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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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FROM THE PEN OF THE EDITOR

VED PRAKASH
Director, JOTRI

Esteemed Readers

Keeping with our promise made in the earlier issue (Editorial August, 2006), we are able to bring out this issue with little more promptitude. The next issue (December, 2006) is also in the process and I firmly believe that we shall be in a position to dispatch the same before the conclusion of year 2006.

In past couple of months there have been a number of developments of far reaching importance in legal arena. The first and the most important being the introduction of concept of "Plea Bargaining" into our criminal justice system which was almost overdue. Because of the ever increasing arrears of cases for past many years the system was finding itself quite crippled and thus unable to come true to the expectation of the society as far as timely justice is concerned.

The debate regarding inclusion of the scheme of "Plea Bargaining" into our system began almost 1½ decades back when Law Commission of India in year 1991 in its 142nd Report came out with a categorical recommendation that to tackle the problem of arrears of cases and consequent delay and resultant failure of justice on criminal side, the scheme of "Plea Bargaining" or to say "Mutual Satisfactory Disposition" should be made part of our criminal justice system. The Commission after an in-depth and broad-based study and after considering various pros and cons of this scheme strongly pleaded for its inclusion. However, the suggestions/recommendations were not taken with due seriousness. The Law Commission of India in its 154th Report submitted in 1996 again stressed about the need of inclusion of the scheme of "Plea Bargaining" into our criminal justice system. It is almost after a decade since then that we find the scheme of "Plea Bargaining" in Criminal Procedure Code in the shape of Chapter 21-A which has been engrafted by way of Criminal Law (Amendment) Act of 2005.

Now that the scheme has ultimately become part of our system, it is but incumbent upon us to prepare ourselves for its implementation in a manner so that it can be helpful in strengthening the confidence of the common man in the efficacy of the system. It requires an open mind and unbiased approach about the scheme, at the same time efforts are needed to involve the prosecution and the defence wings so that there may be requisite degree of awareness and adequate sensitization which can help in ensuring effective implementation of the scheme.

Needless to say that the system of "Plea Bargaining" has worked quite successfully in various jurisdictions including United States of America and Canada, where as per available statistics around 90% criminal cases are resolved through the process of "Plea Bargaining" and only about 10% cases go for regular trial. The process has distinct advantages over the process of full-fledged trial because it saves time, money and energy of the prosecution and defence. At

the same time it stipulates a significant role of the victim of the crime who stands almost marginalized in the existing set-up.

Looking to the need of the hour, the Institute under the valuable guidance and motivation provided by Hon'ble the Chief Justice has embarked upon an ambitious plan of organizing ten workshops by December 2006. In these workshops, which have to be organized on regional basis at Jabalpur, Gwalior, Bhopal, Rewa and Indore, we plan to cover three hundred Judicial Officers, one hundred Prosecution Officers and one hundred Lawyers. The idea is to disseminate the knowledge regarding the scheme as well as to sensitize the various participants of the field of Criminal Justice System on this issue. First two workshops of the series have already been organized at Jabalpur on 28th and 29th October, 2006.

Another remarkable development has been in the shape of coming into force of "Protection of Women from Domestic Violence Act, 2005" w.e.f. 26th October, 2006. The Act which appears to be an effective step in the direction of ensuring gender justice, envisages an important role for Judicial Magistrate First Class, who has the jurisdiction to pass various orders under Chapter 4 of the Act regarding residence, monetary relief, custody of children and compensation. We plan to organize in near future few workshops in relation to this Act. As of now, we in this issue are publishing an illuminating article on this new piece of legislation by Hon'ble Shri Justice D.M. Dharmadhikari, Chairman, State Human Rights Commission and former Judge, Supreme Court of India, which throws light over various important features of this Act.

Part II of the Journal is again abound with a number of judicial pronouncements which may help in dispelling doubts on various important but contentious legal issues including one relating to the question whether a woman can be held liable u/s 376 (2) (g) I.P.C. for gang rape (Note No, 286). The decision of the Apex Court rendered in Bhupinder Singh's case (Note No. 288) sets at rest the long drawn controversy regarding maximum period of detention u/s 167 (2) Cr.P.C. for an offence u/S 304-A C.P.C..

