's responsibilities due to Golden Jubilee Functions have further enhanced, but we are there to shoulder it with You. We belong to one family of which You are the **'Karta'.**

Wishing Your Lordship a successful career ahead as Chief Justice.

We once again welcome You, dear Bhabhi Ji and other family members to this Marble City of Jabalpur.

Thanking you.
Jai Hind.

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REPLY BY

HON'BLE THE CHIEF JUSTICE SHRI A.K. PATNAIK TO THE WELCOME OVATION

Thank you very much for all that you have said while welcoming me as the Chief Justice of this High Court. Though Madhya Pradesh High Court was formally constituted on 1st November, 1956, its history dates back to the date when the High Court of Nagpur was established on 2nd January, 1936 by the Letters Patent issued by King George, The Fifth, under the Government of India Act, 1935. While the temporary Bench of High Court of Madhya Pradesh at Indore was created by the Chief Justice of Madhya Pradesh by order issued on 1st November, 1956, a High Court at Indore was established way back in 1916 by Maharaja Holkar. Similarly, though the temporary Bench of the High Court of Madhya Pradesh at Gwalior was constituted by Chief Justice of Madhya Pradesh High Court on 1 November, 1956, the High Court of Gwalior appears to have commenced functioning way back in 1894. The Madhya Pradesh High Court has, therefore, a long history and the Bench and the Bar have established healthy traditions and practices on account of which the High Court is widely recognized as one of the best High Courts of the country. It is this High Court of Madhya Pradesh which has produced legal luminaries such as late Justice M. Hidaytullah, Justice. J.S. Verma and Justice R.C. Lahoti who have reached the highest position in the Indian Judiciary and became Chief Justice of India, as also Judges like Justice G.P. Singh whose judgments are known for erudition, analysis and wisdom. I am indeed very fortunate to get an opportunity to serve as a Chief Justice of this High Court and I will endeavour with all earnestness and try to maintain the great legacy of this High Court, discharge the onerous duties of the Chief Justice of this High Court to the best of my abilities.

But as I assume the office of the Chief Justice of Madhya Pradesh High Court, I see before me great challenges ahead. As the President of the High Court Bar Association has reminded us, the High Court would be celebrating its Golden Jubilee during 2005-06 and all arrangements will have to be made to ensure that the Golden Jubilee celebrations are inaugurated on 22nd October, 2005 by Hon'ble the Chief Justice of India in presence of His Excellency, Governor of Madhya Pradesh, Chief Minister of Madhya Pradesh, Judges of the Supreme Court and all other dignitaries in a manner befitting the prestige and dignity of this High Court. The Golden Jubilee celebrations will not be a one-day affair, but have to be spread throughout the year with programmes organized not only at Jabalpur but also at Indore and Gwalior with meticulous thought

and preparations so that the traditions of the High Court and the contribution made to the justice delivery system in the State are known to the country.

The learned Advocate General and the Assistant Solicitor General have mentioned about the pendencey of the cases in the judiciary in Madhya Pradesh. There are as many as 1,84,720 cases pending as on 1st September, 2005 in all the three Benches at Jabalpur, Indore and Gwalior taken together. The sanctioned strength of the Judges of the High Court of Madhya Pradesh is 42. 31 Judges are in position and the appointments of 9 Judges are in process. Immediate steps will have to be taken to expedite the appointments of these 9 Judges. Statistics have shown that only when the entire sanctioned strength of the Judges are in position, a High Court is able to clear the backlog of cases and at the same time copes up with the fresh institution of cases. All of us will have to make sincere efforts to improve the team work amongst all the Judges of three Benches and ensure that we love and respect each other as brothers because it is only by our united efforts that we can achieve the best results. There is immense talent as well as experience in the Judges of Madhya Pradesh High Court and my job as Chief Justice of the High Court will be to use them in the best possible manner and reduce the pendency of cases in the High Court in as sort period as possible.

The subordinate judiciary in Madhya Pradesh has a large strength of as many as 801 Judicial Officers, 245 in Higher Judicial Service and 556 in the Lower Judicial Service and yet as on 1st July, 2005 the total number of cases pending in the Subordinate Judiciary is as huge as 9,47,102. Enormous efforts will have to be made to clear the backlog of cases in the Subordinate Judiciary. The 52 posts of Fast Track Courts and the 150 posts of Civil Judges Class II lying vacant will have to be filled up as early as possible. 360 new posts of Civil Judge Class-II have been created recently and recruitment to these 360 posts will have to be taken up separately but expeditiously. Besides disposal of cases by adjudicatory process, the Judges manning the Civil Courts will have to follow the mandate of Section 89 of the CPC and refer those cases in which there is possibility of settlement for alternate dispute resolution.

As the Chief Justice of the High Court, my focus may be on the large arrears of cases pending in the High Court and the Subordinate Judiciary, but I would never like that the pending cases in the High Court and Subordinate Courts are disposed of hastily, sacrificing the quality of justice. But the quality of justice at the High Court and Subordinate Courts depends to the large extent on the assistance that the Judges get from the Bar. It is acknowledged by the legal fraternity that the members of the Bar of Madhya Pradesh High Court

are very learned and competent and we expect that members of the Bar will continue to extend able assistance to the Bench. There is already a Judicial Officers' Training & Research Institute at Jabalpur. The training facilities in this Institution will have to be upgraded for imparting the best possible training to our Judicial Officers. With more of training, the Judicial Officers of the State of Madhya Pradesh will be able to improve on the quality of justice that they have to impart to the people of Madhya Pradesh. Computers will have to be provided and knowledge on Computer Application will have to be imparted to our Judicial Officers to make them more efficient in the administration of justice. The Vigilance Department of the High Court has to be activated to ensure honesty and transparency in the administration of justice in the Subordinate Judiciary.

At the end, I may say, that the High Court is not known by the size or the architecture of its building nor by the number of its judges or its Bench, but the quality and speed with which it delivers justice to the litigant public. The people of Madhya Pradesh have reposed their confidence in the High Court and the Subordinate Judiciary in Madhya Pradesh. We must all ensure that justice in its purest form, free from any pollution, is delivered to them as early as possible and only then will the people of Madhya Pradesh will continue to retain their confidence and trust in the High Court and the Subordinate Judiciary. I am sure for this noble cause, I will have the cooperation of my Brother Judges, Judicial Officers of the Subordinate Judiciary and learned Members of the Bar in the High Court and in the District Courts and the Registry of this High Court.

Thanking you.

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If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.

FRANCIS BACON

The roots of valid law.... are, and can only be, within the individual conscience.

HAROLD J. LASKI

SALIENT FEATURES OF THE RIGHT TO INFORMATION ACT, 2005

JUSTICE S.P. KHARE, LL.M.,
President,
M.P. Industrial Court,
Indore, (M.P.)

Right to Information Act, 2005 is revolutionary in its character. It will bring far reaching changes in the process of administration. I will deal with a few of its provisions which are of vital nature.

The first striking feature of this legislation is Section 4(1) (d) of the Act. It provides that every public authority shall "provide reasons" for its administrative or quasi-judicial decisions to affected persons. It is one of the principles of natural justice that every judicial or quasi-judicial decision must be supported by reasons. There has to be a 'speaking order' or 'reasoned order'. There were observations in certain judicial decisions on administrative law that an administrative decision if it affects the rights of others should be a reasoned decision. That has now been given statutory recognition by Section 4(1) (d) of the Act. Now the affected person has been given a statutory right to ask the public authority to "provide reasons" for its administrative decision. This is a very valuable right which has been conferred on a citizen. It imposes a corresponding obligation on a public or administrative authority to disclose the reasons on which certain administrative decision is based. It is implicit in this provision that reasons will have to be recorded at the time the administrative decision is taken. The reasons for such a decision will have to be reasons which are relevant and germane. Reasons introduce clarity in the order. These are indicative of application of mind. Reasons substitute subjectivity by objectivity. Right to reason is now an indispensable part of a sound administrative system. The affected person will have the right to know why the decision has gone against him and in favour of his rival. So far the reasons for administrative decisions were very cryptic or unintelligible. For example, the stock phrases "in the administrative interest" or *"prashashnik hit me"* were being used. This will no-longer be a valid reason. The affected person will have the right to know the real reason for the administrative decision. The right to information includes the right to inspect and have certified copy of the order. The recording of reasons for an administrative decision has become mandatory and those reasons will have to be supplied to the affected person when he asks for the same. The objectivity has been introduced in the process of taking administrative decisions also. The public authority will be required to disclose the real unvarnished truth for the administrative decision. More important would be recording of the reasons in support of the administrative decision. Still more important would be taking the administrative decision on objective determination and on sound basis.

This will require full consideration of the merits of the case at the time the decision is taken . It will be difficult to supplement the reasons at a later stage after the decision has been taken. That would be liable to be branded as after-thought. Ordinarily the reasons recorded will be provided to the affected person when he asks for the same. The recording of reasons will provide a safeguard against discriminatory treatment. For example, if an officer is allowed to remain at one place for 10 to 15 years and a similarly circumstanced officer is transferred every three years then he would have the right to know the reasons for such differential treatment. Thus the administrative decisions will be open to public gaze. It would be difficult to justify an administrative decision if it is taken for ulterior reasons. Armed with the reasons the affected person can approach the courts for testing whether the reasons for the administrative decision are genuine and adequate. All these aspects will have to be considered by the administrative authorities while taking the decision. This provision to provide reasons for administrative decision is as a sequel to the dominant object of the Act to promote "transparency and accountability" in the working of the public authorities. The transparency or objectivity will have to be first observed and then demonstrated if the person affected asks for it.

There is another important aspect of this Act. The general rule as per Section 3 is that all citizens will have the right to information. This provision has been given overriding effect by Section 22 which provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. The general principle is to provide all kinds of information to the citizens. The right to information includes the right to inspect and have certified copies. The exceptions to the general rule are very few as enumerated in Sections 8 and 9. There are only 10 to 12 categories of information which are "exempted" from disclosure. The field of exemptions is very narrow.

Section 8 provides that there shall be no obligation to give any citizen –

(a) information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relations with foreign State or lead to incitement of an offence;

(b) information, which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court ;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party;

(e) information available to a person in his fiduciary capacity;

(f) information received in confidence from foreign government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purpose;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;

provided that the decisions of the Council of Ministers, the reasons thereof and the material on the basis of which the decisions were taken shall be made public after the decision has been taken and the matter is complete, or over;

provided that those matters which come under the exemptions in this section shall not be disclosed;

(j) information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual.

As per Section 9 the information involving an infringement of copyright subsisting in a person other than the State is exempted.

In every case where a citizen seeks information or applies for inspection or certified copy it will have to be decided by reference to Sections 8 and 9 whether there is exemption from disclosure of the said information. The exemptions are very few and their scope is very limited. I will give three examples to show whether the case is covered by exemptions or not.

Firstly, there are students and candidates who are dissatisfied with the examination of their answer-books. They file writ petitions before the High Courts for calling the answer-book and request the Court to peruse the same to ascertain whether there has been proper evaluation of the answers and whether the totalling is correct. The reported cases would go to show that in many cases the answer-books were not properly evaluated or even the totalling was incorrect. In some cases the experts were called to revalue the answer-books and the results were startling. In some cases the marks jumped from 16 to 64. The students or the candidates appearing in the examinations of the Public Service Commission or similar bodies make a request that even if the revaluation is not permissible they should atleast be shown the evaluated answer-books for their satisfaction. Some rule is shown to them and it is said that such a request cannot be entertained. But now such a rule would stand superseded by the provisions of the Right to Information Act, 2005 which has overriding effect over all other rules and the laws. Now a candidate appearing in civil services examina-

tion or any other examination will have a right to call upon such bodies to show him his answer-book. This will be covered by his right to information. He would also be entitled to have a certified copy of his evaluated answer-book and perhaps also that of his competitor. Sections 8 or 9 of the Act do not exempt such cases.

Secondly, there is a system of recording of confidential reports. Adverse remarks are communicated to the officer or employee but the remarks in his favour are seldom communicated.

That sometimes gives a distorted picture of his performance. Now if he applies that he should be given certified copy of those remarks also which are in his favour, will the authorities be able to refuse to disclose the remarks in his favour ? The answer is no. There is no such exemption in Sections 8 or 9 of the Act.

I will give only one more illustration which is of vital importance in the working of the Secretariate. The notings of the officers and Secretaries were considered to be privileged under Sections 123 and 124 of the Evidence Act. That privilege is perhaps no-longer available as the provisions of the Right to Information Act, 2005 would have overriding effect upon the provisions of the Evidence Act. As per Section 8 (1) the exemption has been given to "cabinet papers" including records of deliberations of the Council of Ministers, Secretaries and other officers. It is highly debatable how far this exemption clause will cover the notings of the officers and Secretaries on various files. In majority of the cases a citizen will have a right to inspect such notings and obtain certified copies. Even in respect of cabinet papers the decisions, the reasons for the decision and the material on the basis of which decisions were taken shall be made public after the decision has been taken. Therefore, the precis which are submitted by the secretaries for consideration of the cabinet will require careful drafting.

If the public authority wants to refuse to give any information on the grounds specified in Sections 8 and 9 it will have to give reasons for such refusal. The interesting feature is that an applicant making request for information shall not be required to give any reason for asking for the information. "Secrecy" in a variety of situations would become a thing of the past. The central focus will be on openness, transparency and responsive administration in the interest of the citizenry. That will require a complete reorientation and overhauling of the approach which was being adopted hitherto. The administrative matters and the decisions will be more or less as open as the proceedings of the court.

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SESSIONS TRIAL - A PANORAMIC VIEW

VED PRAKASH
Director

Chapter VIII of the Code of Criminal Procedure, 1973 (in short 'the Code') consisting of Sections 225 to 237 provides the procedure for trail of a case before a Court of Session. Whether a case is triable by a Court of Session or not has to be decided on the basis of classification of offences given in Schedule I of the Code.

Section 9 of the Code mandates the State Government to establish a Court of Session for every sessions division to be presided over by a Sessions Judge appointed by the High Court including Additional Sessions Judges, who also exercise jurisdiction in a Court of Session. There is only one Court of Session in the sessions division and all Additional Sessions Judges exercise jurisdiction in a Court of Session and their judgments are those of Court of Session. (See – *Gokaraju Rangaraju, Achanti Sreenivasa Rao & Ors. v. State of A.P., AIR 1981 SC 1473*). Therefore, there is nothing like a Court of Additional Sessions Judge and such type of nomenclature in various proceedings recorded in a case tried by an Additional Sessions Judge is basically erroneous. In *Abdul Mannan & Ors. v. State of West Bengal, AIR 1996 SC 905* it has been held by a Three Judge Bench of the Apex Court that Sessions Judges includes Additional Sessions Judge and he has all the powers and the jurisdiction of the Sessions Judge to try the offences enumerated under the Code. However, the jurisdiction of Additional Sessions Judge to try cases is not independent. In view of Section 194 of the Code an Additional Sessions Judge can try only such cases as are made over to him by the Sessions Judge by general or special order or as the High Court by special order direct him to try.

A Court of Session, as per Section 9 (6) of the Code, is required to hold its sitting at such place or places as notified by the High Court in this respect. However, where in a particular case the Court is of opinion that sitting at any other place in the sessions division will tend to the general convenience of the parties and witness then it may, with the consent of prosecution and accused, hold the sitting at any other place. The Sessions Judge u/s 408 (1) of the Code may order a particular case to be transferred from one Court to another within the sessions division, if it is found expedient for the ends of justice. Sessions Judge also enjoys power u/s 409 (2) of the Code to recall a case from an Additional Sessions Judge at any time before the trial of the case has commenced. Interpreting the provisions of Sestions 408 and 409, it has been laid down by our own High Court in *Re District & Sessions Judge, Raisen (Misc. Cr. Case No. 7155 of 2004, judgment dated 24.9.2004, Main Seat, Jabalpur (DB)* that power u/s 408 (1) is a judicial power while power under Section 409 is administrative in nature and can be exercised in case of part-heard cases when a Judge before whom the case was

pending has retired, resigned, died or stands transferred outside the sessions division. In such case mere reasons are required to be recorded. This decision overrules the earlier decision rendered by a Single Bench in *Deepchand v. State of M.P., 1998 (2) MPLJ 670.* In other cases the power to recall is only before the trial has commenced. Trial commences when the charge is framed.

COGNIZANCE

Unlike Magistrate, who has power u/s 190 of the Code to take cognizance either on police report or complaint, the Sessions Court can take cognizance of a case, as provided in Section 193 of the Code, only on committal of a case by a Magistrate and not otherwise. Section 199 (2) of the Code engrafts an exception to this rule for specific type of cases provided therein. The interdict of Section 193 prevents a Court of Session from taking cognizance in any other manner unless it is expressly provided in any other law for the time being in force. (See – *Gangula Ashok v. State of A.P., AIR 2000 SC 740*). However, as laid down by the Apex Court in *Ranjit Singh v. State of Punjab, AIR 1998 SC 3148 (3 Judge Bench)*in case of involvement of a person who has not been arrayed as accused, the Sessions Court in order to prevent miscarriage of justice may send a report to the High Court detailing the situation. In such case the High Court in exercise of its inherent or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left-out accused.

TRIAL PREPARATION

Before the commencement of trial the Court must ascertain about the compliance of Section 207 of the Code, which commands the committal Court to supply the copies of statements of witnesses and other documents to the accused, in a case instituted on police report. If It happens to be a complaint case, then as per Section 208 of the Code copies of all statements recorded u/Ss 200 and 202 of the Code, confessions, if any, and documents produced before the Magistrate and relied upon by the prosecution should be supplied to the accused. As laid down in *Pulakuri Kotaiah v. Emperor, AIR 1947 PC 67* it is a valuable right of the accused and should be complied scrupulously. However, non-supply of such documents-simplicitor is not always prejudicial to the accused. (See- *Noor Khan v. State of Rajasthan, 1964 SC 286*). The Court should also examine at that stage that property relating to case has been produced before the Court and deposited in the *Malkhana* so that it is available during trial and delay is not occasioned due to its non-availability.

PROSECUTION

Prosecution in every trial before a Court of Session has to be conducted by a Public Prosecutor i.e Government Pleader or Additional Government Pleader, as the case may be, who are appointed u/s 24 (3) of the Code by the

State Government. A trial before sessions Court cannot be conducted in the absence of Public Prosecutor. In *Paresh Chandra Deb v. Ganesh Chandra Deb, (1991) 1 Crimes 222*, order of framing of charge u/s 326/302 IPC in absence of Public Prosecutor was held illegal. The State Government/Central Government may appoint a Special Public Prosecutor for any class or classes of cases as provided u/s 24 (8) of the Code. Even in a case initiated on a private complaint the trial has to be conducted by the Public Prosecutor or Special Public Prosecutor, as the case may be (See – *Mukul Dalal and others. V. Union of India and others, (1988) 1 SCR 868.*)

A person, as provided u/s 301 (2), other than a Public Prosecutor or Additional Public Prosecutor is not entitled as of right to stand on behalf of the prosecution. However, a Pleader may act under the direction of Public Prosecutor to assist him and may with the permission of Court submit written arguments. The accused has also a right to be defended by a Pleader of his choice (See – Section 303), where an accused is not represented by a pleader and Court finds that he is not having sufficient means to engage a pleader then the Court is under duty to assign to him a pleader at the instance of the State u/s 304 of the Code. As per D.O. No. $\frac{1111}{111\text{-}2\text{-}3/74}$ (304-2) Dt. 23.6.98 issued by the High Court of Madhya Prade to accused should not be permitted to engage a private counsel in such a case.

FRAMING OF CHARGE

Next comes the stage of considering whether charge can be framed against the accused relating to an offence triable by a Court of Session. This exercise has to be undertaken after hearing the prosecution and defence. However, at this stage any material filed by the accused to advance his defence need not be considered. For this proposition law laid down in *State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568* may usefully be referred, wherein the Apex Court has expressly overruled its earlier view expressed in *Satish Mehra v. Delhi Administration & another, (1996) 9 SCC766.*

Many a times it is found that order relating to framing of charge is too lengthy. However, as laid down by the Apex Court in *Pollution Control Board v. Mohan Meakins AIR 2000 SC 1456* and *State of A.P. v. Golkonda Linga Swamy and another, (2004) 6 SCC 522* no reasoned or formal order is required to be recorded, if ultimately the Court comes to the conclusion that a charge is made out against the accused. If the Court is recording an order of discharge u/s 227 of the Code, then reasons must be set forth. {See – *Pollution Control Board* (Supra)}. Again while framing charge, the Court need not examine the veracity and effect of evidence. A reasonable suspicion about the involvement of accused amounting to prima facie case is sufficient to frame a charge. (See – *R.S. Nayak v. A.R. Antulay, AIR 1986 SC 2045*) If the Court finds that the case is not exclusively triable by it then it may after framing the charge can transfer the case u/s 228 (1) (a) of the Code for trial to the Chief Judicial Magistrate.

The charge should be clearly brought to the notice of the accused. In case the accused pleads guilty the Court has discretion to convict him or to proceed with the trial. (Section 229). After framing of charge the prosecution is required to submit a programme of trial for examining the witnesses. In order to avoid delay the Court may ask the prosecution to submit the trial programme on the same day and on the application of the prosecution may issue process to secure the attendance of prosecution witnesses as proposed by it.

PROSECUTION EVIDENCE

As per Section 231 of the Code the Court shall take all such evidence as may be produced in support of the prosecution. The phraseology of the section is clear enough to indicate that the witnesses to be produced by the prosecution need not always be restricted to the details shown in the charge-sheet. Even a person whose statement is not recorded under section 161 of the Code can be examined by the prosecution. Again the Public Prosecutor is not obliged to examine all the witnesses named in the charge sheet. It has the discretion to put only those witnesses before the Court about whom it has the reasonable belief that they are going to support the prosecution case. However, the power of the Court to summon or examine any person as witness or recall or re-examine any person already examined as contemplated u/s 311 of the Code gives all the discretion to the Court to call witnesses not examined by the prosecution, if their evidence is found necessary. Here it is noteworthy that second part of Section 311 imposes an obligation upon the Court to examine a person whose evidence appears to be essential to the just decision of the case. The Court should exercise the aforesaid discretion carefully for advancing ends of justice. In *Lt. Col. S.J. Chaudhari v. State (Delhi Administration), AIR 1984 SC 618* the Apex Court has clearly mandated that Sessions cases must not be tried piece-meal. Once the trial commences except for very special reason, which makes an adjournment inevitable, the Court should proceed de, die and diem until the trial is concluded.

Provisions of Section 276 of the Code are also apposite here which provide that the evidence of witnesses shall be taken down ordinarily in the form of narrative but the judge may in his discretion take down, or cause to be taken down any part of such evidence in the form of question and answer. The evidence so recorded should be signed by the presiding judge. Sometimes prayer is made by the defence for deferment of cross-examination until any other witness or witnesses are examined. The Court may u/s 231 (2) of the Code allow such a prayer depending upon the facts and circumstances of the case. However, it is all within the discretion of the Court and not a right of the accused. (See – *Ramesh and Suresh Guman Singh v. State, (1991) 1 Crimes 377 (Mad.)*

The evidence should be recorded, as provided in Section 373, in the presence of the accused unless his personal attendance has been dispensed with. The power to dispense with the personal presence of the accused is contemplated u/s 317 (1) of the Code. Whenever a request is made for dispensing with the presence of the accused the counsel be asked to give in writing that evidence may be recorded in the absence of the accused and there shall be no dispute regarding the identity in the matter. While examining the witnesses the Court should keep in mind its duty as well as power to record comments about the demeanor of witnesses as contemplated u/s 280 of the Code.

ORDER OF ACQUITTAL

Unlike Warrant Trial or Summons Trial a typical stage for recording order of acquittal is provided in Sessions Trial. Section 232 of the Code in this respect provides that if Court finds that there is no evidence that the accused committed the offence, the judge shall record an order of acquittal. This stage is meant for those situations where there is lack of total inculpatory evidence. It does not cover cases of insufficiency of evidence or absence of witnesses. (See – *1994 Cr.L.J. 681 (SC)*)

Next comes the stage where accused is required to be examined u/s 313 of the Code regarding all the circumstances appearing in the evidence against him to enable him to personally explain about them. The importance of this exercise has been underlined by the Apex Court in *Lallu Manjhi and Anr. v. State of Jharkhand, (2003) 2 SCC 401.* The questions which are put to the accused should be simple and in questioning mode. (See - *Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502*). Though Section 313 of the Code in terms does not contemplate examination of accused through counsel but as laid down by the Apex Court in *Basavaraj R. Patil and others v. State of Karnataka and others, AIR 2000 SC 3214* where due to physical incapacity or huge expenses involved in attending the Court, the Court considers it fit to examine the accused through counsel then it has power to proceed accordingly depending upon the facts and circumstances. The detailed procedure to be adopted in this respect has also been laid down by the Apex Court in this case.

DEFENCE

Section 233 of the Code enables the accused to adduce any evidence which he may have in support of his defence. He has also a right to put written statement. The Court, on a prayer made by the accused, is required to issue processes for compelling attendance of witnesses/production of documents or things unless it finds that the prayer has been made for the purpose of vexation or for delay or for defeating the ends of justice. Accused himself also happens to be a competent witness for defence if prayer is made by him in writing. (Section 315)

ARGUMENTS AND JUDGMENT

Prosecution and defence are entitled to put their case one by one by way of concise oral arguments before the Court. Either party may also submit memo of arguments before conclusion of oral arguments. Court has ample power u/s 314 (4) of the Code to regulate the oral arguments if the same are not concise or relevant.

After arguments Court has to pronounce judgment in the case. The judgment must confirm to the requirements of Section 354 of the Code. If it happens to be a judgment of conviction then Court is required to hear the accused on the question of sentence as contemplated u/s 235 (2) of the Code. However, the law is settled that Court need not adjourn the case for such hearing and pronouncement of sentence on hearing the accused on the same day is not illegal. (See – *Ramdeo Chauhan Raj Nath v. State of Assam, (2001) 5 SCC 714.*) This decision refers to Section 309 (2) of the Code which provides that judgment should not be adjourned simply for hearing of the accused on sentence. If the case is one in which the Court has imposed death sentence, then as explained in *Muniappan v. State of Tamil Nadu, AIR 1981 SC 1220* reasons for imposing death penalty as contemplated u/s 354 (3) of the Code should also be given in the judgment and the case should be submitted to the High Court u/s 366 (1) of the Code for confirmation of the death sentence.

As regards quantum of sentence it has been the consistent view of the Apex Court that undue sympathy regarding imposition of sentence or imposition of sentence totally inadequate in the fact situation of the case undermines the confidence of public in the efficacy of criminal justice system. Therefore, sentence must be proportionate to the gravity of crime. (See – *Surjit Singh v. Nahara Ram & Anr., (2004) 6 SCC 513*) If the sentence includes sentence of imprisonment then a copy of judgment should be provided to the accused free of cost. (Section 363). The copy of the finding/sentence should also be sent to the District Magistrate as contemplated u/s 365 of the Code.

The cases of lunatic accused have to be dealt u/s 329 of the Code. The fact of unsoundness or mental incapacity of the accused must be examined. The accused may be subjected to medical examination for this purpose. If it is found that the accused is of unsound mind or is incapable of making his defence then after recording a finding to that effect the trial should be postponed. Such trial may be resumed when the person concerned ceases to be of unsound mind. There may be cases where accused though not of unsound mind may not understand the proceedings. In such cases, as proveded u/s 328 of the Code, the Court may proceed with the inquiry or trial and on conviction the proceedings should be forwarded to the High Court with the report of the case.

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न्यायालय प्रशासन के वित्तीय पहलू

आर.के. मिश्रा
प्राचार्य,
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कार्यालयीन कार्यप्रणाली के व्यवस्थित संचालन के लिये दो तरह की व्यवस्थाएं अहम् भूमिका निभाती हैं –पहला – प्रशासकीय व्यवस्था, दूसरा – वित्तीय व्यवस्था।

प्रशासकीय व्यवस्था हेतु मध्यप्रदेश शासन द्वारा विभिन्न प्रकार के नियम/निर्देश आदेश जारी किये गये है। जिनके परिपालन से कार्यालयीन प्रशासकीय व्यवस्था का संचालन होता है जैसे म.प्र. मूलभूत नियमावली, म.प्र. पेंशन नियम, अवकाश नियम, यात्रा भत्ता नियम आदि। वहीं दूसरी ओर वित्तीय व्यवस्था के संचालन एवं नियंत्रण हेतु शासन ने नियमों को कई प्रकार की संहिताओं में संकलित किया है। वित्तीय प्रक्रियाओं के संचालन/ नियंत्रण के लिये शासन द्वारा प्रकाशित संहिताओं में वित्त, लेखा, आहरण एवं संवितरण के निर्देश समाहित किये गये हैं।

शासन द्वारा वित्तीय नियंत्रण संचालन के लिये निम्नांकित संहिताओं/ नियमों का प्रकाशन किया गया है:–

1. म.प्र. कोषालय संहिता भाग – 1 एवं 2
2. म.प्र. वित्तीय संहिता भाग – 1 एवं 2
3. म.प्र. वित्तीय अधिकारों की पुस्तिका भाग – 1 एवं 2

इन संहिताओं में वित्तीय प्रक्रियाओं को क्रमानुसार संकलित किया गया है जब भी हमें कोई शासकीय व्यय संपादन करना होता है तो उस व्यय के संपादन में निम्नांकित प्रक्रियाओं से गुजरना होता है :–

1. व्यय की स्वीकृति एवं आवश्यक शर्तें।
2. व्यय के लिये राशि का आहरण।
3. राशि का संवितरण एवं लेखांकन।

स्वीकृति कौन देगा – शासकीय व्यय करने के लिये सर्वप्रथम महत्वपूर्ण शर्त यह होती है कि वह सक्षम अधिकारी द्वारा स्वीकृत हो एवं स्वीकृति के साथ–साथ उस मद में पर्याप्त राशि का आबंटन उपलब्ध हो। व्यय की स्वीकृति कौन दे सकता है, कौन इसके लिये सक्षम है आदि की जानकारी के लिये शासन द्वारा वित्तीय अधिकारों की पुस्तिका भाग –1 एवं 2 (M.P. Book of Financial Powers) प्रकाशित की गई है इस पुस्तिका के भाग एक में सभी कार्यालयों में होने वाले सामान्य व्ययों की जानकारी होती है जबकि भाग दो के अंतर्गत विभागों के विशेष प्रकार के व्ययों का उल्लेख है।

स्वीकृति किन शर्तों नियमों के अनुसार हो :– शासकीय व्यय करने के लिये जब यह निश्चित कर लिया जावे कि इस व्यय की स्वीकृति कौन देगा इसके बाद महत्वपूर्ण प्रश्न यह उपस्थित होता है कि शासकीय व्यय हेतु राशि स्वीकृत करने के क्या नियम होंगे? क्या शर्तें होंगी जिनका पालन आवश्यक है, किस सीमा तक व्यय किया जा सकता है आदि। समस्त प्रकार की वित्तीय स्वीकृतियां जारी करने के नियम एवं निर्देश या शासकीय व्यय संपादित करने की आवश्यक शर्तों का वर्णन म.प्र. वित्तीय संहिता भाग –1 एवं 2 में किया गया है। अतः वित्तीय

स्वीकृति जारी करने के लिये वित्तीय संहिता भाग–1 में वर्णित नियमों का पालन आवश्यक है एवं भाग 2 में इस हेतु प्रयुक्त किये जाने वाले प्रपत्रों का उल्लेख है।

आहरण एवं संवितरण :– जब किसी व्यय की स्वीकृति हो जाती है तो दूसरा कार्य उसका कोषालय से आहरण होता है, कोषालय से राशि आहरण के लिये देयक तैयार करके कोषालय में प्रस्तुत करना होता है, कोषालय में प्रस्तुत किये जाने वाला देयक किस प्रपत्र में तैयार होगा, कैसे उसे कोषालय में प्रस्तुत किया जावेगा उसकी प्रक्रिया क्या होगी? देयक कैसे तैयार किया जावेगा आदि सभी तथ्यपरक जानकारी म.प्र. कोषालय संहिता भाग –1 एवं 2 में समाहित की गई है।

किस निर्धारित प्रपत्र पर देयक तैयार होगा अर्थात् इस हेतु कौन–कौन से प्रपत्र प्रयोग किये जावेंगे इसकी जानकारी हमें कोषालय संहिता भाग–2 में प्राप्त होगी तथा देयक तैयार करने, कोषालय में प्रस्तुत करने, कोषालय से राशि प्राप्त कर संवितरण करने आदि की जानकारी म.प्र. कोषालय संहिता भाग–1 में प्राप्त होगी।

लेखांकन :– शासकीय आय एवं व्ययों के लेखांकन का कार्य भी एक महत्वपूर्ण प्रक्रिया है किसी भी प्रकार का शासकीय लेन–देन कब और किस अभिलेख में लेखांकित किया जावेगा इन सभी बातों की जानकारी के लिये म.प्र. कोषालय संहिता भाग–1 में नियमों का उल्लेख किया गया है।

इस तरह शासन द्वारा वित्त एवं लेखा प्रक्रिया के संबंध में जारी संहिताओं का अध्ययन कब आवश्यक है, उपरोक्त वर्णन से स्पष्ट हो गया है।

न्यायालयों के विशेष संदर्भ में वित्तीय/कोषालय संहिताओं के कौन–कौन से प्रावधान प्रभावशील होते हैं इस विषय वस्तु पर प्रकाश डालने के लिये हम न्यायालय लेखांकन प्रणाली को निम्नांकित बिन्दुओं में वर्गीकृत कर उस पर प्रकाश डालेंगे :–

1. न्यायालय में प्राप्त होने वाली सिविल न्यायालय जमा राशि।
2. बहुमूल्य सामग्री का संधारण।

1. कोषालय में नगदी तिजोरी (Cash Chest) एवं बहुमूल्य (Valuable) जमा करना –

म.प्र. कोषालय संहिता भाग –1 के सहायक नियम 47 (2) के अनुसार नगदी की तिजोरियां/सीलबंद पैकेट कोषालय में रखें जावेंगे। ऐसे पैकेट/तिजोरी जब कोषालय/उप–कोषालयों में रखे जावें तो उन्हें एक ज्ञापन के साथ, जिसमें उसमें रखी वस्तु का खुलासा (विवरण) हो, प्रस्तुत किया जाना चाहिये। ऐसे पैकेट की, जिसमें कहा गया है कि अमुख राशि है, अभिस्वीकृति कोषालय अधिकारी द्वारा मूल ज्ञापन में दी जावेगी एवं उसमें कोषालय में संधारित बहुमूल्य पैकेट की पंजी का क्रमांक एवं वर्ष दर्ज किया जावेगा।

ऐसे बहुमूल्य सम्पत्ति के पैकेट कोषालय में भेजने के समय निम्नांकित बिन्दुओं पर ध्यान देना चाहिये :–

1. बहुमूल्य पैकेट की पैकिंग अच्छी तरह से हो, वह आवाज न कर रहा हो।
2. वह पैकेट अच्छी तरह से सिला एवं सीलबंद हो।
3. ऐसे पैकेट पर एक विवरण युक्त पर्ची (स्लिप) लगी हो, जिसमें वह किस प्रकरण से संबंधित है, उसका अनुमानित मूल्य क्या है आदि का विवरण दर्ज हो साथ ही ऐसी स्लिप पर सक्षम अधिकारी के हस्ताक्षर हों।
4. इस जमा किये गये बहुमूल्य पैकेट की सूचना महालेखाकार को अवश्य दी जानी चाहिये।

किसी शासकीय अधिकारी के हाथ में उसकी शासकीय हैसियत में आने वाले/आने वाली सोना, चांदी आभूषण, अन्य मूल्यवान वस्तुओं, प्रतिभूति, बंधपत्रों को जिनका मूल्य 250/– रूपये या अधिक है, नियम एवं आदेश (दाण्डिक) के नियम 680 के अंतर्गत न्यायालयों द्वारा सुरक्षित अभिरक्षा के लिये कोषालय/उप–कोषालय में जमा किया जाता है ऐसे बहुमूल्य पैकेट न्यायालय द्वारा किसी प्राधिकृत कर्मचारी के हस्ते कोषालय में जमा कराने के लिये भेजा जाना चाहिये।

बहुमूल्य पैकेट की वापिसी :– बहुमूल्य पैकेट को सुरक्षित अभिरक्षा से निकाल कर लौटाने के पूर्व कोषालय अधिकारी को पूर्व में बहुमूल्य पैकेट जमा करते समय भेजे गये मूल ज्ञापन को प्रस्तुत करना होता है (**म.प्र. कोषालय संहिता नियम 48**) जिस पर कोषालय अधिकारी ने बहुमूल्य पैकेट प्राप्त करने की अभिस्वीकृति दी थी।

यदि बहुमूल्य पैकेट का मूल ज्ञापन गुम हो जावे :– बहुमूल्य पैकेट का मूल ज्ञापन कोषालय अधिकारी की प्राप्ति की अभिस्वीकृति यदि गुम हो जाती है तो उस ज्ञापन के अभाव में नियमानुसार कोषालय अधिकारी पैकेट वापस करने में असमर्थता प्रकट करते हैं। ऐसी स्थिति में जमाकर्ता अधिकारी से क्षतिपूर्ति बंध–पत्र प्राप्त किया जाना चाहिये। ऐसे बंध पत्र में निम्नांकित बिन्दुओं को शामिल किया जाना चाहिये (सहा. नियम 48 टिप्पणी – 2)

1. मूल रसीद खो जाने का प्रमाणपत्र।
2. मूल रसीद बाद में उपलब्ध होने पर कोषालय को लौटाने का वचन।
3. बाद में कोई अन्य व्यक्ति/अधिकारी यदि उक्त रसीद प्रस्तुत कर पैकेट की मांग करता है तो उसके लिये संबंधित अधिकारी जो मूल रसीद के अभाव में पैकेट वापस लेता है, मांग करने वाले अधिकारी/शासन के प्रति स्वयं उत्तरदायी होगा।

बहुमूल्य पैकेट का सत्यापन :– कोषालय में जमा किये गये बहुमूल्य पैकेट का प्रति 3 वर्ष में एक बार जमाकर्ता अधिकारी द्वारा सत्यापन किया जाना चाहिये। इस प्रक्रिया के तहत् मूल ज्ञापन कोषालय में प्रस्तुत कर पैकेट प्राप्त किया जाना चाहिये एवं ऐसे बहुमूल्य पैकेट को खोलकर उसमें रखी हुई सामग्री का सत्यापन कर उसे पुनः सीलबंद कर कोषालय में जमा कराया जाना चाहिये।

2. न्यायालय में प्राप्त होने वाली सिविल न्यायालय जमा राशि :–

म.प्र. कोषालय संहिता भाग–1 के नियम 7 के अनुसार राज्य की समेंकित निधि अथवा लोक लेखे में जमा की जाने हेतु शासकीय सेवकों द्वारा प्राप्त या उनको निविदत्त सभी धन राशियां बिना विलम्ब किये तुरंत कोषालय/बैंक में जमा कर देना चाहिये और उन्हें राज्य की समेंकित निधि या लोक लेखे में शामिल कर देना चाहिये। उपरोक्तानुसार प्राप्त धनराशियों का विनियोग न तो विभागीय व्यय की पूर्ती के लिये किया जाना चाहिये और न ही उसे राज्य की समेंकित निधि अथवा लोक लेखे से पृथक रखना चाहिये।

कोषालय संहिता भाग–1 के नियम 7 (2) के अनुसार कुछ विभागों को प्राप्त विभागीय आय उसी प्रकृति के विभागीय व्ययों के लिये प्रयोग की अनुमति दी गई है, जिसमें स्पष्ट किया गया है कि सिविल, राजस्व एवं आपराधिक प्रकरणों में समंस की तामीली हेतु प्राप्त राशि, गवाही की खुराक एवं इसी प्रयोजन हेतु प्राप्त राशि का उपयोग उसी तिथि में होने वाले इसी प्रकृति के भुगतान के लिये किया जा सकता है।

इसी तरह सिविल न्यायालयों में अमानत के तौर पर प्राप्त जमा राशि इसी प्रकृति के अन्य मामलों में अमानत जमा वापसी के लिये प्रयोग की जा सकती है।

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of April, 2005. The Institute has received articles from various districts. Article regarding topic no. 1 received from -Chhindwara is being included in this issue. As we have not received worth-publishing articles regarding remaining four topics, therefore, the Institute is publishing its own articles on these topics:

1. Legal value that may be attached to special oath in a case after repeal of Indian Oaths Act, 1873?

भारतीय शपथ अधिनियम, 1873 के निरसन के पश्चात् किसी मामले में ली गई विशेष शपथ का विधिक महत्व क्या है?

2. Whether a proceeding for levy of fine initiated u/s 421 Cr.P.C. stands concluded on issuance of a warrant u/s 421 (1) (b) Cr.P.C. authorizing the Collector to realize the fine as arrears of land revenue?

क्या अर्थदण्ड के उद्ग्रहण के लिये धारा 421 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रारम्भ की गयी कार्यवाही धारा 421 (1) (बी) दण्ड प्रक्रिया संहिता के अन्तर्गत ऐसी राशि राजस्व के बकाया के रूप में वसूल किये जाने हेतु कलेक्टर को वारंट द्वारा प्राधिकृत किये जाने की दशा में समाप्त हो जाती है?

3. Whether conviction can be based on the basis of admission of guilt by accused subsequent to denial at the stage of framing of charge?

क्या आरोप विरचना के समय दोष प्रत्याख्यान के पश्चात् अभियुक्त द्वारा अपराध के बारे में की गयी स्वीकारोक्ति के आधार पर दोषसिद्धि की जा सकती है?

4. Whether a complaint case which has been dismissed due to default in appearance of the complainant u/s 249 Cr.P.C. can be restored by the Magistrate?

क्या ऐसे परिवाद पत्र को, जिसे परिवादी की अनुपस्थिति के कारण धारा 249 दण्ड प्रक्रिया संहिता के अन्तर्गत निरस्त किया गया है, मजिस्ट्रेट के द्वारा पुनःस्थापित किया जा सकता है?

5. What is the nature and extent of penal liability of the owner/driver of a vehicle under Motor Vehicle Act, 1988 when the vehicle is being driven or is allowed to be driven without registration/permit/ insurance or driving licence?

किसी वाहन को पंजीयन पत्र/परमिट/बीमा या चालक अनुज्ञप्ति के बिना चलाने अथवा चलाने की अनुमति देने की स्थिति में वाहन स्वामी/वाहन चालक के आपराधिक दायित्व का स्वरूप व विस्तार मोटर यान अधिनियम, 1988 के अन्तर्गत क्या है?

LEGAL VALUE THAT MAY BE ATTACHED TO SPECIAL OATH IN A CASE AFTER REPEAL OF INDIAN OATHS ACT, 1873

JUDICIAL OFFICERS
District Chhindwara

The concept of "Special Oath" was embodied in The Indian Oaths Act, 1873 (hearinafter called as "Old Act"). According to S.8 of the Old Act, "If any party to, or witness in, any Judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuation to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him." The oath or solemn affirmation referred to in S.8 in its nature and essence was quite distinct from the oaths and affirmation contemplated by S.5 of the old Act. Under S.8 the oath or solemn affirmation may be as infinite in form and contents, as racial customs or the dictates of any religious persuation might sanction or require. So, the oath or solemn affirmation referred to in S.8 might be in any form common amongst or held binding by persons of the race or persuasion to which "the deponent" belonged and not repugnant to "Justice or Decency" (Please c.f. *Parasram Harprasad and ors. v. Pannalal Munnalal and ors, A.I.R. 1954 Nag. 56*).

S.9 of the Old Act says that "If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in such proceeding, the court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation." Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question. S.10 of the Old Act, laid down the principle of acceptance of such offer of special oath and said that "If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorise him to take the evidence of the person to be sworn or affirmed and return it to the Court."

In this context, it is noticeable that S.11 of the Old Act laid down the principle that "the evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

So, according to Old Act, the evidence given on "Special Oath" was considered conclusive proof against that person who offered to be bound by such special oath, but now, S.9 (1) of The Oaths Act, 1969 (hereinafter called as "Act") repeals

The Indian Oaths Act, 1873, so the concept of "Special Oath" has not got its status in this "Act" (except the conditions mentioned in S.9 (2) of the "Act").

Subsequent to this change in legal position, the Apex Court in the famous case of *K.M. Singh v. Secretary, Association of Indian Universities and others, A.I.R. 1992 S.C. 1356* has laid down the principle that, where an offer has been made by plaintiff that if named officials of respondent take special oath at specified religious place to the effect that resignation was not involuntary, the issue will be dismissed as withdrawn and if the oath was taken by officiais in stipulated manner, then it amounts to admission of respondent's claim by plaintiff under special oath, in view of S.20 of the Evidence Act. So, despite repeal of Indian Oaths Act, 1873, where the circumstances appear that one party offering to be bound by special oath and the second party made statement on such special oath, then the effect would be that compromise containing offer of special oath would be covered by S.20 of the Evidence Act (Please c.f. also, *Thakur Singh and ors. v. Inder Singh, A.I.R., 1976 P. & H. 28.*)

It is worth noticeable that in the case of *J.A. Munuswami Naidu v. K. Sp. Thyagaraya Chettair and ors., A.I.R. 1977 Mad. 273* it has been observed that "We are unable to accept the contention of the learned counsel that because Oaths Act of 1873 had been repealed, what the plaintiff had stated on special oath is not evidence. It may be that if the appellant was aware that the Oaths Act of 1873, was not inforce, he might have questioned the evidence of the plaintiff and submitted that it was not conclusive as against him. But, as it is, what the plaintiff had stated is evidence and the mere fact that he had given it under special oath will not deprive it of its status as evidence."

Recently, in the year of 2002, Hon. M.P. High Court has also discussed the matter in the case of *Pohap Singh alias Shambhu (dead) through L.Rs. Shrimati Rambai and ors. v. Nain Singh and ors. (P1.c.f. 2002 (3) M.P.L.J. 136).* In this case suit was filed for declaration of plaintiff's joint possession in the lands in dispute. The plaintiff's claim was that he was legitimate son of defendent No.2 and therefore, he was also entitled to these lands. The defendant No. 2 in the written statement admitted that woman to whom the plaintiff was born was married wife of defendant No. 2 but it was pleaded that after 2-3 months of her marriage she went to her father's place and lived there for one year and plaintiff was born to her during this period. She came to the house of the defendant No. 2 at the time of the death of his father and at that time she was pregnant. In the written statement an offer was made on behalf of the defendants that even now if Parvatibai says in the Court, by holding Gangajal and Ramayan that Nain Singh is son of Shambhu he is prepared to accept him. The counsel for the plaintiff

expressed before the Court that Parvatibai was prepared to accept the offer of the defendant made in para-6 of the written statement. Parvatibai was called in the Court and para 6 of the written statement was read-over to her. She expressed willingness to abide by it. By holding a Ramayan and Gangajal she made her statement before the Court. Thereafter, both sides expressed that they do not wish to lead any further evidence.

The statement made by Parvatibai was as under :-

> "मैं हाथ में ली हुई रामायण व गंगाजल की कसम खाकर कहती हूँ, उपस्थित न्यायालय नैनसिंह, उपस्थित न्यायालय शंभू उर्फ पोहप सिंह का पुत्र है, जो मेरे गर्भ से पैदा हुआ है।"

On the basis of such unchallenged testimony of Parvatibai, the trial Court held that Plaintiff Nain Singh is son of Pohap Singh alias Shambhu Prasad and decreed the suit for declaration of title and joint possession. Afterwords, appeal was filed and the first appellate Court dismissed the appeal then the second appeal was filed before Hon. The High Court.

The Court, while considering the matter laid before it stated that the compromise arrived at between the counsel for the plaintiff on behalf of his client and the defendant-appellant would be covered by section 20 of the Evidence Act and the plaintiff would be bound by the statement made by the defendant if the same is found to have been made strictly in accordance with the terms offered by him. The matter is not left there. After the statement on oath made by Pravatibai the defendant No.2 expressly stated that he does not wish to lead any evidence on that point. That rendered the statement of Parvatibai wholly unrebutted and it became of unimpeachable character". The Court held that, the two Courts below have rightly held on the basis of the material on record that the plaintiff is son of the defendant No.2 and he has a right to joint possession of the lands in dispute, and dismissed the appeal.

Thus, inspite of repeal of Indian Oaths Act, 1873, where an offer is made for special oath and it is accepted, and statement is given in the stipulated manner, such statement is considered as "evidence", in the eyes of law, and if it is not rebutted by cogent evidence (because, now such special oath can not be considered as conclusive proof), then the party offering such special oath is bound by such evidence and such type of compromise would be covered by S.20 of the Evidence Act.

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द.प्र.सं. की धारा 421 (1) (बी) के अन्तर्गत अर्थदण्ड उदगृहण हेतु जारी वारंट का लम्बित उद्‌गृहण प्रकरण पर प्रभाव

(संस्थानिक आलेख)

दोषसिद्धि पर दण्डादिष्ट किये गये अभियुक्त से अर्थदण्ड का उद्‌गृहण दण्ड प्रक्रिया संहिता, 1973 (अत्र पश्चात् केवल 'संहिता') की धारा 421 के अन्तर्गत किया जाता है। संहिता की धारा 421, पूर्व दण्ड प्रक्रिया संहिता, 1898 की धारा 386 का परिवर्धित रूप है। धारा 386 में अधिरोपित अर्थदण्ड के उद्‌गृहण हेतु कलेक्टर को वारण्ट द्वारा प्राधिकृत किये जाने का प्रावधान तो था [धारा 386 1 (ब)], लेकिन कलेक्टर ऐसे वारण्ट के अन्तर्गत अर्थदण्ड की राशि को भू–राजस्व के बकाया के रूप में वसूल नहीं कर सकता था अपितु उसे इस हेतु सिविल न्यायालय के समक्ष निष्पादन कार्यवाही करानी होती थी। इस प्रक्रिया को दुरूह एवं विलम्बकारी मानते हुए नवीन संहिता में बकाया अर्थदण्ड को भू–राजस्व के बकाया के रूप में उद्‌गृहण हेतु कलेक्टर को वारण्ट द्वारा प्रावधित करने विषयक प्रावधान किया गया।

अभियुक्त को अर्थदण्ड से दण्डादिष्ट किये जाने की दशा में दण्डादिष्ट करने वाला न्यायालय 'संहिता' की धारा 421 के अधीन इस हेतु कर्तव्याधीन है कि अधिरोपित अर्थदण्ड का उद्‌गृहण उक्त धारा में प्रावधित अधोउल्लेखित किसी एक या दोनों विधियों से किया जाये:

> **421. जुर्माना उद्‌गृहीत करने के लिए वारण्ट** – (1) जब किसी अपराधी को जुर्माने का दण्डादेश दिया गया है तब दण्डादेश देने वाला न्यायालय निम्नलिखित प्रकारों में से किसी या दोनों प्रकार से जुर्माने की वसूली के लिए कार्यवाही कर सकता है, अर्थात् वह –
>
> (क) अपराधी की किसी जंगम सम्पत्ति की कुर्की और विक्रय द्वारा रकम को उद्‌गृहीत करने के लिये वारण्ट जारी कर सकता है:
>
> (ख) व्यतिक्रमी की जंगम या स्थावर सम्पत्ति या दोनों से भू–राजस्व की बकाया के रूप में रकम को उद्‌गृहीत करने के लिए जिले के कलेक्टर को प्राधिकृत करते हुए उसे वारण्ट जारी कर सकता है।

उक्त प्रावधानों से यह प्रगट है कि अर्थदण्ड उद्‌गृहण हेतु न्यायालय जहां एक ओर चल सम्पत्ति की कुर्की एवं विक्रय के लिये वारण्ट जारी कर सकता है, वहीं दूसरी ओर दण्डादिष्ट अभियुक्त की अचल या चल सम्पत्ति से अर्थदण्ड वसूल किये जाने के लिये कलेक्टर को वारण्ट द्वारा ऐसी राशि भू–राजस्व के बकाया के रूप में वसूल करने के लिये अधिकृत कर सकता हैं।

अधिरोपित अर्थदण्ड के उद्‌गृहण हेतु नियम एवं आदेश (आपराधिक) के अध्याय 14 के नियम 352 सहपठित नियम 575 (8) के अन्तर्गत विविध न्यायिक प्रकरण पंजीबद्ध किया जाना आपेक्षित है। उक्त पृष्ठभूमि में विश्लेषण हेतु हमारे समक्ष मौजूद प्रश्न यह है कि क्या कलेक्टर को अर्थदण्ड वसूली हेतु 'संहिता' की धारा 421 (1) (बी) के अन्तर्गत वारण्ट द्वारा प्राधिकृत कर दिये जाने पर विविध दाण्डिक प्रकरण की कार्यवाही समाप्त हो जाती है। इस प्रश्न के पीछे मूल समस्या यह रही है कि दण्ड न्यायालयों के समक्ष अर्थदण्ड

उद्गृहण हेतु बहुल संख्या में विविध न्यायिक प्रकरण विचाराधीन हैं तथा तर्क की एक धारा यह रही है कि ऐसे मामलों में कलेक्टर को वारण्ट जारी किये जाने पर ऐसी कार्यवाही का स्वतः अवसान हो जाता है।

जैसा कि प्रारम्भ में स्पष्ट किया गया है कि अधिरोपित अर्थदण्ड का उद्गृहण न्यायालय का प्राथमिक दायित्व है, (संदर्भः – सिद्दप्पा विरूद्ध मैसूर राज्य, ए.आई.आर. 1957, मैसूर 52)। 'संहिता' की धारा 421(1) (बी) के अन्तर्गत कलेक्टर को वारण्ट द्वारा अर्थदण्ड की राशि भू–राजस्व के बकाया के रूप में उद्गृहीत करने के लिये प्राधिकृत करने विषयक प्रावधान उद्गृहण प्रक्रिया का एक भाग है, जिसका उद्धेश्य बकाया अर्थदण्ड की वसूली सुनिश्चित करना है।

अर्थदण्ड उद्गृहण के संबंध में आधारभूत प्रावधान भारतीय दण्ड संहिता, 1860 की धारा 70 में दिये गये हैं, जो निम्न हैः–

> **70. जुर्माने का छह वर्ष के भीतर या कारावास के दौरान में उद्गृहणीय होना – सम्पत्ति को दायित्व से मृत्यु उन्मुक्त नहीं करती** – जुर्माना या उसका कोई भाग, जो चुकाया न गया हो, दण्डादेश दिए जाने के पश्चात् छह वर्ष के भीतर किसी भी समय, और यदि अपराधी दण्डादेश के अधीन छह वर्ष से अधिक के कारावास से दण्डनीय हो तो उस कालावधि के अवसान से पूर्व किसी समय, उद्गृहीत किया जा सकेगा, और अपराधी की मृत्यु किसी भी सम्पत्ति को, जो उसकी मृत्यु के पश्चात् उसके ऋणों के लिए वैध रूप से दायी हो, इस दायित्व से उन्मुक्त नहीं करता।

उक्त प्रावधान दर्शाते हैं कि अधिरोपित अर्थदण्ड अधिरोपण के 6 वर्ष के अंदर तथा जहां अपराधी को 6 वर्ष से अधिक कारावास से दण्डित किया गया है तो ऐसी कालावधि के अवसान से पूर्व किसी समय उद्गृहीत किया जा सकेगा। वस्तुतः भारतीय दण्ड संहिता की धारा 70 में प्रावधित कालावधि के अंदर 'संहिता' की धारा 421 की प्रक्रिया का अनुसरण करते हुए अर्थदण्ड का उद्गृहण किया जाना आपेक्षित है। धारा 421 के प्रारंभिक भाग से अपने आप में यह स्पष्ट है कि न्यायालय अर्थदण्ड उद्गृहण के लिये उपधारा 1 (क) तथा 1 (ब) में से किसी एक या दोनों प्रक्रियाओं का उपयोग कर सकता है। धारा 421 की उपधारा (1) (ख) के अन्तर्गत उद्गृहण प्रक्रिया का महत्व इस बात में निहित है कि उसके अधीन संबंधित व्यक्ति की अचल संपत्ति भी दायित्वाधीन हो जाती है, जबकि उपधारा (1) (क) के अन्तर्गत केवल चल संपत्ति की कुर्की एवं विक्रय का प्रावधान है। द्वितीयतः उपधारा (1) (ख) के अन्तर्गत अर्थदण्ड को भू–राजस्व बकाया के रूप में किंचित अधिक प्रभावशाली तरीके से उद्गृहीत किया जा सकता है लेकिन ऐसी प्रक्रिया के अनुसरण भर से उद्गृहण नहीं हो जाता है। अतः कलेक्टर को वारण्ट जारी कर प्राधिकृत करने मात्र से उद्गृहण हेतु प्रारंभ की गई विविध आपराधिक कार्यवाही का अवसान होना युक्तियुक्त रूप से नहीं माना जा सकता है।

पूर्व 'संहिता' की धारा 386 उपधारा (2) तथा वर्तमान संहिता की धारा 421 उपधारा (2), जो समरूप है, राज्य शासन को उपधारा (1) के विषय में नियम बनने की शक्ति प्रदान करते हैं। राज्य शासन के द्वारा धारा 386.(2) के अन्तर्गत बनाये गये नियमों का उल्लेख नियम एवं आदेश (आपराधिक) के नियम