In Part III we have included "ADR Rules" which have recently been notified and will pave the way for effective implementation of ADR scheme as introduced by CPC (Amendment) Act, 2002.

Indeed two very useful dispute resolution tools in the shape of scheme of "Plea Bargaining" and "ADR" are in our hands. But then as rightly said the ultimate success or failure of any scheme, howsoever foolproof it may be, depends upon the persons having the responsibility to implement it. Here comes the role of district Judiciary. Let us rise to the occasion. I conclude this monologue with the words of our beloved President His Excellency Dr. A.P.J. Abdul Kalam (from *"The Wings of Fire"*)

> 'Let the latent fire in the hearts of every Indian acquire wings,
> and the glory of this great country light up the sky'

Thank you!

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APPOINTMENT OF JUDGE IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of Madhya Pradesh on 11.10.2006, in a brief swearing-in-ceremony held in the Conference Hall of High Court at Jabalpur administered the oath of office to Hon'ble Shri Justice R.C. Mishra on his appointment as Additional Judge of the High Court of Madhya Pradesh.

Born on 3.6.1951, Hon'ble Shri Justice R.C. Mishra joined M.P. State Judicial Service as Civil Judge Class II on 8.7.1975. Was promoted to the post of Additional District Judge on 22.6.1989. Worked as Commissioner of Departmental Enquiries, GAD, Bhopal from 7.7.2001 and as Registrar, National Judicial Academy, Bhopal from 25.09.2001 onwards. Was Presiding Judgre, Family Court from 25.9.2004. Was District & Sessions Judge, Jabalpur from 7.5.2005 prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 11th October, 2006.

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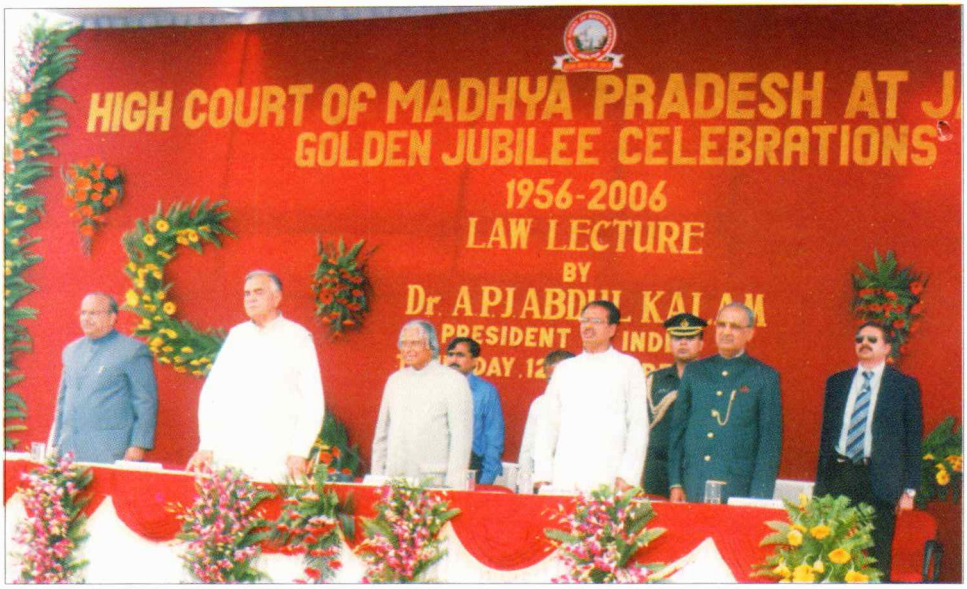
HON'BLE SHRI JUSTICE SUSHIL KUMAR PANDEY DEMITS OFFICE

Hon'ble Shri Justice Sushil Kumar Pandey demitted office on 03.08.2006 on His Lordship's attaining superannuation. Born on 4th August 1944 at Khandwa (M.P.). Obtained B.A. Degree in 1964 and then LL.B. Degree in 1966 from Sagar University. Enrolled as an advocate in the State Bar Council of M.P. in March 1967. Joined as Civil Judge Class II on 23.10.1967. Was promoted as Civil Judge Class I in 1979 and then as Additional District Judge in 1984. Was posted as Additional Registrar (J) in the High Court at Jabalpur and Additional Registrar, High Court of Madhya Pradesh, Bench Indore. Worked as District & Sessions Judge at Sehore, Satna, Sagar and Bhopal and as Registrar, High Court of Madhya Pradesh, Bench Gwalior. Was Chairman, S.T.A.T. Was Registrar (Judl.) of the High Court of Madhya Pradesh, Jabalpur till his elevation as Additional Judge, High Court of M.P on 21st March 2003.