359 में किया गया है। इन नियमों के अनुसार चल संपत्ति की कुर्की एवं विक्रय हेतु जारी वारण्ट संबंधित न्यायालय द्वारा निष्पादन हेतु उस अधिकारिता के तहसीलदार को भेजा जायेगा जहां अभियुक्त निवास करता है। नियम 3 इस क्रम में यह भी प्रावधित करता है कि यदि अर्थदण्ड सत्र न्यायालय ने अधिरोपित किया है तो ऐसा वारण्ट सीधे जिला दण्डाधिकारी को भेजा जायेगा जो उसे निष्पादन हेतु तहसीलदार को पृष्ठांकित कर सकेगा।

उक्त विधिक स्थिति इंगित करती है कि सत्र न्यायालय के द्वारा अर्थदण्ड अधिरोपण की दशा में संहिता की धारा 421 (1) (क) के अधीन अर्थदण्ड वसूली का वारण्ट जिला दण्डाधिकारी को, जो सामान्यतः जिला कलेक्टर भी होता है, भेजा जाना चाहिये। यदि ऐसा वारण्ट जिला दण्डाधिकारी को भेजे जाने पर वसूली कार्यवाही का अवसान नहीं होता है तो धारा 421 (1) (ख) के अधीन जारी वारण्ट कलेक्टर को भेजे जाने से उद्‌गृहण कार्यवाही के अवसान की बात विधि सम्मत या तर्क सम्मत नहीं मानी जा सकती है।

पूर्वोक्त विश्लेषण के प्रकाश से यही निष्कर्ष निकलता है कि धारा 421 (1) (ख) के अन्तर्गत अर्थदण्ड उद्‌गृहण हेतु कलेक्टर को वारण्ट द्वारा प्राधिकृत किये जाने मात्र से उद्‌गृहण संबंधित विविध न्यायिक प्रकरण का अवसान नहीं हो जाता है।

प्रश्नाधीन विषय पर विधिक स्थिति के विश्लेषण के समापन से पूर्व नियम एवं आदेश (आपराधिक) के नियम 363 का उल्लेख यहां असंगत नहीं होगा, जो निम्नवत् है:

> 363. भारतीय दण्ड संहिता की धारा 70 के उपबन्ध यह अनिवार्य नहीं करते हैं कि शास्ति या उसके ऐसे भाग जो वसूल न हों को दण्डादेश की तारीख से पूरे 6 वर्ष की अवधि के लिये रजिस्टर पर रखा जावे, यदि उसे वसूल करने के हर संभव उपाय किये जा चुके हों तथा असफल रहे हैं। कोई सत्र न्यायाधीश, कोई जिला मजिस्ट्रेट (अब मुख्य न्यायिक मजिस्ट्रेट) तथा जिला मजिस्ट्रेट या जिला जज, जैसी भी स्थिति हो की लिखित अनुमति से जिला मजिस्ट्रेट (अब मुख्य न्यायिक मजिस्ट्रेट) के अधीनस्थ कोई मजिस्ट्रेट या सिविल न्यायालय किसी भी समय शास्ति की वसूल न हो सकने योग्य राशि जिसका कि भुगतान उसके न्यायालय या उसके पूर्वाधिकारी के न्यायालय में आदेशित हो चुका है, को बट्टे–खाते में डाल सकता है, यदि उसे प्रतीत होता है कि यह राशि वसूल नहीं की जा सकती है।

उक्त प्रावधानों से यह भली भांति प्रकट है कि बकाया अर्थदण्ड के उद्‌गृहण हेतु प्रारंभ की गयी विविध न्यायिक कार्यवाही को प्रत्येक मामले में भारतीय दण्ड संहिता की धारा 70 में प्रावधित 6 वर्ष की अवधि के लिये लम्बित रखना अपेक्षित नहीं है। यदि न्यायालय को यह विश्वास करने का आधार है कि अवशिष्ट अर्थदण्ड का उद्‌गृहण संहिता की धारा 421 में प्रावधित प्रक्रिया के अन्तर्गत कर पाना संभव नहीं है तो तत्संबंधित विविध न्यायिक प्रकरण को लम्बित रखने के बजाय नियम 363 के अनुसार अर्थदण्ड का बट्टे खातों में डालने की कार्यवाही की जानी चाहिये।

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LEGALITY OF CONVICTION BASED ON SUBSEQUENT ADMISSION OF GUILT BY ACCUSED

Institutional Article

The issue 'whether conviction can be based on the basis of admission of guilt by accused subsequent to denial at the stage of framing of charge' has long been a debatable and controversial issue. The legal opinion on this issue appears to be sharply divided. Here is an attempt to explore and excavate the correct legal position on this issue.

RELEVANT PROVISIONS

To begin with, a brief reference to the relevant provisions of law is necessary in order to understand the problem in its proper perspective. Chapter XVIII of the Code of Criminal Procedure, 1973 (in short 'the Code') provides the procedure for trial before a Court of Session. Section 228 of it deals with the framing of charge against the accused. Section 229 provides that - 'If the accused pleads guilty the judge shall record the plea and, may in his discretion, convict him there on'. In trial of warrant cases by Magistrate (Chapter XIX of the Code) Sections 241 and 246 (3) of 'the Code' respectively, provide for framing of charge in cases instituted on a police report and cases instituted otherwise than on a police report. Sections 241 and 246 (3) provide that if the accused pleads guilty the Magistrate shall record the plea and, in his discretion, convict him there on. Apparently, the provisions of Sections 229, 241 and 246 (3) are identical in terms of their texture.

Here it is apposite to state that no express provision is there stipulating a stage which may give an opportunity either to the Court or to the accused for seeking or offering, plea of guilt either in Chapter XVIII or Chapter XIX of 'the Code' except the aforesaid provisions relating to recording of plea, i.e. Sections 229, 241 and 246 (3). At the same time, there is nothing in the aforesaid two chapters or anywhere in 'the Code', so as to restrain an accused from pleading guilty at a subsequent stage. The genesis of the problem at hand in fact lies in the aforesaid obscurity.

VIEWS FOR & AGAINST

One view has been that as 'the Code' nowhere contemplates for a subsequent stage for recording the plea of guilt, therefore, it is not open either to the Court or to the accused to solicit or offer plea of guilt at a subsequent stage and any such exercise is totally illegal. Pronouncements of the Madhya Pradesh High Court in *Shivnaryan v. State, 1960 JLJ 1015 (SB),* Madras High Court in *In re Selvi and another, 1975 Cri.L.J. 113 (SB)* and Kerala High Court in *Daveed Chellayan v. The State, 1957 Cri.L.J. 478 (DB)* may usefully be referred in this connection. Though all these pronouncements are under 'the Code' of Criminal Procedure, 1898 (since repealed) still the provisions of 'the Code' pertaining to the issue under controversy, as far as these pronouncements are concerned, are almost mutatis mutandis to the provisions under the Code of 1898.

In *Shivnarayan's case (supra)* the Court observed that where there is no admission by the accused and conviction thereon u/s 243 Cr.P.C., the Magistrate is bound to hear the case and take the evidence adduced by both the parties. It is not open to the Magistrate under such circumstances to obtain a further plea of guilty from the accused or to acquit him without recording the prosecution evidence. In this case the accused, who was prosecuted for offences under Sections 117, 72/124 and Section 87/112 of the Motor Vehicles Act (old), abjured the guilt. While evidence for prosecution was being recorded, the accused moved an application expressing that he was willing to admit his guilt. The Magistrate after examining him u/s 342 (New Section 313) convicted him under section 112 of the M.V. Act imposing a fine of Rs. 5 only. The procedure was held to be illegal.

In *Selvi's case (supra)* the Court laid down as under:

> "If there is no admission on the part of the petitioners entailing a conviction in terms of Section 243 Cr.P.C., the inevitable duty of the Magistrate is to record evidence under Section 244, Cr.P.C. The Code does not warrant the subsequent admission of guilt on the part of the petitioners, when once there is a denial of the offence, under Section 242 Cr.P.C."

In *Daveed Chellayan's case (supra)* the Court observed:

> "Section 244 (old) provides that if the Magistrate does not convict the accused under S. 243 (old) or if the accused does not make an admission of guilt the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence. Section 245 provides that if the Magistrate upon taking evidence finds the accused not guilty he shall record an order of acquittal and that if he finds the accused guilty pass sentence upon him according to law.
>
> It is thus clear that when the accused pleaded not guilty when he was questioned by the learned Magistrate under S. 242 the Magistrate was bound to proceed in the manner prescribed by S. 244. The learned Magistrate has clearly gone wrong in questioning the accused a second time and in convicting him on the plea of guilty."

Taking a contrary view Allahabad High Court in *Ram Kishun v. State of U.P., 1996 Cri. L.J. 440(DB)* has held that if at any stage the accused pleads guilty and the Judge is satisfied that the said plea is voluntary, there is nothing in 'the Code' to prevent such a guilt (sic. plea) being recorded and conviction passed on such plea. The relevant observation is as under:

"It is stated at the outset that plea of guilt of an accused is a voluntary act. It does not partake character of confession. The stage of investigation is over much before the stage of pleading guilt reaches. The Judge's task is to find out truth involved in the case before him and if at any stage the accused pleads guilty and the Judge is satisfied that the said plea is voluntary plea and without any coercion-physical or mental, there is nothing in the Cr.P.C. to prevent such a guilt being recorded and thereafter on its basis, conviction can safely be recorded."

"There is no reason to restrict the applicability of Section 229 Cr.P.C. to a particular date or occasion but the purport of section is obvious that plea of guilt can be advanced by an accused at any stage of the trial after framing charge."

PLEA BARGAINING

With the aforesaid conflicting and sharply divided opinions on this point, the confusion further stands compounded because of the issue of 'plea bargaining' which as ordained by the Apex Court in *Kasambhai v. State of Gujarat and Anr., AIR 1980 SC 854* is not only unfair but unconstitutional as being violative of Article 21 of the Constitution of India. To quote:

"The conviction of the appellant was based solely on the plea of guilty entered by him and this confession of guilt was the result of plea bargaining between the prosecution, the defence and the learned Magistrate. It is obvious that such conviction based on the plea of guilty entered by the appellant as a result of plea bargaining cannot be sustained. It is to our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty, he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of the new activist dimension of Article 21 of Constitution."

'Plea bargaining', which is a concept of American Jurisprudence, consists of a negotiated agreement between a prosecutor and accused whereby the accused pleads guilty for some concession in sentence, usually a lenient sentence. It is also known as 'plea negotiation' and 'trading out'. 'Plea bargaining' may well be there at the initial stage of recording of plea of guilt or if there has been an initial denial then it may be there at a subsequent stage when accused pleads guilty. But it does not imply that whenever an accused pleads guilty either initially or at a subsequent stage, the plea can be tainted as an outcome of 'plea bargaining'. The fact situation may differ from case to case. To get a clear-cut picture on the issue relating to 'plea bargaining' some landmark decision of the Apex court may be referred.

In *Muralidhar Meghraj Loya v. State of Maharashtra, AIR 1976 SC 1929* the accused, who was facing trial for charges u/ss 7 (a) and 16 (1) (a) of the Prevention of Food Adulteration Act, 1954 (in short 'the P.F.A. Act'), for selling adulterated *khurasani oil,* initially abjured the guilt but on being questioned u/s 342 of the Old Code (New Section 313), the accused pleaded guilty to the charge, which led to his conviction followed by a fleebite sentence of fine of Rs. 250/-. In revision the High Court enhanced the sentence to a minimum of six months and a fine of Rs. 1,000/- on the ground that the offence fell within section 16 (1)(a) which provides for a minimum sentence. The aggravated conviction and sentence was challenged before the Apex Court. The Apex Court felt that the whole process was suggestive of a tripartite consensual arrangement based on 'plea bargaining'. However, the appeal failed because the aggravated conviction and enhanced sentence was found correct.

In *Kisan Trimbak Kothula and Ors. v. State of Maharashtra, AIR 1977 SC 435* (Three Judge Bench) the accused persons, who were facing trial for offences under 'the P.F.A. Act' pleaded guilty for charges u/ss 7 (i) and 7(ii) r/w/ s 16 (1)(a)(ii) relating to storing and sale of adulterated buffalo milk. The Magistrate on conviction sentenced the accused persons (Accused No. 1 firm and No. 2 and 3 its partners) leniently with a fine of Rs. 500/- each. In an appeal for enhancement of the sentence the High Court enhanced the sentence to six month's imprisonment and fine of Rs. 500/- for accused No. 2 and 3 on the ground that it was minimum obligatory sentence. The Apex Court after an elaborate discussion, though suspecting that the entire process smacked of 'plea bargaining', dismissed the appeal on the ground that minimum sentence was imposed.

In *Ganeshmal Jashraj v. Government of Gujarat and Anr., AIR 1980 SC 264,* again a case u/s 16(1)(a)(i) of the P.F.A. Act, the appellant initially pleaded not guilty to the offence charged against him but while being examined u/s 313 of 'the Code' he admitted his guilt by submitting an application. The Magistrate thereupon convicted and sentenced him to suffer simple imprisonment till rising of the Court and a fine of Rs. 300/-. In a *suo motu* revision the High Court enhanced the sentence to imprisonment of three months and a fine of Rs. 500/-, finding the same to be minimum prescribed sentence. In appeal the Apex Court was of the view that subsequent admission was result of 'plea bargaining', therefore, the Magistrate was not entitled to take into account such admission . The appeal was allowed and the matter was remanded back for retrial from the stage of examination u/s 313 of 'the Code'.

In *Kasambhai's case (supra)* the accused was charged u/s 16 (1)(a) (i) r/w/s 7 of 'the P.F.A Act' for selling adulterated turmeric powder. After some evidence was led on behalf of the prosecution, the appellant pleaded guilty and

the Magistrate after recording a finding of conviction let-off him with a nominal sentence of imprisonment till raising of the Court and a small fine. The High Court in *suo motu* revision enhanced the sentence to the prescribed minimum, i.e three months imprisonment and fine of Rs. 500/-. In appeal, the Apex Court found that the entire exercise was outcome of 'plea bargaining' and hence conviction and sentence were set aside and matter was sent back for trial.

In *Thippaswamy v. State of Karnataka, AIR 1983 SC 747* the accused on being charged for an offence u/s 304-A I.P.C. pleaded guilty. The Magistrate after conviction imposed upon him only a sentence of fine of Rs. 1,000/-. The High Court in appeal imposed the substantive sentence of rigorous imprisonment for one year. In appeal to the Apex Court, it was held that the conviction and sentence, being result of 'plea bargaining', could not be upheld. The matter was remanded back for trial.

In *State of Uttar Pradesh v. Chandrika, AIR 1999 SC 164* the trial court convicted the appellant for an offence u/s 304 part-I I.P.C.and sentenced him to eight years R.I. In appeal the High Court maintained the conviction but altered the sentence to the period of imprisonment already undergone and a fine of Rs. 5,000/- Finding this alteration of sentence a result of 'plea bargaining' the Apex Court in appeal set aside the same and remanded the matter to the High Court.

From the aforesaid decisions it is amply clear that a conviction and sentence may be rendered illegal and unconstitutional if the same is based on plea of guilty which was procured through the process of 'plea bargaining' irrespective of the fact that the plea was at the initial stage contemplated under 'the Code' or at a later stage after initial denial, or at appellate stage. The corresponding angle of this proposition is that a conviction or sentence may not be characterized as bad or unconstitutional simply because it is based on plea of guilty, which was recorded after initial denial.

This brings us to the pronouncement of the Apex Court in *State of Maharashtra v. Sukhdeo Singh and another, AIR 1992 SC 2100,* which has a close bearing on the issue under consideration. In this case the Apex Court considered the scheme of Chapter XVIII of 'the Code' and concluded with absolute clarity that there is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of trial. It is apposite to reproduce here the relevant observations of the Apex Court:

> "Where the Judge frames the charge, the charge so framed has to be read over and explained to the accused and the accused is required to be asked whether he pleads guilty of the offence charged or claims to be tried. Section 229 next provides that if the accused

pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon. The plain language of this provision shows that if the accused pleads guilty the Judge has to record the plea and thereafter decide whether or not to convict the accused. The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt. If, however, the accused does not plead guilty or the learned Judge does not act on his plea he must fix a date for the examination of witnesses i.e. the trial of the case. *There is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of the trial.* But before the trial Judge accepts and acts on the plea he must administer the same caution unto himself. This plea of guilt may also be put forward by the accused in his statement recorded under S. 313 of the Code."

(emphasis supplied)

From the aforesaid pronouncement it clearly follows that plea of guilt is nothing but an admission of all the facts constituting the offence. A Judge while considering the plea of guilt must be satisfied that not only the plea of the accused is clear, unambiguous and unqualified but also that he understood the nature and allegations against him. Application of caution and circumspection on the part of the Court is required before accepting and acting on such plea of guilt. The requirement of caution and circumspection is applicable irrespective of whether the plea of guilty is initial plea or a plea subsequent to the initial denial. The proposition of law laid down in *Sukhdev Singh's case (supra)* makes it crystal clear that the contra view expressed on this point by various High Courts including one by our own High Court in *Shivnarayan's case (supra)* does not reflect the correct position of law rather the legal position on this point happens to be one enunciated in *Sukhdev Singh's case (supra)*. However, before acting upon such plea of guilt the Court must be satisfied that it is clear, unambiguous, unqualified, voluntary, without any coercion - physical or mental and that it is not the result of 'plea bargaining'.

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दण्ड प्रक्रिया संहिता, 1973 की धारा 249 के अन्तर्गत निरस्त परिवाद का पुनर्स्थापन

संस्थानिक आलेख

परिवाद के आधार पर संस्थित मामले में, चाहे उसका विचारण वारण्ट प्रक्रिया के अन्तर्गत किया जा रहा हो अथवा संमस प्रक्रिया के अन्तर्गत, सामान्य नियम के रूप में परिवादी की उपस्थिति न्यायालय के समक्ष आवश्यक है। दण्ड प्रक्रिया संहिता, 1973, जिसे अत्र पश्चात् 'संहिता' कहा जायेगा, की धारा 249 विनिर्दिष्ट परिस्थितियों में परिवादी की अनुपस्थिति की दशा में अभियुक्त को उन्मोचित करने का विवेकाधिकार न्यायालय को प्रदान करती है। 'संहिता' की धारा 256 विनिर्दिष्ट परिस्थितियों में परिवादी की अनुपस्थिति या उसकी मृत्यु की दशा में अभियुक्त को दोषमुक्त किये जाने का प्रावधान करती है।

उक्त दोनों प्रावधान परिवाद की सुनवाई के दौरान परिवादी की अनुपस्थिति के परिणामों को दर्शाते हैं। संहिता की धारा 249 के अन्तर्गत न्यायालय अभियुक्त को उन्मोचित करने के लिये उसी दशा में अग्रसर हो सकता है जबकि मामला विधिपूर्वक शमनीय अथवा असंज्ञेय प्रकृति का हो तथा आरोप विरचित न हुए हों।

विधिक क्षेत्रों में इस बारे में मतवैभिन्यता रही है कि क्या संहिता की धारा 249 के अन्तर्गत अभियुक्त को उन्मोचित करने के पश्चात् न्यायालय परिवाद प्रकरण को पुनर्स्थापित कर सकता है। जहां एक ओर *वाहेंगबाम टोमचाऊ सिंह विरूद्ध चिंगाखाम, ए.आई.आर. 1961 मणिपुर 34, इन रि वासुदेव नारायन फड़नीस, ए.आई.आर. 1950 बाम्बे 10 (खण्डपीठ) तथा आर. आर. वर्मा विरूद्ध टी. एन. ललानी, 1980 क्रि.ला.ज, (एन.ओ.सी.)* 5 दिल्ली में यह मताभिव्यक्ति की गई है कि न्यायालय उन्मोचन के आदेश को वापस लेते हुए परिवाद को पुनर्स्थापित करने की अधिकारिता रखता है क्योंकि ऐसा आदेश जो गुण दोष पर आधारित नहीं है, 'संहिता' की धारा 362 की परिधि में 'निर्णय', अंतिम आदेश की परिधि में नहीं आता है; वहीं इसके विपरीत *लालचन्द एवं अन्य विरूद्ध असिस्टेंट कलेक्टर कस्टम्स, 1989 क्रि.ला.ज. 731 (जम्मू काश्मीर), एस. लुईसराज विरूद्ध रोसलिन एल. राज, क्रि.ला.ज, 1981 पृष्ठ 791 (मद्रास), पायोनियर स्पोर्टस (इण्डिया) प्रा. लि. विरूद्ध राज्य, 1992 (2) क्राइम्स 901 (मद्रास) तथा चुन्नीलाल भुईया विरूद्ध विकास भुईया, 1988 क्रि.ला.ज, 791 गोहाटी* में यह ठहराया गया है कि धारा 249 के अन्तर्गत अभियुक्त के उन्मोचन के साथ ही न्यायालय पद कार्यनिवृत्त हो जाता है तथा दण्ड प्रक्रिया संहिता में ऐसा कोई भी प्रावधान नहीं है जो न्यायालय को उन्मोचन के आदेश पर पुनर्विचार कर परिवाद प्रकरण को पुनर्स्थापित करने के लिये अनुज्ञात करता हो।

उक्त परस्पर विरोधी मतों की पृष्ठभूमि में शीर्षस्थ न्यायालय ने *बिन्देशवरी प्रसाद सिंह विरूद्ध काली सिंह, ए.आई.आर. 1977 एस. सी. 2432* के मामले में सम्पूर्ण स्थिति पर विचार करते हुए यह स्पष्ट विधिक प्रतिपादन किया है कि चूंकि संहिता (पुरानी) के अधीन मजिस्ट्रेट को अपने आदेश पर पुनर्विचार करने की कोई अन्तर्निहित शक्ति प्राप्त नहीं थी अतः अभियुक्त को उन्मोचित करने वाले आदेश को बदलने तथा परिवाद मामले को पुनर्स्थापित करने की अधिकारिता मजिस्ट्रेट को नहीं है। माननीय शीर्षस्थ न्यायालय के शब्दों में :

> ".....there is absolutely no provision in the Criminal P.C. of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Criminal P.C. does contain a provision for inherent powers, namely, S. 561 A which, however, confers these powers on the High Court and the High Court alone. Unlike S. 151 of Civil P.C., the subordinate criminal Courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision. In fact, after having passed the order dated 23-11-1968, the Subdivisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever."

मेजर जनरल ए.एस. गौरैया एवं एक अन्य विरूद्ध एस. एन. ठाकुर एवं एक अन्य, ए. आई. आर. 1986 एस. सी. 144 में शीर्षस्थ न्यायालय ने पुनः इस बिन्दु पर पूर्व न्याय दृष्टांतों की समीक्षा एवं विश्लेषण करते हुए तथा *बिन्देशवरी प्रसाद सिंह (पूर्वोक्त)* का संदर्भ लेते हुए यह प्रगट किया है कि परिवाद मामले के पुनर्स्थापन हेतु प्रस्तुत आवेदन पर विचार के समय न्यायालय को यह देखने की आवश्यकता नहीं है कि निरस्त परिवाद को पुनर्स्थापित करने के आवेदन पर विचार करने से मजिस्ट्रेट को प्रतिषिद्ध करने वाला प्रावधान संहिता में है या नहीं; अपितु यह देखना चाहिए कि क्या संहिता में ऐसा कोई प्रावधान है जो किसी अन्य प्रावधान के अभाव में अन्तर्निहित शक्तियों का प्रयोग करने के लिये न्यायालय को अनुज्ञात करता हो। *बी. डी. सेट विरूद्ध वी. पी. देवान, (1971) 7 डी. एल. टी. 162* में दिल्ली उच्च न्यायालय की खण्डपीठ द्वारा प्रगट किये गये इस मत को अतिष्ठित करते हुए कि न्यायालय अपने आदेश पर पुनर्विचार कर सकती है, माननीय शीर्षस्थ न्यायालय उक्त मामले में निर्दिष्ट किया कि:

> "So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code a Magistrate cannot exercise any inherent jurisdiction."

यहां यह बात ध्यान देने योग्य है कि शीर्षस्थ न्यायालय के द्वारा किया गया उक्त विधिक प्रतिपादन 'संहिता' की धारा 249 एवं धारा 256 दोनों के ही अन्तर्गत निरस्त किये गये परिवाद प्रकरण के विषय में समान रूप से प्रयोज्य है क्योंकि उसमें अभियुक्त के 'उन्मोचन' अथवा 'दोषमुक्ति' को अंतिम आदेश निरूपित करते हुए उस पर पुर्नविचार हेतु संहिता में कोई विनिर्दिष्ट प्रावधान न होने तथा परिवाद के पुनर्स्थापन हेतु मजिस्ट्रेट को अन्तर्निहित अधिकारिता न होने की बात कही गई हैं।

उक्त परिप्रेक्ष्य में यह भलीभांति प्रगट है कि 'संहिता' की धारा 249 के अन्तर्गत पारित उन्मोचन आदेश तथा धारा 256 के अन्तर्गत पारित दोषमुक्ति का आदेश अंतिम है तथा मजिस्ट्रेट को ऐसे परिवाद प्रकरण को, जिसमें उक्त आदेश पारित किया गया है, पुनर्स्थापित करने की अधिकारिता नहीं है। लेकिन इस विधिक प्रतिपादन के बारे में माननीय शीर्षस्थ न्यायालय द्वारा *मोहम्मद अजीम विरूद्ध ए. वैंकटेश एवं अन्य, 2002 (7) एस.सी.सी. 726* में किये गये विनिश्चय से किंचित शंका उत्पन्न होने की बात कतिपय विधिक क्षेत्रों में उठाई गई है। यह मामला पराकम्य लिखत विलेख अधिनियम, 1881 की धारा 138 के अपराध हेतु (तत्समय समंस विचारण योग्य) प्रस्तुत परिवाद को मजिस्ट्रेट द्वारा परिवादी की अनुपस्थिति में निरस्त कर अभियुक्त को दोषमुक्त करने के आदेश के क्रम में परिवादी द्वारा परिवाद के पुनर्स्थापन हेतु प्रस्तुत प्रार्थना के विषय में था। मजिस्ट्रेट न्यायालय तथा तत्पश्चात् उच्च न्यायालय ने यह आवेदन स्वीकार नहीं किया। माननीय शीर्षस्थ न्यायालय ने इस मामले में यह मताभिव्यक्ति की कि मजिस्ट्रेट ने परिवादी की अनुपस्थिति के लिये परिवाद को निरस्त करने तथा परिवादी द्वारा अपनी अनुपस्थिति हेतु पर्याप्त कारण दर्शाने के बावजूद भी उसे पुनर्स्थापित करने से इंकार करने में भूल की है।

मोहम्मद अजीम (पूर्वोक्त) के मामले में, जो माननीय सर्वोच्च न्यायालय की द्विसदस्यीय पीठ द्वारा विनिश्चित किया गया है, *मेजर ए.एस. गौरैया (पूर्वोक्त)* तथा *बिन्देशवरी प्रसाद सिंह (पूर्वोक्त)*, जो कि द्विसदस्यीय पीठ के विनिश्चय थे, पर विचार किये बिना उक्त मताभिव्यक्ति की गई है क्योंकि उक्त दोनों मामलों का कतई कोई संदर्भ उसमें नहीं है। अतः यह विचारणीय हो जाता है कि क्या मोहम्मद अजीम (पूर्वोक्त) के विनिश्चय को आबद्धकारी न्याय–निर्णय कहा जा सकता है?

उक्त विषय पर किसी नतीजे तक पहुंचने के लिये न्याय–निर्णय के आबद्धकर स्वरूप के विषय में कतिपय विधिक प्रतिपादनों का संदर्भ आवश्यक है। *जबलपुर बस ऑपरेटर्स एसोसिएशन एवं एक अन्य विरूद्ध मध्यप्रदेश राज्य एवं एक अन्य, 2003 (1) एम.पी.जे.आर. 158 (पूर्ण पीठ)* में यह स्पष्ट प्रतिपादन किया गया है कि शीर्षस्थ न्यायालय की समान न्यायाधीशों की दो पीठों के विनिश्चयों में विरोधाभास की स्थिति में पूर्ववर्ती पीठ का विनिश्चय बंधनकारी होगा यदि उसे पश्चात्वर्ती पीठ के द्वारा स्पष्टीकृत नहीं किया गया है। *बिहार राज्य विरूद्ध कालिका, 2003 (5) एस.सी.सी. 448* में भी यह स्पष्ट किया गया है कि समान संख्या के न्यायाधीशों से गठित दो पीठों के परस्पर विरोधी विनिश्चयों की स्थिति में पश्चात्वर्ती विनिश्चय 'पर इनक्यूरियम' होने के कारण बंधनकारी नहीं होगा। ऐसी दशा में *मोहम्मद अजीम (पूर्वोक्त)* में किये गये विनिश्चय को आबद्धकर स्वरूप का नहीं माना जा सकता है।

पूर्वोक्त विश्लेषण के प्रकाश में यह विधिक स्थिति स्पष्ट रूप से उभर कर सामने आती है कि परिवादी की अनुपस्थिति में संहिता की धारा 249 व धारा 256 के अन्तर्गत निरस्त किये गये परिवाद को पुनर्स्थापित करने की अधिकारिता मजिस्ट्रेट को नहीं है।

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PENAL LIABILITY OF THE OWNER/DRIVER OF A VEHICLE UNDER MOTOR VEHICLES ACT, 1988 WHEN THE VEHICLE IS BEING DRIVEN WITHOUT REGISTRATION/PERMIT/INSURANCE OR DRIVING LICENCE

Institutional Article

A comparative study of phraseology of Sections 39 (relating to necessity for registration) and 66 (relating to necessity for permits) creates some doubts as to whether the owner or the driver or both are liable under these Sections. The operating Sections namely Sections 192 and 192-A are also not in absolute consonance with substantive Sections (Sections 39 and 66) and cloud of uncertainty continues to loom large over the exact intent of the legislature. The confusion can best be understood by placing side by side the substantive and the operative parts of Sections 39 and 66 respectively.

Section 39. Necessity for registration.— No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven In any [public place or in any other place unless the vehicle is registered in accordance with this Chapter	**Section 66. Necessity for permits.-** (1) No owner of a motor vehicle shall use or permit the use of the vehicle as as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted .....
Section 192. Using vehicle without Registration.-(1) Whoever drives a vehicle or causes or allows a motor to be used in contravention of the provisions of Section 39 shall be punishable for the first offence with a fine which may extend to five thousand rupees but shall not be less that two rupees for a second or subsequent offence with imprisonment which may extend to one year or with fine which may extend to ten thousand rupees but shall not be less that five thousand rupees or with both : Provided that the Court may, for reasons to be recorded, impose a lesser punishment.	**Section 192-A. Using vehicle without permit**.-(1) Whoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of sub-section (1) of Section 66 or in contravention of any condition of a permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, shall be punishable for the first offence with a fine which may extend to five thousand rupees but shall not be less than two thousand rupees and for any subsequent offence with imprisonment which may extend to one year but shall not be less than three months or fine which may extend to ten thousand rupees but shall not be less than five thousand rupees or with both : Provided that the court may for reasons to be recorded, impose a lesser punishment.

A comparison between Sections 39 and 66 would thus reveal that while Section 39 speaks of the liability of owner as well as of driver, Section 66 speaks about the liability of only the owner. Further Section 192 which is the punishment clause for committing offence under Section 39 incorporates the word 'or' in the following manner : *"whoever drives the motor vehicle or causes or allows the motor vehicle to be used in contravention of provisions of Section 39 ..."* The usage of the word 'or' may create a doubt as to whether the legislature intended that the liability ought to be fixed on either the driver or the owner. Further a dichotomy also arises in the sense that whereas Section 39 uses the word 'and', in Section 192 the word 'or' is there, meaning there-by that Section 39 talks of joint liability but Section 192 talks of alternate liability of either the driver or the owner.

In order to understand the nature and scope of liability under Section 39 read with Section 192, it is important to truly understand the purport of the legislation. As per Section 39 it was intended that any driver of a motor vehicle as also the owner of the motor vehicle shall be liable if the vehicle is driven without the same having been registered. There is no gainsaying that the word 'or' in Section 192 purports to cut down the liability of either of the two persons i.e. the owner or the driver. Thus reading Section 39 together with Section 192 it becomes eminently clear that the liability in such a case is joint i.e. both the driver and the owner are liable.

The mist is even deeper in case of Section 66 read with Section 192-A, Motor Vehicles Act. Section 66 does not even talk of the driver. It only talks about the liability of the owner. However Section 192-A which ought to have been merely the operating part of Section 66, impinges on the liability part and acquires the status of substantive Section as well as it separately purports to fix the liability. That being so the situation is this that although Section 66 talks of liability of only the owner, Section 192-A talks of the liability of the owner or the driver. Again such an anomalous situation can be resolved by giving equal importance to both the Sections which can only be done by holding both the driver as well as owner as jointly liable. Such a construction would also be necessary as it would leave no room for distinction between the liability aspects under Section 39 *vis-à-vis* Section 66.

Thus it appears that although the Sections mentioned are not happily worded so as to make the liability aspect crystal clear, but still one has to apply the rule of harmonious construction and such a construction paves the way for joint liability of driver as well as owner in the case of breach under Section 39 or 192.

Similar construction needs to be applied for imposing liability on driver and the owner in case the vehicle is being driven without insurance against third party risk. Section 146 is the substantive Section which prohibits use of motor vehicle without there being a policy of insurance. Section 196 is the op-

erative part calling for fine upto Rs. 1,000/- or imprisonment of 3 months or with both in case the vehicle is being driven without insurance. In both the substantive Sections i.e. Section 146 as well as in the operating Section i.e. Section 196, the word 'or' has been used. However applying the same rule of construction and the intent of the Legislature it appears that both the driver as well as the owner are jointly liable.

It would be apt to quote the noted author Hon'ble Shri Justice G.P. Singh who in his **"Principles of Statutory Interpretation - Eighth Edition"** at page 370 says thus - *"the word 'or' is normally disjunctive and 'and' is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context (Author quotes from AIR 1990 SC 1277)". The noted author further writes - "But if the literal meaning of the words produces an unintelligible or absurd result, 'and' may be read for 'or' and 'or' for 'and' even though result of so modifying the words is less favourable for the subject provided that the intention of the Legislature is otherwise quite clear".* Thus the word 'or' used in Sections 39, 66, 192, 192-A, 146 and 196 has to be read as 'and' in order to comprehend the intent of the legislature. Legislature could not have intended to punish only the driver whereas the fault in not registering the vehicle or not getting its permit lied with the owner. Driver's liability was there as the Legislature intended that the driver should see to it that he is driving the vehicle which confirms to relevant provisions relating to the registration, and permit of insurance.

There is no confusion regarding the liability of the driver and the owner for driving the vehicle without licence. Liabilities of both are separately provided for under Section 180 (for owner) and under Section 181 (for driver). Liability of driver for driving the vehicle without licence is ofcourse less (upto Rs. 500/- fine or three months imprisonment or both) compared to liability of owner (fine upto Rs. 1,000/- or imprisonment upto 3 months or both).

Punishment Aspect — While there is no distinction as to the punishments required to be imposed under these two sections which is minimum of Rs. 2,000/- and maximum upto Rs. 5,000/- but in subsequent offence the distinction becomes evident and with repeated offence under Section 66 read with Section 192-A there is provision for minimum imprisonment of three months which may extend upto one year or with fine of minimum Rs. 5,000/- and maximum Rs. 10,000/- or with both whereas subsequent offence under Section 39calls for no minimum jail punishment but only with minimum fine of Rs. 5,000/- and maximum fine of Rs. 10,000/- or maximum imprisonment upto one year or with both.

CONCLUSION - Over all conclusion is that both, driver as well as the owner are jointly and severally liable for committing the offence for driving the vehicle or allowing it to be used without registration, permit, insurance and licence.

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BOOK REVIEW

5 Years' MPHT's Consolidated Digest 2000 to 2004 prepared by Anil Agrawal and published by Suvidha Law House Bhopal is a comprehensive compilation of citations on various laws and Acts. The layout is very attractive and compels reader to browse through the pages. Case Law on Acts pertaining to States of Madhya Pradesh and Chhattisgarh is a special feature of this compilation making the treatise as equally useful in both the sister States. The highlights of this digest are that it is very methodic, cases are easy to locate and citations are very relevant. The head notes in bold letters instantaneously attract attention. Fonts are of size which make the reading very convenient. Topical index is provided in the beginning and topics are arranged alphabetically facilitating expeditious search on any given topic. Using the "table of cases" provided after the topical index, one can quickly turn over pages and zero-in on the desired case. An updated collection of cases helps in understanding the contemporaneous trend from the view point of the Courts in the related fields. All in all a very useful book for Judges and Advocates.

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All that mankind has done, thought, gained or been : it is lying as in magic preservation in the pages of books.

THOMAS CARLYLE

PART - II

NOTES ON IMPORTANT JUDGMENTS

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

Culpable negligence – Medical negligence to fasten penal liability u/s 304-A, nature of – Held, though word 'gross' not used in Section 304-A, still gross negligence has to be proved– Prosecution of medical practitioners for medical negligence, guidelines for.

Jacob Mathew v. State of Punjab and another

Judgment dt. 5.8.2005 by the Supreme Court in Criminal Appeal No. 144 of 2004, reported in (2005) 6 SCC 1

Held :

We sum up our conclusions as under :

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three; "duty", "breach" and "resulting damage".

(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional.

So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally

available at the particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence of one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in *Bolam v. Friern Hospital Management Committee, (1957) I WLR 582* holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has if at all, a limited application in trial on a charge of criminal negligence.

In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in *Suresh Gupta (Dr.) v. Govt. of NCT of Delhi, (2004) 6 SCC 422* and reaffirm the same. *Ex. abundanti cautela,*

we clarify that what we are affirming are the legal principles laid down and the law as stated in *Suresh Gupta's* case.

As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam (Supra) test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has ben levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

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265. CIVIL PROCEDURE CODE, 1908 – Section 107 (1)(c)

Whether Appellate Court can deal with issues other than those framed by trial Court – Held, No – Issue of adverse possession not framed and decided by trial Court – Appellate Court has no power to deal with such issue – Law explained.

Vishwanatha Achari v. Kanakasabapathy

Judgment dt. 26.7.2005 by the Supreme Court in Civil Appeal No. 3398 of 2000, reported in (2005) 6 SCC 56

Held :

It appears from the memorandum of appeal that in ground 8 it was specifically stated as follows :

> "The appellate court below had erred in passing issues other than those framed by the trial court thereby depriving the appellant to tender evidence and documents on the new issues apart from the illegality and infirmity attached herewith."

A question was also formulated i.e. whether the lower appellate court is justified in dealing with issues other than those framed by he trial court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter the plaintiff's evidence. It has been clearly stated that there was no issue framed regarding the adverse possession. The lower appellate court was not justified in deciding issues which were not framed. The High Court seems to have taken a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when the specific stand of the appellant was that there was no issue framed relating to adverse possession and, therefore, the first appellate court should not have recorded any finding in that regard. The trial court had not specifically framed any issue relating to adverse possession. Under Section 107 CPC, the appellate court has power to frame issue other than those framed by the trial court. But here again the requirement is to refer them for trial. Consequentially, the defendant would have got opportunity to adduce evidence in that regard.

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266. CONTEMPT OF COURTS ACT, 1971– Section 2 (b)

Civil contempt – Jurisdiction of Court dealing with contempt matters – Such Court cannot deal with the correctness or otherwise of the order – Law explained.

Director of Education, Uttaranchal and others v. Ved Prakash Joshi and Others

Judgment dt. 15.7.2005 by the Supreme Court in Civil Appeal No. 3713 of 2005, reported in (2005) 6 SCC 98= 2005 (3) MPLJ 415 (SC)

Held :

While dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision which has received its finality had

been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision. A similar view was taken in *K.G. Derasari v. Union of India (2002) 10 SCC 496.* The court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher court if according to him same is not legally tenable. Such a question has necessarily to be agitated before the higher court. The court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the court passing the judgment or order. Right or wrong the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt, the court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional directions or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the High Court is set aside.

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267. CRIMINAL PROCEDURE CODE, 1973– Section 313

Examination of accused u/s 313, object of – Examination is part of fair trial – Generally, composite questions should not be asked – Omission to put questions regarding some incriminating material, effect of – Appellate Court can call upon the accused/counsel to explain about such circumstances – Law explained.

State of Punjab v. Swaran Singh

Judgment dt. 25.7.2005 by the Supreme Court in Criminal Appeal No. 763 of 1997, reported in (2005) 6 SCC 101

Held :

As regards the questioning of the accused under Section 313 CrPC, the relevant provision is as follows :

> *"313. Power to examine the accused.*– (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court–
>
> (a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;
>
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally, composite questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial.

In *State (Delhi Admn.) v. Dharampal, (2001) 10 SCC 372* it was held as under; (SCC pp. 376-77, para 13)

> "13. Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him."

In *Jai Dev v. State of Punjab, (1963) 3 SCR 489* it was observed thus; (SCR p. 510)

"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity."

In *Bakhshish Singh Dhaliwal v. State of Punjab, (1967) 1 SCR 211* a three-Judge Bench of his Court held that : (SCR p. 225 D)

"It was not at all necessary that each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under that section;"

In *Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793* a three-Judge Bench of this Court considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, widening the sweep of the provision concerning examination of the accused after closing prosecution evidence made the following observations: (SCC p. 806, para 16)

"It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

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268. WORDS & PHRASES :

Expression 'infructuous', meaning of

Union of India and others v. Narender Singh

Judgment dt. 29.7.2005 by the Supreme Court in Civil Appeal No. 1813 of 2003, reported in (2005) 6 SCC 106

Held :

The expression infructuous means ineffective, unproductive and unfruitful. It is derived from the Latin word "fructus" (fruit). By implementing an order, the challenge to the validity of the order is not wiped out and is not rendered redundant.

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269. CONTEMPT OF COURTS ACT, 1971 – Sections 2 (c), 4 and 5
Contempt of Court – Fair criticism – Criticism based on malice or attempt to impair the administration of justice is not a fair criticism – Law explained.
Rajendra Sail v. M.P. High Court Bar Association and others
Judgment dt. 21.4.2005 by the Supreme Court in Criminal Appeal No. 398 of 2001, reported in (2005) 6 SCC 109

Held :

It has been repeatedly held that the rule of law is the foundation of democratic society. The judiciary is the guardian of the rule of law. The confidence, which the people repose in the courts of justice, cannot be allowed to be tarnished, diminished or wiped out by the contemptuous behaviour of any person. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded. It is for this purpose that the courts are entrusted with extraordinary powers of punishing for contempt of court those, who indulge in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalising it. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice.

The law as it stands today is same as has been aptly put by Lord Atkin in *Andre Paul Terence Ambard v. Attorney General of Trinidad and Tobago, AIR 1936 PC 141* (AIR pp. 145-46)

> "No wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

In *Aswini Kumar Ghose v. Arabinda Bose, AIR 1953 SC 75* it was held that the Supreme Court is never oversensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

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270. INDIAN PENAL CODE, 1860 – Section 300 Exception 4

Section 300 Exception 4, applicability of – To bring a case under Exception 4, the accused should not only prove absence of premeditation but also that he has not taken undue advantage or acted in a cruel or unusual manner – Law explained.

Suresh Chandra v. State of U.P.

Judgment dt. 21.7.2005 by the Supreme Court in Criminal Appeal No. 746 of 2003, reported in (2005) 6 SCC 130

Held :

This Court granted leave confined to the question whether the conviction could be converted into one for the offence punishable under Section 304 IPC instead of Section 302 IPC.

On this aspect, learned counsel for the appellant contended that Exception 4 to Section 300 IPC is attracted. Exception 4 reads as under :

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.
>
> *Explanation.* – It is immaterial in such cases which party offers the provocation or commits the first assault."

Learned counsel for the appellants submits that the incident had happened without any premeditation or prior concert, upon a sudden quarrel and the resultant attack on the victims was unintentional and, therefore, the offence would appropriately fall under Exception 4 punishable under Section 304 Part I or II. We find it difficult to countenance this argument. Though there was absence of premeditation and it was a case of sudden fight, that is not sufficient to bring the offence committed by the accused within the purview of Exception 4. The further requirement of Exception 4 that the offender should not have taken undue advantage or acted in a cruel or unusual manner should be satisfied. The very fact that the accused-appellants used the firearms in the course of a frivolous quar-

rel triggered off by the sarcastic remark of Ravindra Singh would demonstrate beyond doubt that the appellants acted in a crual manner and it would further demonstrate the intention to cause death or at any rate, to cause bodily injury of the nature mentioned in clause thirdly of Section 300. Such intention is writ large on the acts done by the accused. Thus, it is a case in which clauses 1 to 3 Section 300 IPC are attracted and, as already observed, Exception 4 would not come to the rescue of the appellants for the reason that they have acted in a cruel and unusual manner by shooting at unarmed victims who merely indulged in a verbal duel with them.

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271. WORDS & PHRASES :

Expression 'fraud', meaning and connotation of – It is an act of deliberate deception with the design of securing unfair advantage.
State of A.P. and another v. T. Suryachandra Rao
Judgment dt. 25.7.2005 by the Supreme Court in Civil Appeal No. 4461 of 2005, reported in (2005) 6 SCC 149

Held :

By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [See *Vimla (Dr.) v. Delhi Admn, AIR 1963 SC 1572 and Indian Bank v. Satyam Fibres (India) (P) Ltd.2, (1996) 5 SCC 550]*

A " fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1*

"Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad.

An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Althought in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See *Ram Chandra Singh v. Savittri Devi, (2003) 8 SCC 319*)

Suppression of a material document would also amount to a fraud on the court. (See *Gowrishankar v. Joshi Amba Shankar Family Trust, (1996) 3 SCC 310* and *S.P. Chengalvaraya Naidu case* (Supra)

"Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in *Ram Preeti Yadav v. U. P. Board of High School and Intamediate Education, (2003) 8 SCC 311*

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272. CONSTITUTION OF INDIA – Article 226

Writ jurisdiction – Claim for compensation in tort – The action based on negligence ordinarily can be before a civil Court and not by way of writ under Article 226 – Law explained.

SDO, Grid Corporation of Orissa Ltd. and others v. Timudu Oram Judgment dt. 28.7.2005 by the Supreme Court in Civil Appeal No. 1726 of 1999, reported in (2005) 6 SCC 156

Held :

In *Chairman, Grid Corpn. of Orissa Ltd. (Gridco), (1999) 7 SCC 298* with which case these appeals were listed for hearing but could not be heard for want of service, this Court took the view that the High Court committed an error in entertaining the writ petitions under Article 226 of the Constitution and were not fit cases for exercising the jurisdiction under Article 226 of the Constitution. It was held that actions in tort and negligence were required to be established initially by the claimants. The mere fact that the wire of electric transmission line belonging to the appellants had snapped and the deceased had come into contact with it and died by itself was not sufficient for awarding compensation. The Court was required to examine as to whether the wire had snapped as a result of any negligence on the part of the appellants, as a result of which the deceased had come in contact with the wire. In view of the defence raised and the denial by the appellants in each of the cases, the appellants deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission line and yet the wires had snapped because of the circumstances beyond their control or unauthorised intervention of third parties. Such disputed questions of fact could not be decided in exercise of jurisdiction under Article 226 of the Constitution. That the High Court could not come to the con-

clusion that the defence raised by the appellants had been raised only for the sake of it and there was no substance in it. In para 6 it was observed thus: (SCC pp. 301-02)

> "6. In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellants, that, 'admittedly/prima facie amounted to negligence on the part of the appellants.' The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to Appellant 1 had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the appellants and under which circumstances the deceased had come in contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the civil court as it was done in OJC No. 5229 of 1995."

Similar view was taken by this Court in *W.B. SEB. v. Sachin Banerjee, (2002) 2 SCC 162, (1999) 9 SCC 21.* In the said case it was observed as under; (SCC pp. 21-22 para 1)

> "The only grievance of the petitioners relates to an observation in the impugned judgment that two victims had died because of the negligence of the petitioner State Electricity Board. Looking to the fact that the two victims were electrocuted because of an illegal hooking for the purpose of theft of electricity, the petitioners cannot be held guilty of negligence although they may have stated that there is a need for conducting dehooking raids more frequently."

As against this counsel for the respondent cited a later judgment of this Court in *M.P. Electricity Board v. Shail Kumari, (2002) 2 SCC 162, (1999) 9 SCC 21* wherein this Court has taken the view that the Electricity Board could be fastened with the liability in a case in which the live wire snapped and fell on the public road which was partially inundated with rainwater. The observation made by this Court in the aforesaid case would not be applicable to the facts of the present case as in the said case a suit had been filed in which a finding of negligence was recorded by the trial court against the Board. The trial court after coming to the conclusion that the respondents were entitled to a compensation of Rs. 4.34 lakhs non-suited the respondents solely on the premise that the claimants had failed to prove their liability for such compensation. The High Court in the said case had recorded a finding:

> "Therefore, the defences put up by MPEB are absolutely without any basis and do not reflect the real position at the spot, rather attempt has been made to conceal the real position in order to avoid responsibility and liability for payment of compensation."

On these facts, this Court came to the conclusion that the claimants were entitled to the compensation. Counsel for the appellants also cited a judgment in *H.S.E.B. v. Ram Nath, (2004) SCC 793* in which a similar view was taken. In the said case it was observed by the bench that where disputed questions of fact were involved writ petition would not be the proper remedy but since there was no denial in the written statement that wires were loose and drooping and the claimant had asked the Board to tighten the wires, the Board was held liable to pay the compensation. This finding was recorded because the supplier of electricity did not controvert the facts alleged by the respondent writ petitioner. Disputed questions of facts were not involved and as a result of which the finding recorded by the High Court was upheld.

In the present case, the appellants had disputed the negligence attributed to it and no finding has been recorded by the High Court that Gridco was in any way negligent in the performance of its duty. The present case is squarely covered by the decision of this court in *Chairman, Grid Corpn. of Orissa Ltd. (Gridco) (Supra)*. The High Court has also erred in awarding compensation in civil Appeal No. 4552 of 2005 [@ SLP (C) No. 9788 of 1998]. The subsequent suit or writ petition would not be maintainable in view of the dismissal of the suit. The writ petition was filed after a lapse of 10 years. No reasons have been given for such an inordinate delay. The High Court erred in entertaining the writ petition after a lapse of 10 years. In such a case, awarding of compensation in exercise of its jurisdiction under Article 226 of the Constitution cannot be justified.

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273. CONSTITUTION OF INDIA – Article 226

Writ petition against Cooperative Society, maintainability of – Law explained.

Supriyo Basu and others v. W.B. Housing Board and others

Judgment dt. 5.8.2005 by the Supreme Court in Civil Appeal No. 1766 of 2002, reported in (2005) 6 SCC 289

Held :

The rival stands need consideration on the core issue of maintainability of the writ petition, though several other issues were raised by learned counsel for the appellants. It is undisputed that the respondent Society is a cooperative society constituted on agreement between members thereof who had agreed to abide by the provisions of the West Bengal Cooperative Societies Act, 1983, the Rules framed thereunder or the bye-laws framed by the Society. The Society is undisputedly not a department of the State and is also not a creature of a statute but merely governed by a statute. Only if it is established that a mandatory provision of a statute has been violated, could a writ petition be maintainable. Before a party can complain of an infringement of his fundamental right to hold property, he must establish that he has title to that property and if his title itself is in dispute and is the subject-matter of adjudication in proceedings legally constituted, he cannot put forward any claim based on the title until as a result of that enquiry he is able to establish his title. It is only thereafter that the question whether the rights in or to that property have been improperly or illegally infringed could arise. The dispute as noted by the High Court essentially related to the claims of two rival groups of private individuals in relation to common car parking spaces. The learned Single Judge gave certain directions, which even touched upon the legality of the sale deeds. It was not open to be dealt with in a writ petition. As observed by this Court in *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey, (1999) 1 SCC 741* in relation to the question whether a writ petition would lie against a cooperative society the question to be considered is what is the nature of the statutory duty placed on it and the Court is to enforce such statutory public duty.

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274. CIVIL PROCEDURE CODE, 1908 – Sections 96 (3), 104 and O.23 R.3

Decree based on a disputed compromise not a consent decree within the meaning of Section 96 (3) – Appeal against such decree maintainable – Law explained.

Kishun alias Ram Kishun (Dead) through LRs. v. Behari (Dead) by LRs.

Judgment dt. 5.8.2005 by the Supreme Court in Civil Appeal No. 4802 of 2005, reported in (2005) 6 SCC 300

Held :

That apart, we are of the view that the High Court was in error in holding that the appeal filed by Kishun against the decree of the trial court accepting a compromise which was disputed by him, was not maintainable. When on a dis-

pute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order 23 Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of Section 96(3) of the Code. Section 96(3) contemplates non-appealability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it could not be understood as a decree passed by the court with the consent of the parties. As we have noticed earlier, no appeal is provided after 1-2-1977, against an order rejecting or accepting a compromise after an enquiry under the proviso to Order 23 Rule 3, either by Section 104 or by Order 43 Rule 1 of the Code. Only when the acceptance of the compromise receives the imprimatur of the court and it becomes a decree, or the court proceeds to pass a decree on merits rejecting the compromise set up, it becomes appealable, unless of course, the appeal is barred by Section 96(3) of the Code. We have already indicated that when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up.

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275. CIVIL PROCEDURE CODE, 1908 – Section 11

Principle of res judicata, applicability between co-defendants – Principle applicable if relief given/refused involved determination of an issue between co-defendants – Law explained.

Makhiju Construction & Engg. (P) Ltd. v. Indore development Authority and others

Judgment dt. 19.4.2005 by the Supreme Court in Civil Appeal No. 2694 of 2005, reported in (2005) 6 SCC 304

Held :

Hewever the appellant is entitled to succed on the ground that the order of the Division Bench disposing of Crescent's appeal operated as *res judicata* to bind not only Crescent but also Jagriti and the appellant. It makes no difference that Jagriti was a co-respondent with the appellant. The principle of res *judicata* has been held to bind co-defendants if the relief given or refused by the earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the las has been approved as far back as in 1939 in *Munni Bibi v. Tirloki Nath, AIR 1931 PC 114, IA at p. 165,* where it has been said that to apply the rule of res judicata as between co-defendants three conditions are requisite : (AIR p. 117)

"(1) There must be a conflict of interest between the defendants concerned; (2) if must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided.

This view has been consistently followed by this Court. (See *Iftikhar Ahmed v. Syed Meharban Ali, (1974) 2 SCC 151* where the principle was extended to bind co-plaintiffs; *Mahboob Sahab v. Syed Ismail, (1995) 3 SCC 693*

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276. CIVIL PROCEDURE CODE, 1908 – (As amended by Act 46 of 1999 and Act 22 of 2002)
EVIDENCE ACT, 1872 –Section 154

(i) Section 26 (2) & O. 6 R. 15 (4) – Affidavit to be filed with pleadings not an evidence for trial – On amendment of pleadings fresh affidavit necessary.

(ii) Section 80 – Scheme and object of Section 80 – Nominated officers of State/Central Government should ensure that notice given u/s 80 is replied – Non-reply or evasive reply may entail in award of heavy cost against Government to be recovered from the nominated officer.

(iii) Section 148 – Limitation of thirty days, directory not mandatory – Court can extend time in exceptional cases.

(iv) O. 7 R. 14 (4) – Expression "plaintiff's witnesses" used in R. 14 (4) should be read as "defendant's witnesses."

(v) O. 8 Rr. 1 & 10 – Limitation of 90 days for filing written statement – Provisions are directory and not mandatory – Court can extend time in exceptionally hard cases.

(vi) O.9 R.5 – Period of limitation of seven days directory.

(vii) O. 11 R. 15 – Inspection of documents "at or before the settlement of issues" – The expression does not mean that inspection cannot be allowed after settlement of issues

(viii) O.17 R.1 – Bar against grant of more than three adjournments for adducing evidence – Provisions are directory and not mandatory – In exceptional cases Court can grant more than three adjournments.

(ix) O.18 R.4– Examination of witnesses – Permissibility of cross-examination before commissioner – Proof of documents – Law explained.

(x) O.18 R. 17–A (since deleted) Effect of deletion – Deletion of O. 18 R. 17–A does not disentitle presentation of evidence at later stage.

(xi) Protection and custody of documents – Cross-examination before Commissioner – Care and custody of documents – Permissible mode.

(xii) Evidence Act – Section 154 – Whether Commissioner can declare a witness hostile while witness is being cross-examined before him – Held, no – Permissible mode – Law explained.

Salem Advocate Bar Association, T.N. v. Union of India
Judgment dt. 2.8.2005 by the Supreme Court in Writ Petition (C) No. 496 of 2002, reported in (2005) 6 SCC 344

Held :

(i) The affidavit required to be filed under amended Section 26(2) and Order 6 Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts sated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial, Further, on amendment of the pleadings, a affidavit shall have to be filed in consonance thereof.

(ii) Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filling a suit except when there is urgency for interim order in which case the court may not insist on the rigid rule of prior notice. The two months' period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail litigation. The object is also to curtail the area of dipute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the counrty. Judicial notice can be taken of the fact that in a large number of cases either the notice is not replied to or in the few cases where a reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the exchequer as well. A proper reply can result in reduction of litigation between the State and the citizens. In case a proper reply is sent either the claim in the notice may be admitted or the area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

These provisions cast an implied duty on all Governments and States and statutory authorities concerned to sent appropriate reply to such notices. Having regard to the existing state of affairs, we direct all Governments, Central or State or other authorities concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the court finds that either the notice has

not been replied to or the reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and direct it to take appropriate action against the officer concerned including recovery of costs from him.