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



Law Lecture by his excellency the President of India Dr. A.P.J. Abdul Kalam 12th October, 2006. Dignitaries From (L to R) – Hon'ble the Chief Justice Shri A.K. Patnaik, His Excellency the Governor of Madhya Pradesh Dr. Balram Jhakar, His Excellency the President of India Dr. A.P.J. Abdul Kalam, Chief Minister of Madhya Pradesh Shri Shivraj Singh Chouhan, Advocate General of the State Shri R.N. Singh

Hon'ble the Chief Justice Shri A.K. Patnaik Laying the Foundation Stone of the Hostel Complex of the Institute on 18th October 2006.

Hon'ble Shri Justice S.B. Sinha, Judge, Supreme Court of India delivering the address in the foundation training course on mediation Jointly organdised by JOTRI & SALSA (8th July, 2006)

Hon'ble Shri Justice Dipak Misra, Chairman, High Court training institute Addressing the Participants in the foundation training course on mediation jointly organised by JOTRI & SALSA. Hon'ble Shri Justice Madan B. Lokur, Judge High Court of Delhi is Sitting to the right (8th July, 2006)

Hon'ble the Chief Justice Shri A.K. Patnaik delivering Inaugural Address on the Opening Day of the Five Days' Programme on "Foundation Training in Counselling Skills" (25-09-2006)

Participants in the Workshop on "Foundation Training in Counselling Skills" from 25.09.2006 to 29.09.2006

PART - I

"घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005"

जस्टिस डी.एम. धर्माधिकारी
अध्यक्ष
म.प्र. मानव अधिकार आयोग, भोपाल

अन्तर्राष्ट्रीय मंच पर सभी देशों ने अनुभव किया कि महिलाओं के प्रति घरेलू हिंसा भी मानव अधिकार संबंधी एक चिंता का विषय है। संयुक्त राष्ट्र की एक समिति ने वर्ष 1994 में अपनी एक सभा में निर्णय लिया एवं निर्देश जारी किये कि महिलाओं पर समाज में व्याप्त घरेलू हिंसा को रोकने के लिये समस्त सदस्य देश कारगार कानूनी उपाय करें।

भारत में महिलाओं के प्रति घरेलू हिंसा ग्रामीण एवं शहरी, दोनों क्षेत्रों में व्यापक रूप से विद्यमान है। न तो अपराधिक कानून और न ही दीवानी कानून इसकी रोकथाम में पूर्ण रूपेण सफल रहे हैं। दीवानी विधि में तो घरेलू हिंसा से पीड़ित महिला को सभी प्रकार की सहायता प्राप्त होने के लिए उपाय ही उपलब्ध नहीं है। भारतीय दण्ड विधान में धारा 498 – 'अ' में केवल एक ही सजा का प्रावधान है। ऐसी परिस्थिति में घरेलू हिंसा से पीड़ित महिलाओं के हित में एक व्यापक सम्मिश्रित अपराधिक एवं दीवानी विधि पारित करना आवश्यक हो गया था। इस हेतु भारत सरकार ने अन्तर्राष्ट्रीय स्तर पर हुए निर्णयों एवं अनुदेशों के आधार पर घरेलू हिंसा से महिलाओं के संरक्षण का अधिनियम पारित कर दिया है। इसकी जानकारी हमारी सभी शहरी एवं ग्रामीण महिलाओं को होना आवश्यक है, ताकि घरेलू हिंसा से पीड़ित महिलाएं अब अपने को लाचार एवं असहाय न समझें।