(iii) The amendment made in Section 148 affects the power of the court to enlarge time that may have been fixed or granted by the court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of the court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to operate fully. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the court for performance of an act prescribed or allowed by the court.

(iv) Order 7 relates to the production of documents by the plaintiff whereas Order 8 relates to production of documents by the defendant. Under Order 8 Rule 1-A(4) a document not produced by the defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of "defendant's witnesses", the words "plaintiff's witnesses" have been mentioned in Order 7 Rule 14(4). To avoid any confusion we direct that till the legislature corrects the mistake, the words "plaintiff's witnesses" would be read as "defendant's witnesses" in Order 7 Rule 14 (4). We, however, hope that the mistake would be expeditiously corrected by the legislature.

(v) In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the Court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit." Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended

only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.

(vi) The period of seven days mentioned in Order 9 Rule 5 is clearly directory.

(vii) The stipulation in Order 11 Rule 15 confining the inspection of documents "at or before the settlement of issues" instead of "at any time" is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

(viii) While examining the scope of the proviso to Order 17 Rule 1 (1) that more than three adjournments shall not be granted, it is to be kept in view that the proviso to Order 17 Rule 1(2) incorporating clauses (a) to (e) by Act 104 of 1976 has been retained. Clause (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order 17 Rule 1(1) and Order 17 Rule 1(2) have to be read together. So read, Order 17 does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained the third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained theree adjournments. For instance, a party may be suddenly hospitalised on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though the circumstances may be beyond the control of a party, further adjournment cannot be granted because of the restriction of three adjournments as provided in the proviso to Order 17 Rule 1.

In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (take the example of the Bhopal gas tragedy, Gujarat earthquake and riots, and devastation on account of the tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of the practice having been developed to award only nominal costs even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic, and as far as possible actual costs that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable, but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason.

(ix) The amendment provides that in every case, the examination-in-chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in *Salem Advocates Bar Association's* case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in *Salem Advocates Bar Association's* case, it has been held that the trial court in apporipriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to Sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and improtance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner apointed by it. The power under Order XVIII Rule 4(2) is required to exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses.

(x) Order 18 rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just.

(xi) Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to it either by the court or filed before it during the recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in the absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with

the court in case long adjournments are granted and for taking back the documents before the adjourned date.

(xii) The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, 1872 it is the court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order 26 Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in the court under Section 154 of the Evidence Act to declare a witness hostile.

If a situation as to declaring a witness hostile arises before a Commission recording evidence, the party concerned shall have to obtain permission from the court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

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277. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 4
Section 4 whether prospective or retrospective – Law explained.
G. Mahalingappa v. G.M. Savitha
Judgment dt. 9.8.2005 by the Supreme Court in Civil Appeal No. 2867 of 2000, reported in (2005) 6 SCC 441

Held :

Section 4 of the Act prohibits the right to recover property held benami. It reads as under :

> "4 (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> *(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property."*
>
> (Underlining is ours)

Since in this case, we are concerned with the question whether the appellant was entitled to raise the plea of benami in his defence in view of the bar imposed in Section 4 (2) of the Act, let us now confine ourselves to the bar

imposed in Section 4(2) of the Act of taking this plea in his defence and to the question of retrospective operation of this section or this provision is prospective in operation.

Now, therefore, the question arises is whether under Section 4(2) of the Act, defence can be allowed to be raised on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person in any suit, claim or action or on behalf of a person claiming to be the real owner of such property. As noted already, this question cropped up for decision before this Court in the case of *Mithilesh Kumari v. Prem Behari Khare, (1989) 2 SCC 95.* In fact, the retrospective operation of this provision, as noted herein earlier, was answered in the affirmative in the aforesaid decision. However, the correctness of that decision was doubted and an order was passed by this Court subsequently referring this question of retrospectivity for decision to a three-Judge Bench of this Court. In the case of *R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 SCC 630* S.B. Majmudar, J. (as His Lordship then was) writing the judgment for the three – Judge Bench could not agree with the views expressed in *Mithilesh Kumari case* (supra) and held that the Act was prospective in nature and it has no retrospective operation excepting certain observations made in respect of some cases which would be mentioned hereinafter. In para 10 it was observed as follows : (SCC p. 638)

> *"[T] hough the Law Commission recommended retrospective applicability of the proposed legislation, Parliament did not make the Act or any of its sections retrospective in its wisdom."*
>
> (emphasis supplied)

Thereafter on a careful consideration of the provisions made under Sections 3 and 4 of the Act, it was observed : (SCC p. 638, para 10)

> "A mere look at the above provisions shows that the prohibition under Section 3(1) is against persons *who are to enter into benami transactions* and it has laid down that no person shall enter into any benami transaction which obviously means from the date on which this prohibition comes into operation i.e. with effect from 5-9-1988. That takes care of future benami transactions. *We are not concerned with sub-section* (2) but subsection (3) of Section 3 also throws light on this aspect. As seen above, it states that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Therefore, the provision creates a new offence of entering into such benami transactions. It is made non-cognizable and bailable as laid down under sub-section (4). *It is obvious that when a statutory provision creates new liability and new offence, it would naturally have prospective operation and would cover only those offence which take place after Section 3(1) comes into operation."*
>
> (Underlining is ours)

In para 11 of the said decision of this Court, the Supreme Court further observed: (SCC p. 640)

> "On the contrary, clear legislative intention is seen from the words *'no such claim, suit or action shall lie', meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4(1)."*
>
> (Underlining is ours)

In the same paragraph the Supreme Court observed: (SCC p. 641)

> *"With respect, the view taken that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right* inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive."
>
> (emphasis supplied)

In our view, similar is the position in law on the question of retrospectivity of Section 4(2) of the Act.

Finally, this Court in the aforesaid decision held that the decision in *Mithilesh Kumari v. Prem Behari Khare* (Supra) erred in taking the view that under Section 4(2), in all suits filed by persons in whose names properties are held no defence can be allowed at any future stage of the proceedings that the properties are held benami cannot be sustained. *It was also held that Section 4(2) will have a limited operation even in cases of pending suits after Section 4(2) had come into force, if such defences are not already allowed.* The decision in *R. Rajagopal Reddy v. Padmini Chandrasekharan (Supra)* which overruled the decision of a two-Judge Bench in the case of *Mithilesh Kumari v. Prem Behari Khare* (Supra) was also approved by this Court in the cases of *Probodh Chandra*

Ghosh v. Urmila Dassi, (2000) 6 SCC 526 and *C. Gangacharan v. C. Narayanan, (2000)1 SCC 459.* In view of the aforesaid, this question is, therefore, no longer res integra.

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278. CRIMINAL TRIAL :

Accused, found in possession of contraband, not knowing Hindi – I.O. not explaining seizure, etc. to him in Hindi –Proceedings held to be one sided – Accused acquitted.

Ramaswamy v. State of M.P.

Reported in 2005 (3) MPLJ 208

Held :

If the testimony of Investigating Officer is scrutinized further it would reveal that though he came to know that the person who was having contraband article in the hotel was staying denoting himself to be "S. Raman" but this fact has not been mentioned in the case diary by him that by fictitious name the appellant Ramaswamy was staying in the hotel. The Investigating Officer admitted the fact that the appellant is a South Indian and is resident of Chennai. Though he denied the suggestion that appellant knows English and Tamil languages only and according to this witness, accused is little acquainted with Hindi language. But, if this piece of evidence of Investigating Officer is read conjointly along with the evidence of independent witness Mushtak (P.W.8) who was called by the Investigating officer to witness the entire episode and who has also signed all the documents, it is revealed that the accused does not know Hindi language. According to him, when the investigation was being taken place, he was unable to understand the language which was being spoken by the appellant. The other co-accused, who was discharged by the Trial Court namely Zabbar, was speaking in Hindi. In the accused statement recorded under section 313, Criminal Procedure Code also the accused has said that he is not acquainted with the Hindi language and, therefore, the entire investigation which was conducted in Hindi language, cannot rope the appellant. There is no material on record in order to show that whatever the procedure of investigation was adopted by the Investigating Officer was explained to accused/appellant in his own language or in English language. Thus, the entire proceeding and investigation which was conducted against the appellant is one sided and it cannot be said that the appellant was acquainted or was informed that what is being done against him.

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279. HINDU LAW :

Partition in joint Hindu family – Partition may be oral and may be reduced into a memorandum later on – Strangers cannot question such partition – Law explained.

Moolchand Agrawal v. Babulal Agrawal and others

Reported in 2005 (3) MPLJ 217

Held :

Several contentions have been raised by learned counsel for appellants in order to show that the story of partition which has been putforth by plaintiffs is a concocted one and it has been setforth in order to get the sale certificates cancelled. According to me, the said argument is devoid of any substance. Firstly, on the ground that whether there had been any partition in the joint Hindu Family consisting of plaintiffs and defendent No.3, the present defendents No.1and 2 cannot question it as they are strangers. Apart from this, there is overwhelming evidence to the effect that oral partition took place on 15-5-1959 and a memorandum acknowledging the partition was reduced in writing vide Ex. P-3 on 18-6-1959. It be seen that defendant No.1 and 2 are total strangers to the family of plaintiffs and defendant No. 3, and if that is the position according to me, they cannot question the partition which had arrived at in their family. The oral partition is permissible under Hindu Law and it is also permissible to reduce the memorandum acknowledging the partition. In this regard the decision of the Supreme Court in the case of *Roshan Singh and others vs. Zile Singh and others, AIR 1988 SC 881* may be seen. The Apex Court in this decision has also held that the memorandum acknowledging the earlier partition is not required to be registered.

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280. CIVIL PROCEDURE CODE, 1908 – O.1 R.10
SPECIFIC RELIEF ACT, 1963 – Section 19
Addition of parties – Suit for specific performance of contract for sale – Person claiming against contracting vendor not a necessary party – Law explained.
Kasturi v Iyyamperumal and others
Reported in 2005 (3) MPLJ 261 (SC) = (2005) 6 SCC 733 (3 Judge-Bench)

Held :

So for as addition of parties under the Civil Procedure Code is concerned, we find that such power of addition of parties emanates from Order 1, Rule 10 of the Civil Procedure Code. As we concerned in the instant case with Order 1, Rule 10 of the Civil Procedure Code, we do not find it necessary to refer to other provisions of the Civil Procedure Code excepting Order 1, Rule 10 of the Civil Procedure Code which reads as under :

> Rule 10(1) "Where a suit has been instituted in the name of the wrong persons as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order *the name of any party improperly joined, whether as plaintiff or defendant, be struck out* and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) .....

(4) .....

(5) ....."

(Omitted since not necessary)

In deciding whether a stranger or a third party to the contract is entitled to be added in a suit for specific performance of contract for sale as a defendant, it is not necessary for us to delve in depth into the scope of Order 1, Rule 10, sub-rule (1) of the CPC under which only the addition of a plaintiff in the suit may be directed.

Let us therefore, confine ourselves to the provision of Order 1, Rule 10, sub-rule (2) of Civil Procedure Code which has already been quoted hereinabove. From a bare perusal of sub-rule (2) of Order 1, Rule 10 of the Civil Procedure Code, we find that power has been conferred on the Court to strike out the name of any party improperly joined whether as plaintiff or defendant and also when the name of any person ought to have been joined as plaintiff or defendant or in a case where a person whose persence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In the present case, since we are not concerned with striking out the name of any plaintiff or defendant who has been improperly joined in the suit, we will therefore only consider whether the second part of sub-rule (2), Order 1, Rule 10 of the Civil Procedure Code empowers the Court to add a person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

In our view, a bare reading of this provision namely, second part of Order 1, Rule 10, sub-rule (2) of the Civil Procedure Code would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with notice of the contract, but a person who claims adversely to the

claim of a vendor is, however, not a necessary party. From the above it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.

We may look to this problem from another angle. Section19 of the Specific Relief Act provides relief against parties and persons claiming under them by subsequent title. Except as otherwise provided by *Chapter II, specific* performance of a contract may be enforced against :–

(a) either party thereto:

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

We have carefully considered sub-sections (a) to (e) of section 19 of the Act. From a careful examination of the aforesaid provisions of sub-sections (a) to (e) of the Specific Relief Act we are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-section (a) to (e) of section 19 of the Specific Relief Act.

That apart, from a plain reading of section 19 of the Act we are also of the view that this section is exhaustive on the question as to who are the parties against whom a contract for specific performance may be enforced.

As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the

parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all.

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281. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141
Liability of the Director/Manager/Secretary of the Company on behalf of the Company – Whether liability is established or not is a matter to be adjudicated at the trial – Law Explained.
S.V. Muzumdar and others v. Gujarat State Fertilizer Co. Ltd. and another
Reported in 2005 (3) MPLJ 271(SC)

Held :

We find that the prayers before the Courts below essentially were to drop the proceedings on the ground that allegations would not constitute a foundation for action in terms of section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in charge of or is responsible to the company for conduct of the business is to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial.

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

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

(1) The company who committed the offence.

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

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

Whether or not the evidence to be led would establish the accusations is a matter for trial. It needs no reiteration that proviso to sub-section (1) of section

141 enables the accused to prove his innocence by discharging the burden which lies on him.

It has to be borne in mind that while dealing with an application in terms of section 205 of the Code, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence.

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282. STANDARDS OF WEIGHTS AND MEASURES ACT, 1976 – Sections 39 and 63

Complaint u/s 39 r/w/s 63 of the Act against manufacturing Company for shortage in weight of contents – Retailer not impleaded – Complaint cannot be treated within jurisdiction of the Court where retailer sold the packet.

M.S. Banga and others v. State of M.P.

Reported in 2005 (3) MPLJ 300

Held :

The instant complaint was instituted before the learned Chief Judicial Magistrate, Ratlam by respondent. The complaint inter alia alleged shorn of details that on 7-7-2000 one Krishna Kumar Goel purchased from one of the Redistribution Stockists of Hindustan Lever Limited several packs of 250 grams of Lipton Taaza Tea. The particulars which were mentioned on the pack were :–

Lipton Taaza
Net Weight : 250 g.
MRP. Rs. 42.50
PKD. 05-2000
CODE No. U29A9
MFD BY : HINDUSTAN LEVER LIMITED
165/166, BACKBAY RECLAMATION
MUMBAI 400 020

Thereafter on 23-11-2001 almost one and a half years from the date of the said purchase, the said retailer took one such pack of Lipton Taaza Tea to the office of the respondent and alleged that the package did not contain the amount of tea that it claimed to contain, in other words that the pack claimed that its net weight was 250 grams but nevertheless it suffered from shortage in weight. The respondent thereafter on receiving the complaint weighed the pack in his office and reached the conclusion that the pack weighed 214 grams and not 250 grams and thereby discovered shortage in weight of 36 grams. Hence he seized the pack and recorded a seizure memo dated 23-11-001 and thereby has brought the instant complaint against the applicants under section 39 read with section 63 of the Standards of Weights and Measures Act. 1976.

During the course of arguments, the learned Senior Advocate appearing for the applicants submitted that section 74 of the Standards of Weights and

Measures Act, 1976 is similar to section 17 of the Prevention of Food Adulteration Act, 1954. He submitted that with reference to section 17 of Prevention of Food Adulteration Act, 1954 vide *1983 (II) FAC 241, Sri Rakesh Palta and another vs. State of Andhra Pradesh*, the Hon'ble Andhra Pradesh High Court has held as under :-

> **"Prevention of Food Adulteration Act, 1954 – Section 20-A – Prevention of Food Adulteration Rules, 1955 – Rule 22A** – Scope of – complaint not filed against the local vendor but against the manufacturer in another State – Jurisdiction of the Court held the Metropolitan Magistrate at Hyderabad had no jurisdiction to take the complaint filed only against them when such complaint was not also filed against the local vendor at Hyderabad from whom the sample of vanaspathi was obtained."

The learned Senior Advocate also submitted that provisions of section 28 of the Drugs and Cosmetics Act, 1910 are also not different and with reference to section 28 thereof vide *1989(1) FAC 173, Parasmal vs. Drug Inspector and others*, the Hon'ble High Court of Rajasthan has held as under :-

> **"Drugs and Cosmetics Act, 1910, section 28** – Jurisdiction to take cognizance – The offence punishable under section 27(b) of the Act stood committed at Jodhpur. It was complete at Jodhpur. No. consequence ensued at Jalore within the meaning of section 179, Criminal Procedure Code – The provisions section 180, Criminal Procedure Code are also not applicable in this case. The offence of storing and selling the said commodity punishable under section 28(b) of the Act stood committed at Jodhpur– The complaint has been filed by the Drugs Inspector against the accused petitioner only. If M/s. Agarwal and Jain Brothers, Jalore would have been impleaded along with the accused petitioner in the complaint, the position would have been different. Both of them could be tried by the learned Chief Judicial Magistrate, Jalore – The order under revision cannot be said legal and proper. It is held that the learned Chief Judicial Magistrate, Jalore had no jurisdiction to take the cognizance and try the accused of the said offence."

The learned Senior Advocate also submitted that vide *2001 (4) Crimes 294, Mohammed Ahmad Khan and Ors. vs. State of Madhya Pradesh*, the Hon'ble High Court of Madhya Pradesh has held as under :-

> **"Essential Commodities Act, 1955, section 3/7** – Prosecution for offence against employees of a manufacturing company carrying manufacturing activities outside the State – Local vendor from whom sample of fertilizer was drawn not joined as accused in the case – Whether Special Court at Shajapur where samples were drawn in Madhya Pradesh had jurisdiction to try offence? No."

In the light of the observations of the above cases, in view of the facts as found with regards the instant complaint, the same is not within the jurisdiction of learned Chief Judicial Magistrate, Ratlam since the retailer has not been impleaded.

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283. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)
Computation period of 90/60 days for compulsive bail – Date of production of accused to be excluded while date of filing chargesheet to be included – Law explained.
Ajay Singh v. Surendra and others
Reported in 2005 (3) MPLJ 306

Held :

In this application for cancellation of bail, the contention of the learned counsel for applicant/ complainant is that the learned ACJM, Bagli has committed error in computing period of 90 days. Admittedly, the non-applicants were produced before the said Court on 27-5-2004 and chargesheet was filed on 25-8-2004. According to the Apex Court judgment rendered in case of *State of M.P. vs. Rustam and others, 1995 Supp. (3) SCC 221,* it has ruled in paragraph three which is as under :–

> "3. We find that the High Court was in error – both in the matter of computation of the period of 90 days prescribed as also in applying the principle of compulsive bail on entertaining a petition after the challan was filed as the so-called "indefeasible right" of the accused, in our view stood defeated by efflux of time. The prescribed period of 90 days, in our view, would instantly commence either from 4-9-1993 (excluding from it 3-9-1993) or 3-12-1993 (including in it 2-12-1993). Clear 90 days have to expire before the right begins. Plainly put, one of the days on either side has to be excluded in computing the prescribed period of 90 days. Sections 9 and 10 of the General Clauses Act warrant such an interpretation in computing the prescribed period of 90 days. The period of limitation thus computed on reckoning 27 days of September, 31 days of October and 30 days of November would leave two clear days in December to compute 90 days and on which date the challan was filed, when the day running was the 90th day. The High Court was, thus, obviously in error in assuming that on 2-12-1993 when the challan was filed, period of 90 days had expired."

In the judgment of Rustam (supra), the Supreme Court has decided the issue as to how the computation of 90 days is to be done. The Supreme Court has held that for computation of clear 90 days either first day of production of the accused before the learned Magistrate is to be excluded or the date on which the chargesheet was filed will be included. For the purposes of computation of period of 90 days, the Supreme Court has considered the provisions of sections 9 and 10 of the General Clauses Act.

In the instant case, applying the aforementioned ratio, the non-applicants were produced before the learned ACJM Bagli on 27-5-2004. This date is to be excluded and computation will commence from 28-5-2004. The chargesheet was filed on 25-8-2004. This date will be included and on computation, it is found that when the chargesheet was filed i.e. 25-8-2004, it was 90th day (four days of May, 30 days of June, 31 days of July and 25 days of August = 90 days). On computation, it is found that chargesheet was filed within 90 days from the date of production of the non-applicants before the learned ACJM, Bagli.

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284. GUARDIANS AND WARDS ACT, 1890 – Section 17
Custody of the minor child – Relevant considerations – Welfare of the child paramount consideration – Law explained.
Wazid Ali v. Rehana Anjum
Reported in 2005 (3) MPLJ 319

Held :

Custody of minor is a sensitive issue. It is also a matter involving the sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parities towards the minor child and the welfare of minor which is a paramount importance. [See *R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71*].

Section 17 enumerates the matters which the Court must consider in the matter of appointment of guardians. It is emphasised in both these sections that the welfare of the minor must be the paramount consideration in appointment or declaration of any person as guardian. The cardinal principle is that minors cannot take care of themselves so that the State as *pater patrice* has powers to do all acts and things necessary for their protection. It is, therefore, the primary duty of the Court to be satisfied what would be for the welfare of the minor and to make an order appointing or declaring a guardian accordingly. It is settled law that the word "welfare" must be understood in its widest sense so as to embrace the material and physical well-being; the education and upbringing; happiness and moral welfare. The Court must consider every circumstance bearing upon these considerations. (See *Rajkumar Mahant vs. Indrakumari, 1972 MPLJ 775 = 1972 JLJ 1045*).

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285. SCHEDULED CASTES SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995 – Rule 7
Investigation of the offence under the Act by a Police Officer below the rank of DSP, effect of – Held investigation vitiated.
Dhanraj Singh v. State of M.P.
Reported in 2005 (3) MPLJ 332

Held :

From the facts on record it is clear that investigation was not conducted by Deputy Superintendent of Police in accordance with the provisions of Ruld 7 (1) of the Scheduled Castes Scheduled Tribes (Prevention of Atrocities) Rules, 1995. Rule 7 (1) provides as under :–

> "An offence committed under the Act shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into accounts his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time."

These rules have been framed by the Central Government in exercise of rule making power conferred under section 23 of the Act. The Central Government has been authorised under section 23(1) of the Act to make rules for carrying out the purposes of the Act. It has been specifically mentioned under Rule 7 that officer shall be appointed either by the State Government or Director General of Police or Superintendent of Police and he shall not be below the rank of Deputy Superintendent of Police. While appointing the officer they will take into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time. It is clear that the Act has been enacted by the Parliament to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. It is a beneficiary legislation in favour of a class which belongs to downtrodden society. It has been experienced that despite the various measures taken to improve the socio-economic conditions of the Scheduled Castes and Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property and under these circumstances this special enactment has been made. Therefore, it is necessary that the provisions of the Act and Rules should be followed strictly and in such cases investigation should be conducted by police officer not below the rank of Deputy Superintendent of Police. This special rule has a purpose. Therefore, if the Rules are not followed strictly by the investigating agencies, purposes of the Act cannot be achieved. Thus, this contention of the learned counsel for the appellant carries weight. There is no compliance of provisions of Rule 7 Nature of the rule is mandatory. Investigation has not been conducted by Deputy Superintendent of Police either appointed by the State Government or Director General of Police or Superintendent of Police. There is no evidence to this effect in the cases and when the investigation has not been done by an authorised or appointed officer, the entire investigation is vitiated and on this ground conviction of the appellants cannot be maintained.

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286. CIVIL PROCEDURE CODE, 1908 – Section 11

Res Judicata – Compromise decree whether has the effect of res judicata – Held, No – Such decree creates estoppel by conduct between parties – Law explained.

Narayansingh and others v. Bhagwansingh and others

Reported in 2005 (3) MPLJ 335

Held :

As regards the plea of res judicata, the courts below have rightly held that the earlier decree based upon compromise could not operate as res judicata because nothing was decided by the court. It is well settled that the compromise decree is not a decision by the court. It is the acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The Court does not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court can be res judicata, whether statutory under section 11 of the Code of Civil Procedure or constructive as a matter of public policy on which the entire doctrine rests. Such a decree cannot strictly be regarded as decision on a matter which was heard and finally decided and cannot operate as res judicata. Such a decree might create an estoppel by conduct between the parities, but such an estoppel must be specifically pleaded. See *(1964)2 SCR 310, Pulavarthi Venkata Subba Rao and others vs. Valluri Jagannadha Rao. Similar view was taken by subsequent decision reported in AIR 1971 SC 664, Ram Govinda Daw and others vs. Smt. H. Bhakta Bala Dassi.*

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287. CRIMINAL PROCEDURE CODE – Sections 177 and 178

Territorial jurisdiction – Court within whose territorial jurisdiction crime committed has jurisdiction to try the case – Law explained.

Shakuntala Sharma and others v. State M.P. and another

Reported in 2005 (3) MPLJ 338

Held :

The proper and ordinary venue for the trial of the crime is the area of jurisdiction in which, on the evidence, the facts occurred and are alleged to constitute the crime. Thus, if an offence is commenced within the jurisdiction of one Court and is completed within the jurisdiction of another Court, the provisions of section 178 of the Code are attracted and in that situation the case can be proceeded at either place. But, if the offence has been completely committed in the territorial jurisdiction of a particular Court then, in the territory of that Court only the offence could be tried. There is no whisper in the complaint made in the FIR that any demand of dowry or commission of any act constituting an offence, has taken place at Chhatarpur, and if that is the position, according to me, the chhatarpur Court had no territorial jurisdiction. On bare perusal of column No. 5 (b) of the FIR, the place of incidence has been shown at E-1/24 Arera Colony, Bhopal apart from this, there is nothing in the FIR in order

to stretch the provisions of section 178, Criminal Procedure Code so that the Court at Chhatarpur can be clothed with the territorial jurisdiction. The decision of the Apex Court in the case of *Y. Abraham Ajith and others v. Inspector of Police, Chennai and another, 2004 AIR SCW 4788* is squarely applicable in the present case. The decision *State of Madhya Pradesh v. Suresh Kaushal and another, 2001 AIR SCW 4587* relied by learned Govt. Advocate is tangentially off the point. In that case the physical torture was made to the complainant at Indore and in consequence to the said torture her parents took her back to Jabalpur and in consequence of beating by the in-laws at Indore, the miscarriage took place at Jabalpur. In that context, it was held by the Apex Court that the Jabalpur Court was also having territorial jurisdiction.

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288. MOTOR VEHICLES ACT, 1988 – Section 166

Head-on collusion between school bus and truck – Apportionment of liability between the two drivers – The case being that of composite and not contributory negligence, apportionment of liability between joint tort-feasors not permissible – Law explained.

New India Assurance Co. Ltd. v. Arun Kumar and others

Reported in 2005 (3) MPLJ 351

Held :

After having heard the learned counsel for the parties and going through the material available on the record, in the considered opinion of this Court, learned Claims Tribunal has rightly held that the accident occurred due to composite negligence of both the drivers. So far as claimants are concerned, it was rightly held that it is not a case of contributory negligence. The only question is, whether there can be an apportionment of liability between the two drivers. In the considered opinion of this Court, this is not permissible in view of the Division Bench decision reported in *1967 MPLJ 972 = 1968 ACJ 1, Manju Devi Bhuta and another vs. Manjusri Raha and others.* The same view has also been reiterated recently by Full Bench of this Court in a decision reported in *2005 (1) MPLJ (F.B.) 372 = 2005 (1) JLJ 15, Sushila Bhadoria (Smt.) and others vs. M.P. State Road Transport Corporation* and another. The Full Bench having a panoramic view of the pronouncement of various High Courts, has categorically held that apportionment is possible only in case of 'contributory negligence' and in case of a 'composite negligence', there cannot be apportionment of liability between the two joint tort-feasors. It was observed by the Full Bench as under :-

> "24. Next question involved in the case is whether there can be apportionment ?
>
> In the cases of joint tort-feasors, it is difficult to determine the extent of liability of each tort-feasor and it will not be possible to apportion the ratio of negligence of the joint tort-feasors. In the case of composite negligence or in the cases of joint tort-feasors arising out of

the use of motor vehicle, award can be passed against both or any-one of them for the entire amount because the injured is not in a position to quantify or qualify the apportionment of each vehicle. Since he has suffered injury on account of use of motor vehicles, both the motor vehicles will be jointly and severally liable to pay the compensation. It is the choice of the claimant to sue both or may claim compensation from one of the joint tort-feasors as their liability is joint and several. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two, as it is difficult to determine the apportionment in the absence of the drivers of the vehicles appearing in the witness box. Therefore, there cannot be any apportionment of the claim between the joint tort-feasors."