साररूप में इस अधिनियम के मुख्य प्रावधानो में व्यवस्था है जिससे घरेलू हिंसा के लिए दोषी व्यक्तियों को तत्संबंधित अपराधिक विधि में सजा मिल सके एवं इसके अलावा पीड़ित महिलाओं को चिकित्सीय सुविधा, आश्रय की सुविधा और बच्चों के बारे में संरक्षण की सहायता मिल सके। अधिनियम में यह भी व्यवस्था है कि जहां कौटुम्बिक जीवन पुनर्स्थापित होने की संभावना है वहां सलाह मशविरा या अन्य प्रकार के समझौते हो सकें। सबसे महत्वपूर्ण प्रावधान घरेलू हिंसा की भविष्य में रोकथाम का है। इससे न केवल घरेलू हिंसा से पीड़ित महिला को उपचार मिलेगा, परन्तु आगे भी इसके प्रति घरेलू हिंसा न हो सके या घरेलू हिंसा की संभावना से जो महिलाएं भयभीत हैं उनके लिए न्यायालय, एक संरक्षणात्मक प्रतिषेध जारी कर सकता है। यह एक प्रकार का निषेधात्मक आदेश है जिसमें न्यायालय किसी पुरूष या महिला को आदेश दे सकता है कि वह घरेलू हिंसा न करे और यदि उस आदेश का उल्लंघन होता है तो उसे कारावास की सजा से दंडित किया जावेगा।

इस अधिनियम के अन्तर्गत यदि हिंसा की घटना हो चुकी है तो उसके लिए आर्थिक मुआवजा देने का भी प्रावधान है।

इस अधिनियम के मुख्य प्रावधानों को समझ लेने की आवश्यकता है। अधिनियम के माध्यम से सहायता पाने के लिए 'पीड़ित व्यक्ति' की परिभाषा में, वे सभी महिलाएं आती हैं जो किसी गृह में, रिश्तेदारी के संबंधों के कारण रह रही हैं और जिनके विरूद्ध किसी तरह की कोई हिंसा उस घर में हुई हो। 'घरेलू संबंध या रिश्तेदारी'

को परिभाषित किया गया है, जिसमें कोई व्यक्ति आपसी रिश्तेदारी के कारण किसी मकान में साथ रह रहा हो या कि माता पिता की संतान हो या उनके बीच विवाह हुआ हो या उन्हें गोद लिया हो या जो किसी संयुक्त परिवार के सदस्य के रूप में निवास कर रहे हों, सभी शामिल हैं।

'सम्मिलित परिवार का गृह' की परिभाषा के अनुसार यह एक ऐसा गृह या घर या उसका भाग है जहां पीड़ित व्यक्ति और दोषी व्यक्ति अपने घरेलू संबंधों के कारण साथ–साथ निवास कर रहे हों या इससे आशय है ऐसे शामिल या सम्मिलित गृह या सम्मिलित रहवास जिसमें महिला को उसके निर्वाधित निवास का अधिकार है भले ही उस मकान में उसका कोई स्वामित्व या मालिकाना हक हो अथवा न हो। 'आश्रय गृहों' को भी परिभाषित किया गया है, उसके मायने ऐसे आश्रय या निवास स्थान से है जो राज्य शासन ने उस रूप में निर्धारित किये हैं एवं सार्वजनिक जानकारी के लिये उस हेतु विज्ञप्ति जारी की है। ऐसा आश्रय गृह आवश्यक हुआ है तो पीड़ित महिलाओं को आश्रय देने के लिए उपलब्ध कराया जावेगा।

'घरेलू हिंसा' की परिभाषा काफी व्यापक है। घरेलू हिंसा में निम्नलिखित सभी प्रकार के आचरणों का समावेश है :–

1. ऐसा किसी भी तरह का दुराचरण जिसमें पीड़ित घरेलू महिला की स्वास्थ्य, सुरक्षा, जीवन तथा अन्य सुख से रहने की इच्छा का हनन होता हो या ऐसा दुराचरण जो घरेलू महिला को शारीरिक या मानसिक दुख देता हो। इसमें मारपीट, भावनात्मक प्रताड़ना, आर्थिक प्रताड़ना और नाजायज शारीरिक सम्बन्ध बनाने की कोशिश, गाली या ताने देना आदि सम्मिलित है।
2. कोई ऐसी प्रकार की प्रताड़ना या हिंसा जिसमें किसी स्त्री को इस बात के लिए मजबूर किया जाये कि वह किसी तरह की अनुचित मांग या दहेज की पूर्ति करें।
3. उपर्युक्त वर्णित प्रकार का दुराचरण, महिला के किसी अन्य रिश्तेदार के विरूद्ध इस उद्देश्य से कि घरेलू महिला पर उसका दबाव पड़े। किसी अन्य प्रकार की प्रताड़ना जिससे शारीरिक या मानसिक कष्ट महिला को हो। शारीरिक प्रताड़ना में उसके स्वास्थ्य को नष्ट करने की चेष्टा, मारपीट, डराना–धमकाना तथा हर तरह की यौन प्रताड़ना या अपमान जो महिला की प्रतिष्ठा के प्रतिकूल हो, वह भी शामिल है।
4. मौखिक और भावनात्मक प्रताड़ना में, उसको अपमानित करना, उसको गाली देना या उसको उलाहना देना इस कारण से कि उसे पुत्र या पुत्री या संतान नहीं हुई, भी शामिल है। इसी तरह की प्रताड़ना उसके किसी रिश्तेदार के विरूद्ध करना भी उसमें शामिल किया गया है।
5. आर्थिक प्रताड़ना में शामिल है कि किसी प्रकार की ऐसी कार्यवाही जिसमें महिला को उप जीविका के साधन कम कर दिये जाएं या रोक दिए जाएं। उसके स्वयं के कपड़े–लत्ते, जेवर, बैंक में जमा राशि या अन्य सम्पत्ति से उसे बेदखल या वंचित किया जाए या रहवास के लिए आवश्यक साधन या सुविधाओं से वंचित किया जाए।

उत्पीड़ित महिला के लिए अधिनियम में कई व्यवस्थाएं अधिकारियों एवं न्यायालयों के माध्यम से दी गई हैं, उनमें सबसे महत्वपूर्ण है शासन द्वारा संरक्षक अधिकारी की नियुक्ति। संरक्षक अधिकारी पर यह उत्तरदायित्व डाला गया है कि यदि उसे किसी महिला के विरूद्ध घरेलू हिंसा की जानकारी मिलती है तो वह उस महिला को अधिनियम के तहत मिलने वाली सहायता और राहत की जानकारी देगा और जिसमें यह विशेष रूप से पीड़ित

महिला को समझायेगा कि वह चाहे तो घरेलू हिंसा से अपने को बचाने के लिए न्यायालय से एक निषेधात्मक आदेश प्राप्त कर सकती है और आर्थिक मुआवजा भी प्राप्त कर सकती है। इसके अलावा आवश्यक हुआ तो वह अपने बच्चों की अभिरक्षा भी मांग सकती है । संरक्षक अधिकारी का यह भी कर्तव्य होगा कि पीड़ित महिला को राहत उपलब्ध कराने के लिए उसे किसी सेवा भावी महिलाओं की मदद दिलवाये। उसे विधिक सहायता अधिनियम में भी आर्थिक सहायता उपलब्ध करवाये और दोषी व्यक्तियों के विरूद्ध भारतीय दंड संहिता की धारा 498–अ में भी दाण्डिक प्रकरण दायर करने में उसकी मदद करे। इस तरह की जानकारी और सहायता देने के लिए शासन एक संरक्षक अधिकारी की नियुक्ति हर जिले में करेगा और उसका काम करने का भौगोलिक क्षेत्र सुनिश्चित करेगा। राज्य शासन को निर्देश है कि जहा तक हो सके संरक्षक अधिकारी के पद पर महिलाओं की नियुक्ति करे, ताकि महिलाओं को अपनी शिकायत देने में और परामर्श लेने में कोई हिचक या परेशानी न हो और उसे पुरूष वर्ग से जूझना न पड़े।