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289. CIVIL PROCEDURE CODE, 1908 – O.22 Rr. 3 and 11
Husband having decree for divorce in his favour – Death of husband before filing of appeal or pending appeal – Wife can challenge such decree against L. Rs. of the deceased husband either in appeal or under O.9 R. 13 if the decree is *ex parte* one – Law explained.
Madan Mohan Sharma v. Smt. Shakuntala Sharma
Reported in 2005 (3) MPLJ 359

Held :

Counsel for the appellant has referred two judgments of the Apex Court in the cases of *Yallawwa vs. Shantavva, AIR 1997 SC 35 and R. Lakshmi vs. K. Saraswathi Ammal, (1996) 6 SCC 371,* wherein it is held that substitution in such cases is permissible. Counsel for the respondent submitted that both the cases referred to by the counsel for the appellant have no application in the present set of facts of the case. The appeal has abated and it be dismissed as abated.

In the case of Yallawwa (supra) it is held that after the decree for divorce is obtained by the petitioner-husband against his wife, then the wife has right to file appeal. Such appeal does not abate on the death of husband whether said death took place prior to filing of the appeal or pending the appeal. Similarly if the ex parte decree of divorce is obtained against wife and thereafter husband dies, aggrieved wife can maintain application under Order IX, Rule 13, Civil Procedure Code even though husband might have died prior to moving of that application or during the pendency of such application. In all such cases, other legal heirs of the deceased husband can be brought on record as opponents or respondents in such proceedings by the aggrieved spouse who wants such decree to be set aside and when the other heirs of the deceased husband would naturally be interested in getting such decree confirmed either in appeal or under Order IX, Rule 13, Civil Procedure Code. It is held in para 7 as under :

"Under these circumstances, if the aggrieved spouse who suffers from such legal effects of the adverse decree against him or her is told off the gates of the appellate proceedings or proceedings for setting aside such ex parte decree, the concerned spouse would suffer serious legal damage and injury without getting any opportunity to get such a decree set aside on legally permissible grounds. Consequently, it may be held that once the petition under section 13 of the Hindu Marriage Act results into any decree of divorce either ex parte or bipartite then the concerned aggrieved spouse who suffers from such pernicious legal effects can legitimately try to get them reserved through the assistance of the Court. In such an exercise, all other legal heirs of deceased spouse who are interested in getting such a decree maintained can be joined as necessary parties. Section 13 (1) of the Hindu Marriage Act can obviously come in the way of such proceedings being maintained against the legal heirs of the decree-holder spouse."

* * *

"If a decree of divorce on these grounds whether ex parte or bipartite is not permitted to be challenged by the aggrieved spouse, it would deprive the aggrieved spouse of an opportunity of getting such grounds re-examined by the competent Court. It cannot, therefore be said that after a decree of divorce is passed against a spouse whether ex parte or bipartite such aggrieved spouse cannot prefer an appeal against such a decree or cannot move for getting ex parte divorce decree set aside under Order IX, Rule 13, Civil Procedure Code. Such proceedings would not abate only because the petitioner who has obtained such decree dies after obtaining such a decree. The cause of action in such a case would survive qua the estate of the deceased spouse in the hands of his or her heirs or legal representatives. Consequently, in such appellate proceedings or proceedings under Order IX. Rule 13, Civil Procedure Code, other heirs of the deceased spouse could be joined as opposite parties as they would be interested in urging that the surviving spouse against whom such decree is passed remains a divorcee and is not treated to be a widow or widower of the deceased original petitioner so that she or he may not share with other heirs the property of deceased spouse."

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290. MOTOR VEHICLES ACT, 1988 – Section 173
Death of young boy of 12 years belonging to a family of agriculturist and a student of Class VI – Just and reasonable compensation – Held, one lakh rupees is appropriate compensation.
Gaya Prasad Pandey and another v. Yatindra Kumar Chaturvedi and others
Reported in 2005 (3) MPLJ 373

Held :

The next question for consideration is that what should be the adequate compensation. The deceased was a young boy of 12 years and was student of VIth class, he belongs to a family of agriculturist since his father (appellant NO. 1 is an agriculturist). Looking to the family status of the claimants, it would be proper to enhance the award from Rs. 50,000/- as passed by the Tribunal, to Rs. 1,00,000.00 (Rupees one lac). The interest @ 6% per annum shall be paid by the respondents on the enhanced amount of Rs. 50,000/- from the date of the filing of the claim petition.

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291. CRIMINAL PROCEDURE CODE, 1973 – Sections 340 and 341
Appeal against order passed u/s 340, nature of – Such appeal filed u/s 341 is a criminal appeal and not a misc. civil appeal under O. 43 R.1 C.P.C. – Law explained.
Balkrishna v. Madhusudan and others
Reported in 2005 (3) MPHT 111

Held :

In *Dhup Narain Singh Vs. The State, AIR 1954 Patna (FB) 76,* it has been held that the Court directing initiation of proceedings in exercise of power under Section 340, Cr. PC (old 476) can not be said to be a Civil Court. Therefore, an appeal under Section 341 must be governed by the provisions of Criminal Procedure Code only. As such appeal against the impugned order said to have been passed under Section 340 shall be deemed to be a criminal appeal under Section 341, Cr. PC. The procedure laid down for a miscellaneous appeal under Order 43 Rule 1, CPC would not be applicable even if the order filing a criminal complaint has been passed by a Civil Court.

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292. CIVIL PROCEDURE CODE, 1908 – O.6 R. 17
Amendment of plaint sought in *ex parte* proceedings – Whether defendant requires to be noticed – Held, defendant not required to be noticed if amendment is not of substantial nature – Law explained.
Hari Ram Keer v. State Bank of India
Reported in 2005 (3) MPHT 147

Held :

Normally a civil suit shall proceed on the basis of pleadings contained in the plaint at the time when the defendant is served with the summons/notice and in case of amendment of substantive nature, it is always desirable that such a defendant shall be again served with the summons/notice in respect of the amended averments. However, every amendment incorporated after drawal of ex-parte proceedings does not entitle a defendant with re-service of summons/notice. It depends on the nature of amendment inserted after drawal of ex-parte proceedings. In the present case, the amendment inserted on 9-10-1997 is in respect of merely an additional mode of relief in the relief clause.

It did not provide any additional factual foundation and did not give any additional or new cause of action to the plaintiff. The amendment effected in the plaint is not of substantive nature so far as the pleadings are concerned. Therefore, no notice was necessary on the defendant even though ex-parte proceedings were already drawn against him.

●

293. CRIMINAL PROCEDURE CODE, 1973 – Section 197

Prosecution of a Bank Manager of a Co-operative Bank for offences u/s 409 and 420 IPC – Whether sanction u/s 197 necessary – Held, No.

Vimal Kumar v. State of Madhya Pradesh

Reported in 2005 (3) MPHT 167

Held :

Learned Counsel for the applicant next contended that the trial can not proceed against the applicant without sanction envisaged in Section 197 of the Code.

Before the sanction under Section 197 of the Code can be invoked two conditions must be satisfied –

(a) that, the accused must be a public servant of the kind mentioned in the Section i.e., he must be a public servant not removable from his office save by or with the sanction of the State Government;

(b) that, the offence must be committed by the accused while acting or purporting to act in discharge of his official duty.

The applicant admittedly was the Branch Manager and for removal of a Branch Manager of a Co-operative Bank, the sanction of the State Government is not required. Even otherwise it is known to all that it is not the part of the official duty to commit offence. An official is not expected to commit offence of cheating or misappropriation, therefore, the applicant is not entitled to protection under Section 197 of the Code.

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294. TRANSFER OF PROPERTY ACT, 1882 – Section 105

EASEMENTS ACT, 1882 – Section 52

Lease or licence – Document whether lease deed or licence deed, determination of – Decisive consideration is intention of the parties and not the description of deed – Law explained.

Bhagchand v. Administrator, Municipal Corporation, Indore and others

Reported in 2005 (2) JLJ 93

Held :

Whether an instrument operates as a lease or as a license is a matter not of words but of substance. There have been large number of decisions on this

question. The decisive consideration is the intention of the parties, but the intention must be gathered on a true consideration of the agreement and not merely from the description given by the parties. The mere use of words appropriate to a license will not preclude it is being held to be a lease and vice versa. The determining factor is that whether in fact the interest is created in the property along with the possession. If it does, then it is a lease. If it only gives the use of the property in a particular way on certain terms while it remains in the possession and control of the owner, it will only be a license. In other words for a lease, there must be a power and intention to hold the property to the exclusion of the "grantor".

The Supreme Court in the case of *Mrs. M.N. Clubwala v. Fida Hussain Saheb (AIR 1965 SC 610)* has held as under :

> "Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement."

The Apex Court in the case of Associated *Hotels of India Ltd. v. R.N. Kapur [AIR 1959 SC 1262]* has ovserved that exclusive possession is not conclusive evidence of a lease. If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. Another decision of the Apex Court on the point which was been placed reliance by learned counsel for appellant is *Lakhi Ram v. M/s. Vidyut Cable and Rubber Industry [1970 MPLJ 69].* Thus in order to ascertain whether the transaction is a lease or licence, the following propositions may, therefore be taken as well established :

(1) the substance of the document must be preferred to the form ; (2) the real test is the intention of the parties whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

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295. SPECIFIC RELIEF ACT, 1963 – Section 10

Whether executing Court can order delivery of possession on the basis of decree of specific performance to execute sale deed – Held, Yes – Law explained.

Gordhan Singh v. Abdulji Alamji and Co.

Reported in 2005 (2) JLJ 135

Held :

In *AIR 1963 MP 186 [Dadulal Hanumanlal v. Smt. Deo Kunwarbai]* it has been held by this Court with regard to grant of relief of possession of suit property in pursuance to a decree for specific performance of contract when the decree is silent about the possession as under :

> "Where a suit for specific performance of a contract of sale with a prayer for possession, the plaintiff is held entitled to the reliefs claimed in the plaint and a decree for specific performance is passed and the same is confirmed in appeal, the executing Court is entitled to order delivery of possession to the decree-holder, while executing the decree under the provisions of 0.21 Rr. 32 and 34. This right of the executing Court in fact is well recognises as its inherent right if either the contract or the decree is silent about delivery of possession. Since under S.55 of the Transfer of Property Act the right to ask for possession and right to obtain the same in the absence of a contract to the contrary, implicit in the contract to transfer the property, the decree-holder automatically gets that right to demand possession from the party conveying the property and that party in such a situation being only the Court, which has replaced the judgment debtor and which has to act, therefore, on his behalf as his statutory agent, if necessarily becomes liable to perform that part of the contract relating to delivery of possession also. What the Court does is nothing but obeying the decree".

This principle has further been reiterated by the Single Bench of this Court in a judgment reported in *1983 JLJ 422 [Bata Shoe Co. v. Preetamdas and others.]* The Hon'ble Court has held as under :

> "While executing the decree for specific performance, the Court is not only concerned with the execution of the deed but a further step in the light of section 55 of the Transfer of Property Act also to be directed. *AIR 1972 SC 1371, AIR 1972 SC 1826 and AIR 1955 Cal. 2267* relied on.

●

296. INDIAN PENAL CODE, 1860 – Section 376 (2) (e)
Offence stipulated in Section 376 (2) (e) regarding commission of rape on a pregnant woman – To fix liability u/s 376 (2) (e) prosecution should prove that accused had knowledge that prosecutrix was pregnant – Law explained.
Mahendra @ Mula v. State of M.P.
Reported in 2005 (II) MPWN 29

Held :

It has come in the evidence of Dr. Smt. Meena Verma that at the time of the examination of the prosecutrix she was carrying pregnancy of 14 to 16 weeks.

Section 376 (2) (e) of the IPC provides that whoever commits rape on a woman *knowing* her to be pregnant shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. Learned counsel contends, and rightly so that not only the prosecutrix should have been pregnant at the time of the commission of the offence, the offender should have knowledge about it and despite that knowledge he should have committed the offence and then only the said provision would be attracted.

We have examined the evidence. While it is true that the medical evidence clearly establishes that the prosecutrix was pregnant at the time the offence was committed by the accused, there is nothing to suggest that accused had knowledge that she was pregnant. Section 376 (2) (e) contemplates commission of the offence on a woman knowing her to be pregnant. The prosecution has not been able to establish that accused had knowledge about the pregnancy of the prosecutrix. The case of the accused would, therefore, fall within sub-section (1) of section 376 of the IPC.

●

297. PREVENTION OF CORRUPTION ACT, 1947 – Section 34 (b) Sanction for prosecution, proof of – If the order itself is eloquent, then formal evidence regarding grant of sanction sufficient – Law explained.

C.S. Krishnamurthy v. State of Karnataka
Reported in 2005 (II) MPWN 35 (SC)

Held :

When the sanction itself is very expressive, then in that case, the argument that particular material was not properly placed before the sanctioning authority for according sanction and the sanctioning authority has not applied its mind becomes unsustainable. When sanction order itself is eloquent enough, then in that case only formal evidence has to be produced by the sanctioning authority or by any other evidence that the sanction was accorded by a competent person with due application of mind. In the present case the learned Additional Sessions Judge took a very narrow view that all the papers were not placed before the Court to show that there was proper application of mind by the sanctioning authority. The view taken by learned Special Judge was not correct and the learned Single Judge correctly set aside the order. In this connection we may refer to a three-Judge Bench decision of this Court in *Indu Bhusan Chatterjee v. State of W.B. [1958 SCR 1001 = 1958 CrLJ 279]* in which a similar argument was raised that the sanctioning authority did not apply his mind to the facts of the case but merely perused the draft prepared by the police and did not investigate the truth of the offence. The learned Judges after perusing the sanction order read with the evidence of Mr. Bokil held that there was a valid sanction accorded by a competent person.

In this connection, a reference was made to a decision of the Consitution Bench in the case of *R.S. Pandit v. State of Bihar, (1964) 2 CrLJ 65* wherein their Lordships after referring to a decision of the Privy Council in the case of *Gokulchand Dwarkadas Morarka v. R., AIR 1948 PC 82 = 49 CrLJ 261* observed as under :

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

Therefore, the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is appearent by reading the order.

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298. MOTOR VEHICLES ACT, 1988 – Section 147 (1)

Whether insurer can be held liable where insured has been absolved – Held, No.

United India Insurance Co. Ltd. v. Kishorilal and others

Judgment dated 21.11.2003 by High Court of Madhya Pradesh in M.A. No. 414 of 1997, reported in 2005 ACJ 1399

Held :

The counsel for the appellant further submitted that it is an admitted position that vehicle was not driven by authorised driver of the owner. Keys of the vehicle were snatched from the driver by the respondent No. 6 Santosh Gupta and he drove the vehicle, which caused the accident. Therefore insurance company is not liable to indemnify the owner.

Counsel for appellant relied upon the judgment in the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi, 1998 ACJ 121 (SC)* and submitted that the insurer is not liable to pay the compensation. He further submitted that in case the liability of insured is upheld, then only insurance company is liable to pay the compensation. Tribunal has held that insured is not liable as there is no negligence on his part but held that Santosh Gupta and insurance company are liable to pay the compensation. After Claims Tribunal has held that owner is not liable to pay compensation, insurance company cannot be held to pay compensation. For this purpose he has referred another judgment in the case of *Sitaram*

Motilal Kalal v. Santanuprasad Jaishankar Bhatt, 1966 ACJ 89 (SC), in which question of vicarious liability is considered. In this case the owner has entrusted the vehicle to his driver and latter gave the keys to the cleaner, therefore, it was held that owner was not liable to pay compensation. There is no vicarious liability as there is no relationship of master and servant.

Considering the facts of the case it is true that the vehicle was driven by the respondent No. 6, who was not engaged by the owner. Keys were snatched from the driver and the Claims Tribunal absolved the owner from his liability. Once the owner has been absolved from his liability, insurance company cannot be held liable to pay compensation.

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299. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b) Sub-letting as a ground for eviction – Unlawful sub-letting must be by tenant and not by a predecessor-in-interest – Law explained.
Remeshwar Prasad Gupta & Ors. V. Prasanna Kumar Jain & Ors.
Reported in 2005 (II) MPJR 171

Held :

In *A.S. Sulochana Vs. C. Dhramlingam, (1987) 1 SCC 180* it has been held that unlawful sub-letting must be done by the tenant himself and not by his predecessor-in-interest where the original tenant had sublet the premises serveral years ago without being questioned by original landlord, the successor-in-interest (son) of the orginal tenant cannot be sought to be evicted by successor-in-interest (son) of the original landlord on ground of unlawful subletting in absence of any evidence showing that lease did not confer upon the original landlord right to create sub-tenancy or that the subletting was done without the written consent of the original tenant. Agreement dated 2.12.56 between the original landlord S.S. Dhanya Kumar Jain and original tenant Ramsakhe specifically speaks that the original tenant Ramsakhe was permitted to create sub tenancy. Even at the time of creation of tenancy vide this agreement dated 2.12.56 there had been a sub tenant in the suit shop. As such the courts below erred in decreeing the suit seeking eviction under Section 12 (1) (b) of the Act.

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300. CIVIL PROCEDURE CODE, 1908 – O.17 Rr. 2 & 3
Dismissal of suit due to want of evidence after rejection of prayer of the plaintiff's counsel for adjournment – Order of dismissal of suit falls under O.17 R.2 – Law explained.
Central Bank of India v. M/s Arestan
Reported in 2005 (II) MPJR 186

Held :

Short facts of the case are that the appellant filed a suit for realization of Rs. 83,911.96 which was registered as C.S. No. 46-B/95, which was dismissed on 29.6.1995 on the ground that the witnesses of the appellant were not present

and the application filed by the appellant for adjournment was dismissed. The application for restoration filed by the appellant within the statutory period, which was registered as M.J.C. no. 14/95, and was dismissed on the ground that since the suit has been dismissed U/O. 17 Rule 3 CPC, therefore the appeal is maintainable and the application for restoration is not maintainable.

Learned counsel for the appellant placed reliance on a case reported in *[1999 (1) MPLJ 719 State Bank of India, Ratlam vs. Nandram,* wherein, this Court has held that following conditions are necessary for application of Order XVII Rule 3 C.P.C.:

> "For application of Order 17 Rule 3 of the Civil Procedure Code three conditions are necessary: (1) time must have been granted to a party to take all or any of the steps mentioned therein for the progress of the suit, (2) there must have been a default in taking such step, and (3) the party concerned should have appeared in Court. Rule 3 would obviously apply only when the party concerned is present on the adjourned date and he fails to do the things for which adjournment was granted. Mere presence of counsel seeking adjournment would not amount to the presence of the party within the meaning of clauses (a) and (b) of Order 17 Rule 3. Rule 3 applies only where the hearing has commenced and an application for an adjournment is then made by one of the parties, but when before the hearing is commenced, plaintiff fails to appear on an adjourned date and the counsel merely appears to seek adjournment, the Court in case refuses the prayer for adjournment can proceed only only under Rule 2 and not under Rule 3."

In this case, the adjournment was sought and this Court found that in such circumstance, Rule 2 of Order 17 applies and application lies under Order 9 Rule 9 C.P.C.

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301. INDIAN PENAL CODE, 1860 – Sections 354 and 504
Outraging the modesty of a woman – Accused a senior police officer gently slapping on posterior of prosecutrix with culpable intention – Held, the conduct amounts to offence punishable u/s 354/509.
Kanwar Pal Singh Gill v. State (Admn. UT Chandigarh) through Secy. and another
Judgment dt. 27.7.2005 by the Supreme Court in Criminal Appeal No. 1032 of 1998, reported in (2005) 6 SCC 161

Held :

The findings of the various courts is to the effect that the accused gently slapped on the posterior of the prosecutrix in the presence the ingredient of Section 354 IPC. It is proved that the accused used criminal force with the intent to outrage the modesty of the complainant and that he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests

would embarrass her. Knowledge can be attributed to the accused that he was fully aware that touching the body of the prosecutrix at the place and time would amount to outraging her modesty. Had it been without any culpable intention on the part of the accused, nobody would have taken notice of the incident. The prosecutrix made such a hue and cry immediately after the incident and the reaction of the prosecutrix is very much relevant to take note of the whole incident. The accused being a police officer of the highest rank should have been exceedingly careful and failure to do so and by touching the body of the complainant with cuplable intention he committed the offence punishable under Sections 354 and 509 IPC.

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302. MOTOR VEHICLES ACT, 1988 – Section 166
WORKMEN'S COMPENSATION ACT, 1923 – Section 4

(i) Claim for compensation u/s 166 Motor Vehicles Act and Section 4 of Workmen's Compensation Act – Difference between – Under Workmen's Compensation Act negligence need not be proved but action u/s 166 of Motor Vehicles Act is based on the principle of tortuous liability – Law explained.

(ii) Liability of Insurance Company for death or injury of the employee of the owner – Law explained.

National Insurance Co. Ltd. v. Prembai Patel and others
Judgment dt. 18.4.2005 by the Supreme Court in Civil Appeal No. 6476 of 1998, reported in (2005) 6 SCC 172

Held :

In a petition under the Workmen's Act the injured or the legal heirs of the deceased workmen have not to establish negligence as a pre-condition for award of compensation. But the claim petition before the Motor Accidents Claims Tribunal is an action in tort and the injured or the legal representatives of the deceased have to establish by preponderance of evidence that there was no negligence on the part of the injured or deceased and they were not responsible for the accident. The exception to this general rule is given in Section 140 of the Act where the ligislature has specifically made provisions for payment of compensation on the principle of no-fault liability.

(ii) The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146 (1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or

passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both "any person" or "passenger". An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words "any person" occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147 (1) (b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third-party risks. The expression – "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 being a liability covered by the terms of the policy" – occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147 (1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147 (1) (b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy wherunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147 (1) (b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

The aforesaid interpretation of the relevant provisions applicable to the case in hand is consonance with the view expressed by a Constution Bench in *New India Assurance Co. Ltd. v. C.M. Jaya, (2002) 2 SCC 278* where, while inter-

preting the provisions of Section 95 (2) the Motor Vehicles Act, 1939, the Court held as under in para 10 of the Report : (SCC p. 285)

> "The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act probhibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done it amounts to rewriting the statute or the contract of insurance which is not permissible."

The Bench also referred to earlier decisions rendered in *New India Assurance Co. Ltd. v. Shanti Bai, (1995) 2 SCC 539 and Amrit Lal Sood v. Kaushalya Devi Thapar, (1998) 3 SCC 744* and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the insurance company is neither unlimited nor higher than the statutory liability fixed under Section 95 (2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

Though the aforesaid decision has been rendered on Section 95 (2) of the Motor Vehicles Act, 1939 but the principle underlying therein will be fully applicable here also. It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) or proviso (i) to Section 147 (1) (b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act.

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303. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal – Court must formulate substantial questions of law – Law explained.

Ram Sakhi Devi (Smt.) v. Chhatra Devi and another

Judgment dt. 12.7.2005 by the Supreme Court in Civil Appeal No. 3608 of 2005, reported in (2005) 6 SCC 181

Held :

In *Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434* this Court in para 10, has stated thus : (SCC p. 441)

> "10. Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

Yet again in *Roop Singh v. Ram Singh, (2000) 3 SCC 708* this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads : (SCC p. 713)

> "7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact-findings courts after appreciating the evidence held that the defendant entered into the possession of the premises as a *batai*, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. *(Thakur Kishan Singh v. Arvind Kumar, (1994) 6 SCC 591).* Hence, the High Court ought not to have interfered with the findings of fact recorded by both the courts below."

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304 PREVENTION OF CORRUPTION ACT, 1947 – Section 5 (2)
Bribery – Trap of public servant – Treating the marked currency notes with phenolphthalein powder, requirement of – Law explained.
Ganga Kumar Shrivastava v. State of Bihar
Judgment dt. 20.7.2005 by the Supreme Court in Criminal Appeal No. 1186 of 1999, reported in (2005) 6 SCC 211

Held :

There is no dispute in this case that phenolphthalein powder was not used by the Vigilance to prosecute the case on the alleged recorvered notes for the

purpose of charging the appellant for bribe. In *Som Prakash v. State of Delhi, (1974) 4 SCC 84* it was observed: (SCC p. 89, para 10)

> *"It is but meet that science-oriented detection of crime is made a massive programme of police work, for in our technological age nothing more primitive can be conceived of than denying the discoveries of the sciences as aids to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific research to prove guilt".*
>
> (emphasis supplied)

In *Raghbir Singh v. State of Punjab, (1976) 1 SCC 145* while discarding the oral and documentary evidence laid on behalf of the prosecution is not such as to inspire confidence in the mind of the court, the Supreme Court observed at para 11 as follows : (SCC p. 153)

> *"We may take this opportunity of pointing out that it would be desirable if in case of this kind where a trap is laid for a public servant, the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein power so that the handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant."*
>
> (emphasis is ours)

We must not forget that in a trap case the duty of the officer to prove the allegations made against a government officer for taking bribe is serious, and therefore, the officers functioning in the Vigilance Department must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the court is not left in any doubt whether or not any money was paid to the public servant by way of bribe. It is also the duty of the officers in the Vigilance Department to safeguard for the protection of public servants against whom a trap case may have been laid.

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305. SERVICE LAW :

Compulsory retirement not being punishment, scope of judicial review limited – Law explained.

M.L. Binjolkar v. State of M.P.

Judgment dt. 21.7.2005 by the Supreme Court in Civil Appeal No. 8662 of 2002, reported in (2005) 6 SCC 224

Held :

The scope for judicial review in matters involving orders of compulsory retirement has been explained in serveral cases. It is a tried law that an order of

compulsory retirement is not a punishment. The employer takes into account various factors emanating from the employee's past records and takes a view whether it would be in the interest of the employer to continue services of the employee concerned. It can certainly pass an order of compulsory retirement when the employee is considered to be a dead wood and practically of no utility to the employer. The purpose and object of premature retirement of a government employee is to weed out the inefficient, the corrupt, the dishonest or the dead wood from government service.

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306. INTERPRETATION OF STATUTES :

Marginal notes, value of – Such notes not legitimate aid to construction of any section or rule – Law explained.

Guntaiah and others v. Hambamma and others

Judgment dt. 22.7.2005 by the Supreme Court in Civil Appeal No. 4308 of 1998, reported in (2005) 6 SCC 228

Held :

The marginal notes are not considered as legitimate aid to construction of any section or rule. The side notes are not considered as part of the Act. Lord Macnaghten in a case decided by the Privy Council held that the marginal notes cannot be referred to for the purpose of construction. Lord Reid in *Chandler v. D.P.P., (1962) 3 All ER 142 (HL) said : (All ER pp. 145 I-146 A-B)*

"In my view, sidenotes cannot be used as an aid to construction. They are mare catchwords and I have never heard.... that an amendment to alter a sidenote could be proposed in either House..... So sidenotes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act."

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307. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168

Determination of compensation in case of a fatal accident – Multiplier method, principle and application of – Law explained.

T.N. State Transport Corpn. Ltd. v. S. Rajapriya and others

Judgment dt. 20.4.2005 by the Supreme Court in Civil Appeal No. 2765 of 2005, reported in (2005) 6 SCC 236

Held :

The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables e.g. the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together.

The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalised by multiplying it by a figure representing the proper number of years, purchase.

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.

In *both G.M. Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176* and *U.P. SRTC v. Trilok Chandra, (1996) 4 SCC 362* cases the multiplier appears to have been adopted taking note of the prevalent banking rate of interest.

In *Susamma Thomas* case (supra) it was noted that the normal rate of interest was about 10% and accordingly the multiplier was worked out. As the interest rate is on the decline, the multiplier has to consequentially be raised. Therefore, instead of 16 the multiplier of 18 as was adopted in *Trilok Chandra case* (supra) appears to be appropriate. In fact in *Trilok Chandra case*, after reference to Second Schedule to the Act, it was noticed that the same suffers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to be invariable ready reckoner. However, the appropriate highest multiplier was held to be 18. The highest multiplier has to be for the age group of 21 years to 25 years when an ordinary Indian citizen starts independently earning and the lowest would be in respect of a person in the age group of 60 to 70, which is the normal retirement age.

Considering the age of the deceased and the principles indicated above, the appropriate multiplier would be 12 and not 16 as adopted by the Tribunal and affirmed by the High Court. By applying multiplier 12, amount of compensation is fixed at Rs. 4,50,000 (in round figures). The Tribunal has fixed interest @ 9% per annum from the date of the claim petition. Taking note of the prevailing rate of interest on bank deposits, the same is fixed at 7.5% per annum. It is stated that a sum of Rs. 4,00,000 has been deposited pursuant to the order dated 22.3.2004. The balance amount shall be deposited with the Tribunal within four weeks from today. Out of the total deposit 90% of the amount shall be kept in fixed deposit in the name of widow (Respondent 1), minor child (Respondent 2) and the mother (Respondent 3) in the proportion of 35%, 40% and 15% respectively. Rest 10% shall be paid in cash equally to the widow and the mother.

Fixed deposits shall be made initially for a period of five years and no withdrawal permitted and only monthly interest will be paid, so far as the fixed deposite in the names of the widow and the mother are concerned. So far as the minor child is concerned, fixed deposit shall be made initially for a period of five years and shall be renewed till the child attains majority. The monthly interest on the deposit shall also be released to the mother as the guardian of the minor.

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308. TRANSFER OF PROPERTY ACT, 1882 – Sections 58 (c) and 54 SPECIFIC RELIEF ACT, 1963 – SECTION 16 (c)

(i) Sale with condition of repurchase and mortgage by conditional sale, distinction between – Law explained.

(ii) Readiness and willingness, proof of – Law explained.

Umabai and another v. Nilkanth Dhondiba Chavan (Dead) by L.Rs. and another

Judgment dt. 13.4.2005 by the Supreme Court in Civil Appeal No. 2583 of 2005, reported in (2005) 6 SCC 243

Held :

There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See *Pandit Chunchun Jha v. Sk. Ebadat Ali, AIR 1954 SC 345, Bhaskar Waman Joshi v. Narayan Rambilas Agarwal, AIR 1960 SC 301, K. Simrathmull v. S. Nanjalingiah Gowder, AIR 1963 SC 1182, Mushir Mohammed Khan, (2000) 3 SCC 536 and Tamboli Ramanlal Motilal, 1993 Supp (I) SCC 295.)*

(ii) In *Pushparani S. Sundaram and others v. Pauline Manomani James (deceased) and others, (2002) 9 SCC 582* it was opined : (SCC p. 583, para 4)

> "Inference of readiness and willingness could be drawn by the conduct of the plaintiff, the circumstances in a particular case in other words to be gathered from the totality of circumstances."

It was further held: (SCC p. 584, para 5)

> "So far there being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hestitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now

examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved."

In *N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao, (1995) 5 SCC 115* this Court held : (SCC p. 118, para 5)

> "The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available."

Yet again in *Manjunath Anandappa @ Shivppa Hanasi v. Tammanansa & others, (2003) 10 SCC 390* this Court held: (SCC p. 401, para 27)

> "27. The decisions of this Court, therefore, leave no manner of doubt that a plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words not been used but readiness and willingness can be culled out from reading all the averments made by the plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16 (c) of the Specific Relief Act may be held to have been complied with."

In *Pukhraj D. Jain, and others v. G. Gopalakrishnan, (2004) 7 SCC 251* it was held: (SCC p. 256, para 6)

> "6. Section 16(c) of the Specific Relief Act lays down that specific performance of contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation (ii) to this sub-section provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The requirement of this provision is that the plaintiff must aver that he has always been ready and willing to perform

the essential terms of the contract. Therefore, not only should there be such an averment in the plaint but the surrounding circumstances must also indicate that the readiness and willingness continue from the date of the contract till the hearing of the suit. It is well settled that equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness of the plaintiff to perform his contract in terms of Forms 47 and 48 CPC. Here Respondent 1 himself sent a legal notice rescinding the contract and thereafter filed OS No. 801 of 1977 on 7.11.1977 claiming refund of the advance paid by him. In fact the suit for recovery of the amount was decreed by the trial court on 24-7-1985 but he himself preferred a revision against the decree wherein an order of rejection of the plaint was passed by the High Court. In such circumstances, it is absolutely apparent that Respondent I was not ready and willing to perform his part of the contract ad in view of the mandate of Section 16 of the Specific Relief Act, no decree for specific performance could be passed in his favour. The trial court, therefore, rightly held that the suit filed by Respondent I was not maintainable."

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309. RENT CONTROL AND EVICTION

Lease of building and lease of business – Distinction between – Rent Acts not applicable in case of lease of business – Law explained.

Spun Casting & Engg. Co. (P) Ltd. v. Dwijendra Lal Sinha (Dead) through L.Rs. and others

Judgment dt. 8.4.2005 by the Supreme Court in Civil Appeal No. 4392 of 1983, reported in (2005) 6 SCC 265

Held :

This Court in *Uttamchand v. S.M. Lalwani, AIR 1965 SC 716* drawing a distinction between the lease of a building and the lease of a business held that what was protected under the Act was the lease of the building and not the lease of the business. The question before the Court was as to whether the lease created of dal mill building with fixed machinery in sound working condition was an "accommodation" within the meaning of Section 3-A of the Madhya Pradesh Accommodation Control Act, 1955. For determining the nature of lease created the Court laid down the test of "dominant intention" of the parties while creating the lease which is to be gathered in each case by construing the terms of the lease deed. Construing the terms of the lease in the said case this Court came to the conclusion that the dominant intention of the parties was to create the lease of the business and not that of the building. It was held that since the lease created was of running the business, the same was not protected under the Act. It was observed in para 12 as under : (AIR p. 719)

"12. What then was the dominant intention of the parties when they entered into the present transaction? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a dal mill. It is true that the document purports to be a lease in respect of the dal mill building; but the said description is not decisive of the matter because even if the intention of the parties was to let out the mill to the appellant, the building would still have to be described as the dal mill building. It is not a case where the subject-matter of the lease is the building and along with the leased building incidentally passes the fixture of the machinery in regard to the mill; in truth, it is the mill which is the subject-matter of the lease, and it was because the mill was intended to be let out that the building had inevitably to be let out along with the mill."

It was further observed in the same paragraph: (AIR p. 719, para 12)

"The fixtures described in the schedule to the lease are in no sense intended for the more beneficial enjoyment of the building. The fixtures are the primary object which the lease was intended to cover and the building in which the fixtures are located comes in incidentally. That is why we think the High Court was right in coming to the conclusion that the rent which the appellant had agreed to pay to the respondent under the document in question cannot be said to be rent payable for any accommodation to which the Act applies."

Following the aforesaid judgment in *Dwarka Prasad v. Dwarka Das Saraf, AIR 1975 SC 1758* this Court held that where a cinema theatre equipped with projector and other fittings is let out it would not be a lease of "accommodation" as defined in Section 2(1)(d) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947. It was observed that, legislature intended to cover within the meaning of word "accommodation", premises simpliciter either for residential, commercial or industrial purposes but did not include the business accommodated in a building. Where the business itself was let out, the same would not fall within the meaning of the word "accommondation" enjoying the protection of the Rent Act. That the leasing of a lucrative cinema business could not be reduced to a mare tenancy of building covered within the scope of the definition of "accommodation."

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310. INDIAN PENAL CODE, 1860 – Section 498-A
Cruelty against married woman – Object of Section 498-A – Courts advised to be cautious against misuse of the provisions.
Sushil Kumar Sharma v. Union of India and others
Judgment dt. 19.7.2005 by the Supreme Court in Writ Petition No. 141 of 2005, reported in (2005) 6 SCC 281

Held:

The Object of the provision is prevention of the dowry meance. But as has been rightly contended by the petitioner many instances have come to light where the complaints are not bona fide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreak personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the courts have to take care of the situation within the existing framework. As noted above the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not as an assassin's weapon. If the cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual "wolf" appears. There is no question of the investigating agency and courts casually dealing with the allegations. They cannot follow any straitjacket formula in the matters relating to dowry tortures, deaths and cruelty. It cannot be lost sight of that the ultimate objective of every legal system is to arrive at the truth, punish the guilty and protect the innocent. There is no scope for any preconceived notion or view.

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311. LAND ACQUISITION ACT, 1894 – Section 23

Determination of compensation – Valuation of land for fixing market value – Comparable sales method – Facts required to be proved before applying comparable sales method – Law explained.

ONGC Ltd. v. Sendhabhai Vastram Patel and others

Judgment dt. 8.8.2005 by the Supreme Court in Civil Appeal No. 173 of 2004, reported in (2005) 6 SCC 454

Held :

In *Shaji Kuriakose v. Indian Oil Corpn. Ltd., (2005) 4 SCC 789* this Court observed : (SCC pp. 652-53, para 3)

> "3. It is no doubt true that courts adopt comparable sales method of valuation of land while fixing the market value of the acquired land. While fixing the market value of the acquired land, comparable sales method of valuation is preferred than other methods of valuation of land such as capitalisation of net income method or expert opinion method. Comparable sales method of valuation is preferred because is furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired

land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act. However, comparable sales method of valuation of land for fixing the market value of the acquired land is not always conclusive. There are certain factors which are required to be fulfilled and on fulfilment of those factors the compensation can be awarded, according to the value of the land reflected in the sales. The factors laid down inter alia are: (1) the sale must be a genuine transaction, (2) that the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, (3) that the land covered by the sale must be in the vicinity of the acquired land, (4) that the land covered by the sales must be similar to the acquired land, and (5) that the size of plot of the land covered by the sales be comparable to the land acquired. If all these factors are satisfied, then there is no reason why the sale value of the land covered by the sales be not given for the acquired land. However, if there is a dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to the court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land."

In *Viluben Jhalejar Contractor v. State of Gujarat, (2005) 4 SCC 789* this Court held : (SCC pp. 796-97, paras 18-21)

"18. One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefore. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

19. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered.

20. The amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquitistion by placing the two in juxtaposition. The positive and negative factors are as under :

Positive factors	*Negative factors*
(i) smallness of size	(i) largeness of area
(ii) Proximity to a road	(ii) situation in the interior at a distance from the road
(iii) frontage on a road	(ii) narrow strip of land with very small frontage compared to depth
(iv) nearness to developed area	(iv) lower level requiring the depressed portion to be filled up
(v) regular shape	(v) remoteness from developed locality
(vi) leval vis-a-vis land under acquisition	(vi) some special disadvantageous factors which would deter a purchaser
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage.	

21. Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneour. Such development charges may range between 20% and 50% of the total price."

It was further observed; (SCC p. 798, para 24)

"24. The purpose for which acquisition is made is also a relevant factor for determining the market value. In *Basavva v. Spl. Land Acquisition Officer, (1996) 9 SCC 640* deduction to the extent of 65% was made towards development charges".

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312. POST OFFICE ACT, 1898 – Section 27
LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 21

(i) Service of notice by post – Notice not accepted by addressee despite intimation by post office – Presumption of service can be raised – Law explained.

(ii) Award passed by Lok Adalat, nature of – Such award deemed to be a decree of civil court, not appealable u/s 96 (3) of C.P.C.

P.T. Thomas v. Thomas Job
Judgment dt. 04.8.2005 by the Supreme Court in Civil Appeal No. 4677 of 2005, reported in (2005) 6 SCC 478

Held :

(i) The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act, 1898. The requirement of the section has been complied

with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the postman has made the endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act, 1872 operates apart from that under the Post Office Act, 1898.

(ii) The Lok Adalat will pass the award with the consent of the parties, therefore there is no need either to reconsider or review the matter again and again, as the award passed by the Lok Adalat shall be final. Even as under Section 96 (3) CPC "no appeal shall lie from a decree passed by the court with the consent of parties". The award of the Lok Adalat is an order by the Lok Adalat with the consent of the parties, and it shall be deemed to be a decree of the civil court, therefore an appeal shall not lie from the award of the Lok Adalat as under Section 96 (3) CPC.

In *Punjab National Bank v. Laxmichand Rai, AIR 2000 MP 301* (AIR at p. 304, para 9) the High Court held that:

> "This provision of the Act shall prevail in the matter of filing an appeal and an appeal would not lie under the provisions of Section 96 CPC. Lok Adalat is conducted under an independent enactment and once the award is made by a Lok Adalat the right of appeal shall be governed by the provisions of the Legal Services Authorities Act. When it has been specifically barred under provisions of Section 21 (2), no appeal can be filed against the award under Section 96 CPC."

The Court further stated that : (AIR pp. 304-05, para 14)

> "14. It may incidentally be further seen that even the Code of Civil Procedure does not provide for an appeal under Section 96(3) against a consent decree. The Code of Civil Procedure also intends that once a consent decree is passed by civil court finality is attached to it. Such finality cannot be permitted to be destroyed, particularly under the Legal Services Authorities Act, as it would amount to defeat the very aim and object of the Act with which it has been enacted. Hence, we hold that the appeal filed is not maintainable."

The High Court of Andhra Pradesh held that, in *Board of Trustees of the Port of Visakhapatnam v. Presiding Officer, Permanent, Lok Adalat-Cum-Secy. District Legal Services Authority, (2000) 5 AnLT 577* the award is enforceable as a decree and it is final. On all fours, the endeavour is only to see that the disputes are narrowed down and make the final settlement so that the parties are not again driven to further litigation or any dispute. Though the award of a Lok Adalat is not a result of a contest on merits just as a regular suit by a court in a regular trial is, however, it is as equal and on a par with a decree on compromise and will have the same binding effect and be conclusive. Just as the de-

cree passed on compromise cannot be challenged in a regular appeal, the award of the Lok Adalat, being akin to the same, cannot be challenged by any of the regular remedies available under law, including by invoking Article 226 of the Constitution and challenging the correctness of the award, on any ground. Judicial review cannot be invoked in such awards, especially on the grounds as were raised in the revision petition.

The award of Lok Adalat is final and permanent which is equivalent to a decree executable, and the same is an ending to the litigation among parties.

In *Sailendra Narayan Bhanja Deo v. State of Orissa, AIR 1956 SC 346* the Constitution Bench held as follows : (SCR p. 82)

> "A judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case".

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313. EDUCATION :

Reservation in admission to professional institutions – Permissibility of in admission in minority/unaided institutions – Law explained. P.A. Inamdar and others v. State of Maharashtra and others Judgment dt. 12.8.2005 by the Supreme Court in Civil Appeal No. 5041 of 2005, reported in (2005) 6 SCC 537

Held:

T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single instituion imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing maladministration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admission by providing a centralised and single – window procedure. Such a procedure, to a large extent, can secure grant of merit-based admissions on a transparent basis. Till

regulations are framed, the Admission Committees can oversee admissions so as to ensure that merit is not the casualty.

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314. LIMITATION ACT, 1963 – Section 3

Question of limitation, nature of – May be either pure question of law or a mixed question of law in fact – If not a pure question of law then to be decided after raising issue and recording evidence – Law explained.

Narne Rama Murthey v. Ravula Somasundaram and others
Judgment dt. 17.8.2005 by the Supreme Court in SLP (C) No. 20182 of 2003, reported in (2005) 6 SCC 614

Held :

We also see no substance in the contention that the suit was barred by limitation and that the courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the court of decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession.

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315. HINDU SUCCESSION ACT, 1956 – Sections 25 and 27

Disqualification of murderer from inheriting property of the murdered – Murderer and stock of his line of descent disqualified to succeed – Law explained.

Velikannu v. R. Singaperumal and another
Judgment dt. 6.5.2005 by the Supreme Court in Civil Appeal No. 4838 of 1999, reported in (2005) 6 SCC 622

Held :

Therefore, once it is held that a person has murdered his father or a person from whom he wants to inherit, he stands totally disqualified. Section 27 of the Hindu Succession Act makes it further clear that if any person is disqualified from inheriting any property under this Act, it shall be deemed as if such person had died before the intestate. That shows that a person who has murdered a person through whom he wants to inherit the property stands disqualified on that account. That means he will be deemed to have predeceased him. The effect of Section 25 read with Section 27 of the Hindu Succession Act, 1956 is that a murderer is totally disqualified to succeed to the estate of the deceased. The framers of the Act in the objects and reasons have made a reference to the

decision of the *Kom Sanyellappa Hosmani v. Grimallappa Channappa Samasagar, AIR 1924 PC 209* that the murderer is not to be regarded as the stock of a fresh line of descent-but should be regarded as non-existent. That means that a person who is guilty of committing the murder cannot be treated to have any relationship whatsoever with the deceased's estate.

Now, adverting to the facts of the present case, the effect of Sections 25 and 27 is that Respondent I cannot inherit any property of his father on the principle of justice, equity and good conscience as he has murdered him and the fresh stock of his line of descent ceased to exist in that case. Once the son is totally disinherited then his whole stock stands disinherited i.e. wife or son. The defendant-Respondent 1 son himself is totally disqualified by virtue of Sections 25 and 27 of the Hindu Succession Act and as such the wife can have no better claim in the property of the deceased Ramasami Konar.

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316. CRIMINAL TRIAL :

Sentence – Reduction of sentence to period already undergone – Course to be adopted – Law explained.

Ajmer Singh v. State of Punjab

Judgment dt. 27.7.2005 by the Supreme Court in Criminal Appeal No. 901 of 2005, reported in (2005) 6 SCC 633

Held :

We have noticed in several judgments of the High Courts which have come up for consideration before us that while reducing the sentence to the period already undergone, no notice is taken of the actual sentence undergone by the accused. There is nothing on record to indicate the period of sentence already undergone by the accused. We, therefore, consider it appropriate to observe that whenever a court reduces the sentence of an accused to the period already undergone, it should categorically notice and state the period actually undergone by the accused.

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317. RENT CONTROL AND EVICTION :

Eviction decree, stay of by appellate Court – Appellant/tenant can be put on reasonable terms to compensate decree-holder for loss occurred in delay of execution of decree.

Anderson Wright & Co. v. Amar Nath Roy and others

Judgment dt. 19.4.2005 by the Supreme Court in IA No. 4 in Civil Appeal No. 2663 of 2005, reported in (2005) 6 SCC 281

Held :

As held by this Court in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705* once a decree for eviction has been passed, in the event of execution of decree for eviction being stayed, the appellants can be put on such reasonable terms, as would in the opinion of the appellate court reason-

ably compensate the decree-holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed. It has also been held that with effect from the date of decree of eviction, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises on being vacated by the tenant. While determining the quantum of the amount so receivable by the landlord, the landlord is not bound by the contractual rate of rent which was prevalent prior to the date of decree.

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318. CONSTITUTION OF INDIA – Article 226

Article 226, writ of mandamus, issuance of – Mandamus which is pre-eminently a public law remedy generally not available against private wrongs – Law explained.

Binny Ltd. and another v. V. Sadasivan and others

Judgment dated 08.08.2005 by the Supreme Court in Civil Appeal No. 1976 of 1998, reported in (2005) 6 SCC 657

Held :

Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to *Halsbury's Laws of England,* 3rd Edn., Vol. 30, p. 682.

> "1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

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319. ARBITRATION ACT, 1940

Award, validity of – Reasons in support of award not required to be given unless so required in agreement/contract – Law explained.

Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others

Judgment dated 12.08.2005 by the Supreme Court in Civil Appeal No. 5045 of 2005, reported in (2005) 6 SCC 678

Held :

In the opinion of this Court, it could not be disputed that in India, it has been "firmly established" that it was not obligatory on the arbitrator or umpire to record reasons in support of the award when "neither any arbitration agreement nor any deed of submission" required reasons to be recorded. In that case also, it was urged, as has been done in the instant case, that if no reasons are disclosed by the arbitrator, it would not be possible for the court to find out whether the award passed is in accordance with law. The Court, however, negatived the contention observing that if the parties wanted reasons to be recorded in support of the award to be passed by the arbitrator or umpire it was open to them to make a provision in the agreement/contract itself to that effect. But in the absence of any stipulation in the contract, the court could not say that arbitrator was duty-bound to record reasons and if reasons are not recorded in support of the award, the award was vulnerable and liable to be set aside or should be remitted to the arbitrator. According to this Court, such an order would amount to virtually introducing by judicial verdict an amendment to the Act. No doubt, if the reasons are recorded by the arbitrator or umpire in support of the award, they can be considered by the court and if those reasons disclose an error apparent on the face of the record, the award can be set aside by a competent court of law. But in the absence of such requirement under the agreement itself, the party could not insist for reasons in support of the award nor a court of law can interfere with non-speaking award.

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320. WORDS AND PHRASES

"Hinduism" and "Jainism" – Meaning and connotation of

Bal Patil and another v. Union of India and others

Judgment dated 08.08.2005 by the Supreme Court in Civil Appeal No. 4730 of 1999, reported in (2005) 6 SCC 690

Held :

Thus, "Hinduism" can be called a general religion and common faith of India whereas "Jainism" is a special religion formed on the basis of quintessence of Hindu religion. Jainism places greater emphasis on non-violence ("Ahimsa") and compassion ("karuna"). Their only difference from Hindus is that Jains do not believe in any creator like God but worship only the perfect human being whom they called Tirathankar. Lord Mahavir was one in the generation of Thirthankars. The Tirathankars are embodiments of perfect human beings who

have achieved human excellence at mental and physical levels. In a philosohpical sense, Jainism is reformist movement amongst Hindus like Brahamsamajis, Aryasamajis and Lingayats. The three main principles of Jainism are Ahimsa, Anekantvad and Aparigrah. [See (1) *Encyclopeadia of Religion and Ethics, Vol. 7 p. 465; (2) History of Jains by A.K. Roy pp. 5 to 23 and Vinobe Sahitya, Vol. 7 pp. 271 to 284.]*

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321. CIVIL PROCEDURE CODE, 1908 – O.8 R.1

Provision relating to filing of written statement within 90 days – Nature of – It is directory and not mandatory – Law explained

Rani Kusum (Smt) v. Kanchan Devi (Smt.) and others

Judgment dated 16.08.2005 by the Supreme Court in Civil Appeal No. 5066 of 2005, reported in (2005) 6 SCC 705

Held :

After elaborating the purpose for introduction of Order 8 Rule 1, this Court in *Kailash v. Nankhu, (2005) 4 SCC 480 at SCC para 45* observed that no strait-jacket formula can be laid down except that observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. The conclusions have been summed up in SCC para 46. The relevant portion reads as follows: (SCC pp. 500-01)

> "46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.
>
> (v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are excep-

tional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

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322. PRACTICE AND PROCEDURE

Strictures/remarks - Strictures/remarks against parties, witnesses, subordinate officers and Judges – Need of judicial restraint in making remarks – Law explained

Samya Sett v. Shambhu Sarkar and another

Judgment dated 12.08.2005 by the Supreme Court in Criminal Appeal No. 994 of 2005, reported in (2005) 6 SCC 767

Held :

This Court has, in several cases, deprecated the practice on the part of judges in passing strictures and in making unsavoury, undeserving, disparaging or derogatory remarks against parties, witnesses as also subordinate officers.

In *Alok Kumar Roy v. Dr. S.N. Sarma, (1968) 1 SCR 813* the vacation Judge of the High Court of Assam and Nagaland passed an interim order during vacation in a petition entertainable by the Division Bench. After reopening of the Court, the matter was placed before the Division Bench presided over by the Chief Justice made certain remarks as to "unholy haste and hurry" exhibited by the learned vacation Judge in dealing with the case. When the matter reached this Court, Wachoo, C.J. observed: (SCR pp. 819 F-820 A)

> "It is a matter of regret that the learned Chief Justice thought fit to make these remarks in his judgment against a colleague and assumed without any justification or basis that his colleague had acted improperly. Such observations even about Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. We are glad that Goswami, J. did not associate himself with these remarks of the learned Chief Justice and was fair when he assumed that Dutta, J. acted as he did in his anxiety to do what he thought was required in the interest of justice. We wish the learned Chief Justice had equally made the same assumption and had not made these observations castigating Dutta, J. for they appear to us to be without any basis. *It is necessary to emphasise that judicial decorum has to be maintained at all time and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible."*
>
> (emphasis supplied)

In *State of M.P. v. Nandlal Jaiswal (1986) 4 SCC 566,* disparaging and derogatory remarks were made by the High Court against the State Government. When the matter came up before this Court and a complaint was made against these remarks, it was observed by this Court that the remarks were "totally unjustified and unwarranted."

Bhagwati, C.J. stated : (SCC p. 615, para 43)

> "43 We may observe in conclusion that judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

In *A.M. Mathur v. Pramod Kumar Gupta, (1990) 2 SCC 533,* which was an offshoot of *Nandlal Jaiswal (Supra)* certain observations were made by the High Court against the conduct of the Advocate General of the State. Quoting Justice Cardozo and Justice Frankfurter, the Court stated that the judges are flesh and blood mortals with individual personalities and with normal human traits. Still judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint should be the constant theme of the judges, observed the Court: "This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. "

The Court further added : (SCC p. 539, para 14)

> "14. The Judge's Bench is a seat of power. Not only do judges have power to make binding decision, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct."

In *'K', A Jucicial Officer, In re, (2001) 3 SCC 54* one of us (R.C. Lahoti, J.), (as His Lordship then was) again considered the relevant decisions on the point and said : (SCC p. 62, paras 6-7)

"6. Several cases are coming to our notice wherein observations are being made against the members of subordinate judiciary in the orders of superior forums made on judicial side and judicial side and judicial officers who made orders as Presiding Judges of the subordinate courts are being driven to the necesssity of filing appeals to this Court or petitions before the High Courts seeking expunging of remarks or observations made and sometimes strictures passed against them behind their back. We would therefore like to deal with a few aspects touching the making of observations or adverse comments against judicial officers and methodology to be followed if it becomes necessary.

7. A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four-corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. *However, sobriety, cool, calm and poise should be reflected in every action and expression of a Judge."*

(emphasis supplied)

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323. CRIMINAL PROCEDURE CODE – Section 311
Power of the Court u/s 311 to summon and examine witnesses, ambit and scope of – Law explained.
C.P. Sahu and others v. State of M.P.
Reported in 2005 (3) MPLJ 401

Held :

The powers under section 311 of the Code are very wide. The Court can, at any stage of the trial, summon any person as a witness. No embargo has been put in section 311 of the Code that only those witnesses can be summoned whose names find place in the list of witnesses filed by the prosecution along with the complaint. The object of the section is obviously to enable the Court to arrive at the truth or otherwise of the fact under investigation by summoning and examining the witnesses who can give relevant evidence irrespective of the fact whether a particular party wants to summon them or not. This section confers a wide discretion on the court to act as the exigencies of justice require.

The section consists of two parts; one gives the discretionary powers to the Court and the other imposes obligation on it. Where the evidence of a witness appears to be essential for just decision of the case, it is the obligation on the

court to summon him. When the trial Court, on the basis of the material on record, found that the evidence of the witnesses mentioned in the order impugned is essential for just decision of the case, it was obligatory for the Magistrate to summon them. In the facts and circumstances of the case, it cannot be said that the evidence of the witnesses was not essential for the just decision of the case. The Court cannot be precluded from exercising its discretion only on the ground that the names of the witnesses are not mentioned in the list of the prosecution witnesses or the case was posted for judgment. Therefore, I do not find any illegality in the order impugned and the same does not call for interference.

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324. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f) Bona fide need – Son, for whose need accommodation required joining service during pendency of the suit – This itself does not overshadow the genuineness of the need – Law explained.
Hindustan Petroleum Corporation Ltd. v. Kamal Vasini Agrawal and another
Reported in 2005 (3) MPLJ 404

Held :

There is no substance in the submission of learned counsel for the appellant that since Dr. Alok Agrawal is serving in Nair Hospital at Bombay, his need has come to an end. It be seen a person will not sit idle till his case is decided and certainly he is required to do something for his earnings and for that purpose if Dr. Alok Agrawal is serving in some hospital at Bombay, would not mean that his need has come to an end. Apart from this the entire answer to this question has been given by the Apex Court in the case of *Gaya Prasad vs. Pradeep Srivastava, (2001) 2 SCC 604* which was a case of bona fide need to open a clinic by the son of landlord who was qualified as a doctor and part of accommodation was required by the landlord for radio repair business. The eviction petition was filed in the year 1978 and the order was passed by the authority on 25-3-1982. The tenant's appeal was dismissed on 10-10-1985 against which he filed writ petition before the High Court and there was stay of eviction. In the year 2000, the writ petition was dismissed and in the meantime the son of landlord joined the provincial medical service. In these circumstances, the Apex Court in para 10 held as under :

> "10. We have no doubt that the crucial date for deciding as to the bona fides of the requirement of the landlord is the date of his application for eviction. The antecedent days may perhaps have utility for him to reach the said crucial date of consideration. If every subsequent development during the post-petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would perhaps be no end so long as the unfortunate situation in our litigative slow-process system subsists. During 23 years, after the landlord moved for eviction on the ground that his

son needed the building, neither the landlord nor this son is expected to remain idle without doing any work, lest, joining any new assignment or starting any new work would be at the peril of forfeiting his requirement to occupy the building. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale, after passing through all the previous levels of the litigation, merely on the ground that certain developments occurred pendent lite, because the opposite party succeeded in prolonging the matter for such unduly long period."

Thus, merely because in order to meet his requirement of his livelihood, Dr. Alok Agrawal has joined the service in one hospital at Bombay, would not overshadow his genuineness of the need nor his action acquiesced his genuine need.

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325. CRIMINAL PROCEDURE CODE, 1973 – Section 190
Whether Magistrate can take cognizance u/s 190 regarding an offence triable by Court of Sessions – Held, Yes – Law explained.
Devraj v. State of M.P.
Reported in 2005 (3) MPLJ 418

Held :

Learned counsel for the petitioner vehemently argued that the learned Magistrate had no power either under section 190 or any other provision of the Code of Criminal Procedure to take cognizance of an offence triable by the Court of Session. The learned Magistrate could not have substituted the result of the investigation.

A perusal of section 190 of the Code of Criminal Procedure reveals that the Magistrate First Class has jurisdiction to take cognizance of any offence. The section does not say that the Magistrate has no jurisdiction to take cognizance of an offence which is triable by the Court of Session. Therefore, the contention that the Magistrate has no jurisdiction to take cognizance of the offence triable by the Court of Session is not acceptable.

There is absolutely no embargo upon the Magistrate to look into the case diary and other material while considering the police report to have complete

assessment and comprehensive picture and the relevant material to facilitate the conclusion with regard to the cognizance of an offence and thereby charge the accused for offences other than those mentioned in the police report on the basis of said material on record. Section 190 (1)(b) the Code of Criminal Procedure empowers the Magistrate to defer with a police report be it a charge-sheet or be it a final report so called.

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326. EVIDENCE ACT, 1872 – Section 32

Dying declaration to be admissible needs no certification by doctor regarding mental fitness of the maker – Law explained.

Moniya Bai v. State of M.P.

Reported in 2005 (3) MPLJ 420

Held :

As regards law on the question of dying declaration, the Constitution Bench of the Supreme Court in the case of *Laxman vs. State of Maharashtra, AIR 2002 SC 2973* has more or less settled the legal position and has held as under :–

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or

otherwise will suffice provided the indication is positive and definite. In most cases, however such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

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327. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 (b)
Notice, requirements of – Notice may include demand for amount of a cheque as well as cost and interest but 15 days time should be given – Law explained.
Arihant Fertilizers Ltd., Indore v. Rahul Builders, Neemuch and another
Reported in 2005 (3) MPLJ 444

Held :

Having considered the factual aspect of this case and the decisions relied upon by the parties, as referred to hereinabove, the facts of the present case are peculiar to the facts mentioned in the above mentioned judgements. The non-applicant/complainant can demand the amount of cheque along with the interest and costs but for all these, he has to give 15 days time to the applicant drawer of the cheque but in the letter dated 31-10-2000 which has been relied by the non-applicant No. 1, as notice under section 138 (b)(c) of the Act, he has demanded payment of all pending bills within 10 days from the date of receipt of the notice and those pending bills were of Rs. 8,72,409/-. For the payment of this amount he has given only ten days time which is contrary to the statutory period of 15 days as required under section 138 (b) and (c) of the Act.

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328. N.D.P.S. ACT, 1985 – Sections 42 and 43
Recovery of contraband from public place (bus of MPSRTC) – Section 43 applicable and not Section 42 – Law explained.
Mohd. Ishaque v. Union of India through C.B.N., Indore
Reported in 2005 (3) MPLJ 455

Held :

It is contended by the learned counsel for the appellant that in view of the infraction of the provisions of sections 42, 50, 52 and 57 of the NDPS Act, the conviction is bad in law. The contraband was not recovered in the personal search of the accused but it was found in the bag of the accused. It is laid down in the case of *Megh Singh vs. State of Punjab, 2003 AIR SCW 4536* that the provision of section 50 of the NDPS Act are not applicable in case of the recovery of he contraband from the bag of the accused. The question of non-compliance of section 42 of the NDPS Act does not arise in this case. In case of recovery of the contraband from public place, the provisions of section 43 of the NDPS Act are applicable. In the case of *Narayanaswamy Ravi Shankar vs. Directorate of Revenue Intelligence, 2003 Cr. L.J. 27(SC)* it is laid down down that the provisions of section 43 of the NDPS Act are applicable in case of search conducted in public place.

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329. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 13 (2)
Complaint – Allegations relating to adulteration of milk – Inordinate delay of 7 months and 20 days in sending notice u/s 13 (2) – Held, because of delay accused stood deprived of right u/s 13 (2).
Ram Singh v. State of M.P.
Reported in 2005 (3) MPLJ 458

Held :

It is not in dispute that right to examine the remaining sample from Central Food Laboratory was a valuable right of the applicant and this could not be destroyed by the prosecution and it is settled position of law that after 6 months the preservative mixed with the milk has lost its strength as deteriorated and the sample does not remain fit for analysis. In this situation when the complaint was initiated after more than 7 months when the remaining sample had become deteriorated and not fit for analysis and then aforesaid notice under section 13(2) was given which was apparently after deterioration of the remaining sample so the applicant was deprived to examine the same from Central Food Laboratory. So this cannot be said that the application under section 13(2) of the Act was not moved by the applicant even after receiving the said notice Ex.P/16, therefore he cannot get benefit of the said provision. For the sake of argument if such an application was moved instead that right could not be exhausted by the applicant in view of deterioration of the sample.

My aforesaid view is supported by the decided case of this Court in the matter of *Shiv Dayal Saligram Tiwari vs. State of Madhya Pradesh* reported in 1977 MPLJ Page 169 in which it was held as under :–

> "Held, that in any case by the time the accused appeared the sample would have deteriorated and that in the circumstances accused was deprived of his right under section 13(2) because of the inordinate delay in launching prosecution and he was entitled to acquittal. *1967 M.P.L.J. 640= AIR 1967 SC 970 and 1974 M.P.L.J. 241, Rel. AIR 1971 SC 1277 and AIR 1972 SC 1631, Dist. AIR 1951 Nag. 191, Ref. (Paras 6, 7).* Quoted from Placitum.

In view of the aforesaid, it is apparent that the applicant was deprived by his valuable right under section 13(2) of the Act and when the notice was sent till then the sample was already deteriorated and this aspect was neither examined nor considered by the Courts below and due to this apparent perversity the judgment of the Courts below are not sustainable in law.

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330. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction for prosecution – No sanction necessary if public servant stands retired on the date of taking cognizance – Law explained.
Jayant Avashiya v. State of M.P.
Reported in 2005 (3) MPLJ 521

Held :

For the prosecution of a public servant for the offence under the Prevention of Corruption Act, provision of section 19 would apply for taking sanction and that provision would apply only when the public servant who is being prosecuted is under the employment. If the prosecution is launched, after retirement or superannuation of a public servant, there is no necessity of sanction as per provision under section 19 of the Act. This legal position has been settled by the Supreme Court long back in the judgment of *Venkataraman's case, AIR 1958, SC 107* followed in the case of *C.R. Bansi vs. State of Maharashtra, AIR 1971 SC 786* and again in the case of *Habibulla Khan vs. State of Orissa and another, 1995 (2) JT* Page 1.

The over all legal position emerged is that Prevention of Corruption Act, 1947 and 1988 sections 6 and 19 respectively of the aforesaid Acts do not contemplate that sanction is necessary for prosecution of a public servant who has superannuated from the service. No sanction is necessary for the prosecution of the petitioner in this case as he is not a public servant on the date of taking of cognizance of the offence by the learned Court below. In the case of *State of Orissa and others v. Ganeshchandra, AIR 2004 SC 2179* while considering the abovementioned judgment in paras 14 to 18 the Supreme Court has considered the former judements on the point and held that if the retired Gov-

ernment servant is prosecuted for the offence other than the offence covered by the Prevention of Corruption Act, then the sanction would be essential but, if the public servant is prosecuted under the provisions of the Prevention of Corruption Act and the date of taking cognizance, he is ceased to be a public servant, there is no necessity of sanction for taking cognizance.

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331. MOTOR VEHICLES ACT, 1988 – Section 166

Liability of insurance company –Accident taking place at 3.00 pm while vehicle insured at 5.00 pm on that very day – Insurance company not liable – Law explained.

Paharilal v. Mahesh and others

Reported in 2005 (3) MPLJ 523

Held :

So far as the liability of respondent No. 3/Insurance Co. is concerned, learned counsel for respondent No. 3 submits that since that accident took place at 3 p.m. and the offending vehicle was insured at 5:00 p.m. on that very day and there is a specific averment in Exhibit N.A. 1 that the effective date and time of commencement of insurance is from 5.00 O' clock on 8-12-1992, therefore, by no stretch of imagination a conclusion can be drawn that the offending vehicle was insured at the time of accident. For this, learned counsel for respondent No.3 insurance Co. submits that the decision reported in the case of *New India Insurance Co. Ltd. v. Ram Dayal and ors., 1990 (2) SCC 680* is distinguishable and has no obligation to the facts of this case. Smt. Amrit Ruprah, learned counsel placed reliance on a decision of Hon'ble Supreme Court reported in *1998 (1) SCC 365 Oriental Insurance Co. Ltd. vs. Sunita Rathi and others,* wherein the Hon'ble Apex Court has held that where the time is mentioned in the cover note then the policy will be effective from the date and time of commencement of the insurance for the purpose of the Act. In the present case accident took place at 3.00 p.m. and the vehicle was insured at 5.00 p.m. In view of this, the insurer cannot be held liable on the basis of the above policy. Therefore, the liability has to be of the owner of the vehicle.

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332. CIVIL PROCEDURE CODE, 1908 – Sections 80 and 80 (2)

Applicability of Sections 80 and 80 (2) – Requirements for – Law explained.

Municipality, through Chief Municipal Officer, Raghogarh v. Gas Authority of India Ltd. and others.

Reported in 2005 (3) MPLJ 530

Held :

Division Bench of this Court in the case of *State of M.P. vs. Bhagwant Rao, 1972 JLJ SN 95* has considered the requirement of valid notice and held that the notice under section 80, Civil Procedure Code must fulfil the three-fold requirements of the section. It is held as under :–

> "Strictly speaking a notice under section 80 of the Code of Civil Procedure must fulfil the three-fold requirement of the section, it must state (1) the name, description and place of residence of the plaintiff, (2) the cause of action for the suit, and (3) the relief which he claims. The section is explicit and mandatory and admits of no implications or exceptions. Though the terms of the section have to be strictly complied with it does not mean that the notice should be scrutinised in a pedantic manner divorced from common sense. Keeping in mind this principles, this Court is of the view that the notice in question substantially meets the requirements of section 80 of the Code of Civil Procedure. It sets out the facts leading to the order of removal, complaints that reasonable opportunity to show cause as envisaged in Article 31(2) of the Constitution was not afforded. The relief of declaration was clearly implicit and there can also be no doubt that he was claiming the relief for payment of arrears of salary on reinstatement. Thus, this Court is of the view that the suit so far as it relates to arrears of salary cannot fail for want of the valid notice as contended."

While considering the application under section 80(2), Civil Procedure mode, plaintiff must plead and prove that the suit is filed to obtain urgent or immediate relief against the Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity, suit can be instituted with the leave of the Court. Thus, it is necessary to consider urgency and immediate relief against the Government or public officer. Basic requirement is that if such urgent and immediate relief is not granted then the plaintiff is likely to suffer irreparable injury or loss which cannot be compensated. In the matter of recovery, if some amount is paid, that is liable to be refunded. As such, there was no urgency in the matter. Until and unless urgency or immediate relief is shown to the Court, the court cannot grant permission mechanically. Court is required to pass a reasoned order while granting such permission specifying the nature of urgency or immediate relief to the plaintiff and loss being caused to the plaintiff if such relief is not granted immediately, in the absence of averments made in the application and the fact that same relief could be claimed by the petitioner in the writ petition before High court, there was no urgency. Even otherwise, if some recovery was made from the plaintiff then the loss could be compensated by ordering refund in future

after the judgment in the suit. As such there was no urgency to grant relief under sub-section (2) of section 80, Civil Procedure Code.

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333. HINDU MARRIAGE ACT, 1955 – Section 19 (as amended by Amendment Act of 2003)
Section 19, applicability of – Held, it is prospective in operation.
Rajesh Makhija v. Smt. Mamta alias Shalu
Reported in 2005 (3) MPLJ 564

Held :

Next contention raised by the counsel for the respondent is that section 19 of the Hindu Marriage Act is now stands amended w.e.f. 23-12-2003 and as per amendment in section 19 of the Act now a divorce petition can be filed at a place where the wife, if she is a petitioner, is residing on the date of presentation of the petition. Counsel for the appellant, therefore, submits that on the date when the judgment was pronounced the Morena Court had jurisdiction to try the case.

Now, the question is whether the said amendment is prospective and will apply to the present case or is retrospective in nature. For this purpose it is necessary to refer the Marriage Laws (Amendment) Act, 2003 whereby section 19(1)(iiia) is introduced.

Now, it will have to be found whether the amendment is retrospective in effect or is prospective. The Apex Court in the case of *Garikapati Veeraya vs. N. Subbiah Choudhry and others, AIR 1957 SC 540* has laid down that if the amendment in law is substantive in nature then the said amendment is always prospective. However, if the amendment is a procedure in nature the said amendment is generally prospective. In the present case right to file a suit at a particular stage is a substantive right and not a procedure. Hence, the said amendment cannot be said to be retrospective unless and until the statute itself makes it retrospective. This Court in case of *Bhagwandas and another vs. National Insurance Co. Ltd. and another, 1994 MPLJ 709 = 1994 JLJ 320* has laid down the same test. This Court in para 17 of its judgment has held that substantive law defines remedy and right while law of procedure defines the modes and conditions of the application of one to the other. Prima facie every statute is prospective unless made retrospective by expressed words or necessary implications.

Considering the above views laid down by the Apex Court and this Court it will be necessary to refer the provisions of the Amendment Act. Section 6 of the Marriage Laws (Amendment) Act, 2003 deals with transitory provision. The said section reads as under :-

Section 6 of the Marriage Laws (Amendment) Act, 2003 reads as under :–

> "6. *Transitory provision.* – All decrees and orders made by the Court in any proceedings under the Special Marriage Act or the Hindu Marriage Act shall be governed under the provisions contained in section 3 or section 5, as the case may be, as if this Act came into operation at the time of the institution of the suit :
>
> Provided that nothing in this section shall apply to a decree or order in which the time for appealing has expired under the Special Marriage Act or the Hindu Marriage Act at the commencement of this Act."

From a bare reading of these provisions it is clear that by section 6, section 3 and section 5 of the Amending Act are made retrospective while the amendment in section 19 where to section 19(1)(iiia) is incorporated by section 2 of the Amending Act and is not made retrospective. This clearly shows the intention of the Legislature to make provision of the section 19(1)(iiia) as prospective and not retrospective. Hence, on the date on which the proceedings were initiated the Court at Morena had no jurisdiction and, therefore, the impugned judgment and decree has been rendered without jurisdiction.

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334. CRIMINAL PROCEDURE CODE, 1973 – Sections 437, 438 and 439
Duration of order of anticipatory bail – Duration need not necessarily be limited in point of time – Protective umbrella u/s 438, whether available after rejection of application u/s 439? – Held, No – Court rejecting application u/s 439 to pass appropriate orders for custody of the accused – Law explained
Brijesh Garg @ Poda v. State of Madhya Pradesh
Misc. Criminal Case No. 4984/2005 by the High Court of Madhya Pradesh Main Seat, judgment dated 18.8.2005 (D.B.)

Held:

Expressing the view that the issues involved appear to be unsettled and should get the finality not only for the benefit of the parties but also for the benefit of subordinate Courts, the learned Single Judge referred following questions to be adjudicated by a Larger Bench and that is how the matter has been placed before us:-

(i) Whether anticipatory bail order should be for a limited duration or the normal rule should be not to limit the operation of the order?

(ii) Whether the protective umbrella granted under the anticipatory bail order can be claimed by the petitioner in case where his application for regular bail has been rejected by the Court of Sessions and in such a situation whether his application under Section 439 of the Code of Criminal Procedure, 1973 would be maintainable?

(iii) Where the petitioner who has been enlarged on anticipatory bail for a limited duration and whose application under Section 439 of the Code is rejected by the Sessions Court, but at the time of consideration of his application, either he was not present before the Court or he moved out of the custody of the Court, whether his application would be maintainable under Section 439 of the Code before the High Court?

* * *

In view of the above discussion, our answer to question No. 1 referred to us is that operation of an order passed under Section 438 (1) of the Code should not necessarily be limited in point of time. The Court may if there are reasons for doing so limit the operation of the order to a short period until the proper material is placed after investigation in relation to a matter covered by an order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable period but this need not be followed as in invariable rule. It is at the discretion of the Court to limit or not to limit the operation of the order in relation to a period of time.

On the basis of above discussion, our answer to question No.2 referred to us is that where the anticipatory bail is granted for limited duration and it is left to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation is still in progress or the charge-sheet is submitted, sufficient time can be given to the applicant to move to regular Court for bail. Till the application is filed and accused surrendered to jurisdiction or orders of the Court, the Court may allow the accused to remain on anticipatory bail. Anticipatory bail may be granted for a duration which may extend to the date on which the bail application is taken up for consideration. When the bail application is rejected by the regular Court, the applicant cannot have further opportunity to move to the High Court under the protective umbrella. Direction under Section 438 of the Code is to be issued only at *pre-arrest* stage. Unless a person is in custody, an application for regular bail is not maintainable.

We may hasten to add that the term 'custody' is very elastic and may mean actual imprisonment or physical detention but it does not necessarily mean actual physical detention in jail or prison but rather synonymous with restraint of liberty. In celebrated case of *Niranjan Singh Vs. Prabhakar AIR 1980 SC 785,* it was held that where the accused had appeared and surrendered before the Sessions Judge, the Judge would have jurisdiction to consider the bail application as the accused would be considered to have been in custody within the meaning of Section 439. Custody, in the context of Sections 437 and 439, is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

In order to obviate any confusion and place it without any ambiguity, we wish to state in specific terms that when an accused applies for grant of regular bail within the time prescribed by the order under Section 438 of the Code and submits to the jurisdiction of the Court, he will be in the deemed custody for regular bail and if the hearing on the application for regular bail is adjourned for any reason whatsoever or the application is rejected, it will be open to the Court to pass appropriate orders for custody of the accused consistent with law irrespective of the fact that the time prescribed in the order under Section 438 of the Code has not expired.

* * *

Once the accused makes an application under Section 437 or 439 of the Code, the provisions of Section 438 cannot be invoked and the advantage thereunder cannot continue after the arrest of the accused which includes submission to the jurisdiction and orders of the Court. The grant of anticipatory bail or continuance of the advantage of the order under Section 438 of the Code to an accused, who is under arrest, involves a contradiction in terms.

This brings us to question No. 3 referred to us by the learned Single Judge. For making an application under Section 439 of the Code, the fundamental requirement is that the accused should be in custody. Where the protection in terms of Section 438 of the Code is for a limited duration during which the regular Court has to be moved for bail obviously, the application which is moved is for regular bail. Section 439 of the Code, mandates the applicant to be in custody. Once the accused is arrested and he moves an application for regular bail before the concerned Court, the concerned Court may either allow it or reject it. If the application is rejected, the applicant cannot be allowed to move out of the custody of the court. If the accused moves out of the custody of the Court, he cannot be said to be in custody and an application under Section 439 of the Code will not lie as the application under Section 439 of the Code presupposes custody.

Thus, our answer to question No. 3 referred to us is that for the purpose of moving an application under Section 439 of the Code, the applicant must be in custody. Section 439 of the Code mandates the applicant to be in custody. If the person is not in custody of the Court or moves out of the custody, an application under Section 439 of the Code is not maintainable. The applicant who has been enlarged on anticipatory bail for limited duration and whose application under Section 439 of the Code is rejected by the Sessions Court cannot be allowed to remain *at remain* at large to enable him to move the higher Court for granting bail under Section 439 of the Code.

* * *

In view of our preceding analysis, we proceed to enumerate our conclusions in answers to the questions referred in *seriatim*:-

1. Operation of an order passed under Section 438 (1) of the Code should not necessarily be limited in point of time. The Court may if there are reasons for doing so limit the operation of the order to a short period until the proper material is placed after investigation in relation to a matter covered by an order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable period but this need not be followed as an invariable rule. It is at the discretion of the Court to limit or not to limit the operation of the order in relation to a period of time.

2. Where the anticipatory bail is granted for limited duration and it is left to the regular Court to deal with the matter on an appreciation of evidence placed before it when the investigation is still in progress or the charge-sheet is submitted, sufficient time can be given to the applicant to move to regular Court for bail. Till the application is filed and accused surrenders to jurisdiction or orders of the Court, the Court may allow the accused to remain on anticipatory bail. Anticipatory bail may be granted for a duration which may extend to the date on which the bail application is taken up for consideration. When the bail application is rejected by the regular Court, the applicant cannot have further opportunity to move to the High Court under the protective umbrella. Direction under Section 438 of the Code is to be issued only at pre-arrest stage. Unless a person is in custody, an application for regular bail is not maintainable.

3. For the purpose of moving an application under Section 439 of the Code, the applicant must be in custody. Section 439 of the Code mandates the applicant to be in custody. If the person is not in custody of the Court or moves out of the custody, an application under Section 439 of the Code is not maintainable. The applicant who has been enlarged on anticipatory bail for limited duration and whose application under Section 439 of the Code is rejected by the Sessions Court cannot be allowed to remain at large to enable him to move the higher Court for granting bail under Section 439 of the Code.

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PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADESH : JABALPUR

MEMORANDUM

No. B/4796/ III-18-180/75 (Guide Lines) Jabalpur, dated 4th August, 1994

To,

The District and Sessions Judge,

.....

Sub:- Transfer of members of Class III and Class IV Staff of their Establishment.

☆ ☆ ☆

It has been observed for some time that the Class III and IV Government servants working in the subordinate Courts are allowed to work on a particular seat for an unreasonably long time with the result that they develop vested interests in many ways giving rise to complaints. So, in order, to obviate such complaints the Hon'ble the Chief Justice has directed that a circular be issued to the following effect to all the District and Sessions Judge, in the State for observance as a matter of Policy on the matter of transfer, namely :

The transfer of seats of such members of the Class III and Class IV staff, especially the Execution Clerk and the Reader, as are amenable to it be effected every three years and while doing so it be ensured that a particular person is not restored to his previsous seat at least within three years.

So, I am directed to inform you accordingly and request you to please ensure its compliance.

Sd/-

(K.P. TIWARI)
Additional Risistrar

●

MINISTRY OF COMMUNICATIONS & INFORMATION TECHNOLOGY

No. G.S.R. 735(E), dated October 29, 2004 – In exercise of the powers conferred by clause (e) of sub-section (2) of section 87, read with section 16 of the **Information Technology Act, 2000** (21 of 2000), the Central Government hereby makes the following rules, namely:–

● Published in the Gazette of India, Extraordinary, Part II, Section 3 (ii), No. 909, dated 18th October, 2004.

1. Short title and commencement.– (1) These rules may be called the **Information Technology (Security Procedure) Rules, 2004.**

(2) 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 Information Technology Act, 2000 (21 of 2000)

(b) "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3 of the Act;

(c) "hardware token" means a token which can be connected to any computer system using Universal Serial Bus (USB) port;

(d) "smart card" means a device containing one or more integrated circuit chips, which perform the functions of a computer's centre processor, memory and input or output interface;

(e) words and expressions used in these rules and not defined but defined in the Act shall have the meaning respectively assigned to them in the Act.

3. Secure electronic record. – An Electronic record shall be deemed to be a secure electronic record for the purposes of the Act if it has been authenticated by means of a secure digital signature.

4. Secure digital signature.– A digital signature shall be deemed to be a secure digital signature for the purposes of the Act if the following procedure has been applied to it, namely :–

(a) that the smart card or hardware token, as the case may be, with cryptographer module in it, is used to create the key pair;

(b) that the private key used to create the digital signature always remains in the smart card or hardware token as the case may be;

(c) that the hash of the content to be signed is taken from the host system to the smart card or hardware token and the private key is used to create the digital signature and the signed hash is returned to the host system;

(d) that the information contained in the smart card or hardware token, as the case may be, is solely under the control of the person who is purported to have created the digital signature;

(e) that the digital signature can be verified by using the public key listed in the Digital Signature Certificate issued to that person;

(f) that the standard referred to in rule 6 of the Information technology (certifying authorities) Rules, 2000 have been complied with, in so far as they relate to the creation, storage and transmission of the digital signature ; and

(g) that the digital signature is linked to the electronic record in such a manner that if the electronic record was altered the digital signature would be invalidated.

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MINISTRY OF COMMUNICATION AND INFORMATION TECHNOLOGY

No. G.S.R. 582 (E) dated September 6, 2004. In exercise of the powers conferred by clauses (b) and (c) of sub-section (2) of Section 87, read with sub-sections (1) and (2) of Section of 6 of the Information Technology Act, 2000 (21 of 2000), the Central Government hereby makes the following rules, namely :–

1. Short title and commencement.– (1) These rules may be called the **Information Technology (Use of Electronic Records and Digital Signatures) Rules, 2004.**

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

2. Definitions. – In these rules, unless the context otherwise requires :–

(a) "Act" means the Information Technology Act, 2000 (21 of 2000);

(b) "electronic record" means data, record of data generated image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

(c) words and expressions used herein and not defined but defined in the Act shall have the meaning respectively assigned to them in the Act.

3.Filing of form, application or any other document. – Any form, application or any other document referred to in clause (a) of sub-section (1) of Section 6 of the Act may be filed with any office, authority, body or agency owned or controlled by the appropriate Government using the software specified by it and such office, authority, body or agencys hall, while generating such software, take into account the following features of the electronic record, namely :–

(a) life time ;

(b) preservability;

(c) accessibility;

(d) readability;

(e) comprehensibility in respect of linked information;

(f) evidentiary value in terms of authenticity and integrity;

(g) controlled destructibility and

(h) augmentability

4. Issue or grant of any licence, permit, sanction or approval. – Any licence, permit, sanction or approval whatever name called referred to in clause (b) of sub-section (1) of Section 6 of the Act may be issued or granted by using the software specified under Rule 3.

5. Payment and receipt of fee or charges. – The payment of receipt of any fee or charges for filing, creation or issue of any electronic record under clause (a) of sub-section (1) of Section 6 of the Act may be made in a cheque in the electronic form.

Explanation. – For the purposes of this rule, "a cheque in the electronic form" has the meaning assigned to it in clause (a) of Explanation 1 to Section 6 of the Negotiable Instruments Act, 1881 (26 of 1881)

●

Of those qualities on which civilization depends, next after courage, it seems to me, comes an open mind, and, indeed, the highest courage is, as Holmes used to say, to stake your all upon a conclusion which you are aware tomorrow may prove false.

LEARNED HAND

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005

An Act Further to amend the Code of Criminal Procedure, 1973

Be it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows :

1. Short title and commencement.– (1) This Act may be called the Code of Criminal Procedure (Amendment) Act. 2005.

(2) Save as otherwise provided in this Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 20.– In Section 2C of the Code of Criminal Procedure, 1973 (2 of 1974), (hereinafter referred to as the principal Act), after sub-section (4), the following sub-section shall be inserted, namely :

"(4-A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate."

3. Amendment of Section 24.— In Section 24 of the principal Act, in sub-section (6), after the proviso, the following Explanation shall be inserted and shall be deemed to have been inserted with effect from the 18th day of December, 1978, namely :

Explanation–For the purposes of this sub-section,—

(a) *"regular Cadre of Prosecuting Officers"* means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post ;

(b) *"Prosecuting Officer"* means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code."

4. Insertion of new Section 25-A.– In Chapter II of the principal Act, after Section 25, the following section shall be inserted, namely :

"**25-A *Directorate of Prosecution.***– (1) The State Government may establish a Directorate of Prosecution consisting of a Di-

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[Note: The Amendment Act has so far not been published in official gazette and therefore, has not yet come into force]

rector of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director or Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (3), of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been Appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor."

5. Amendment of Section 29.– In Section 29 of the principal Act,–

(a) in sub-section (2), for the words "five thousand rupees", the words "ten thousand rupees" shall be substituted;

(b) in sub-section (3) for the words "one thousand rupees", the words "five thousand rupees" shall be substituted.

6. Amendment of Section 46.– In Section 46 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely :

"(4) Save in exceptional circumstances no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judi-

cial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

7. Insertion of new Section 50-A.– After Section 50 of the principal Act, the following section shall be inserted, namely :

> ***"50-A. Obligation of person making arrest to inform about the arrest, etc. to a nominated person.***– (1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.
>
> (2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.
>
> (3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.
>
> (4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person."

8. Amendment of Section 53.– In Section 53 of the principal Act, for the Explanation, the following Explanation shall be substituted, namely :

"***Explanation.***–In this section and in Section 53-A and 54.–

(a) *'examination'* shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques Including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) *'registered medical practitioner'* means a medical practitioner who possess any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

9. Insertion of new Section 53-A.– After Section 53 of the principal Act, the following section shall be inserted, namely :

"53-A. Examination of person accused of rape by medical practitioner.– (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely :

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and,

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

10. Amendment of Section 54.– Section 54 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely :

"(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person."

(To be contd....)

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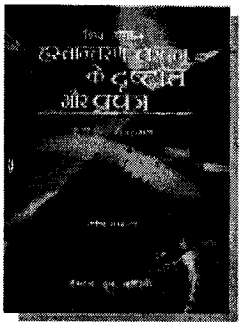

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