राज्य शासन पर यह भी उत्तरदायित्व डाला गया है कि घरेलू हिंसा से पीड़ित महिलाओं के लिए कुछ आश्रय स्थान निर्धारित करें एवं उसके संचालकों पर यह बाध्यता होगी कि यदि कोई संरक्षक अधिकारी या महिला समाज सेवी संस्था किसी उत्पीड़ित महिला के लिए आश्रय की मांग करती है, तो ऐसा आश्रय स्थान देने की व्यवस्था करे । संरक्षक अधिकारी पर यह उत्तरदायित्व डाला गया है कि वह उत्पीड़ित महिलाओं की ओर से सभी कानूनी कार्यवाही अधिनियम के तहत स्वयं करेगा और उसके लिए आवश्यक कदम उठायेगा। संरक्षक अधिकारी उस क्षेत्र के न्यायिक मजिस्ट्रेट की देखरेख में कार्य करेगा और उत्पीड़ित महिला की शिकायत आवश्यक कार्यवाही हेतु मजिस्ट्रेट को पहुंचायेगा। जिन घरेलू हिंसा के प्रकरणों में घरेलू शांति कायम होने की संभावना हो और परिवार टूटने से बचाया जा सकता हो वहां इस हेतु आवश्यक हुआ तो संरक्षक अधिकारी पीड़ित महिलाओं को रजिस्टर्ड समाज सेवी संस्था का परामर्श व सहायता प्राप्त करायेगा।

अधिनियम में घरेलू हिंसा की शिकार महिलाओं व बच्चों के संरक्षण के लिए गैर शासकीय संस्थाओं में सेवारत् महिलाओं की सेवाएं को लेने का प्रावधान एक अभूतपूर्व कदम है। कोई भी रजिस्टर्ड महिलाओं की संस्था इस संबंध में कार्य कर सकती है। उनके अधिकारों में यह दिया गया है कि यदि कोई घरेलू हिंसा की घटना उनके ध्यान में आती है तो वह तत्संबंध में एक रिपोर्ट संरक्षक अधिकारी को एवं उस क्षेत्र के मजिस्ट्रेट को देंगी। उत्पीड़ित महिला का डॉक्टरी जांच भी वह करा सकती है एवं संबंधित पुलिस थाने में भी उस अपराध की रिपोर्ट दे सकती है। समाज सेवी संस्थाओं का कर्तव्य होगा कि वे उत्पीड़ित महिला अगर गृह से निकाल दी गई हो तो उसे आश्रय गृह में या अपने निवासरत गृह में निवास चालू रखने की व्यवस्था करें। इस हेतु आवश्यक निर्देश न्यायालय से लेने के लिए संरक्षक अधिकारी की सहायता वह ले सकती है। इन समाजसेवी संस्थाओं को यह संरक्षण दिया है कि यदि वे सद्बुद्धि एवं सदाशय से किसी उत्पीड़ित महिला के पक्ष में कोई कदम उठाते हैं, तो उनके विरूद्ध किसी तरह का दावा, कानूनी कार्यवाही या अपराधिक प्रकरण पंजीबद्ध नहीं किया जायेगा।

घरेलू हिंसा से बचने व आवश्यक उपचार पाने के लिए संरक्षण, अधिकारी या महिलाओं की समाजसेवी संस्थाओं के माध्यम से उस क्षेत्र के मजिस्ट्रेट के समक्ष आवेदन देकर प्राप्त किया जा सकता है। एक अन्तरिम निषेधात्मक आदेश भी मजिस्ट्रेट दे सकता है, जिससे दोषी व्यक्ति को, पीड़ित महिला पर किसी तरह की कोई हिंसा भविष्य में करने से रोका जा सके। अन्य जो सहायता मजिस्ट्रेट दे सकता है वे हैं:– पीडित महिला को आश्रय स्थान पर पहुंचाने की व्यवस्था, हिंसा से जो उसे मानसिक एवं आर्थिक क्षति हुई है उसकी पूर्ति के लिए

मुआवजा, बच्चों की सुरक्षा के लिए सुरक्षात्मक आदेश, उसकी जायदाद की सुरक्षा तथा अन्य सभी प्रकार की सुरक्षाएं जो एक घरेलू महिला को प्रतिष्ठा पूर्वक जीने के लिए आवश्यक है। मजिस्ट्रेट के अधिकार की सीमा इस हद तक है कि वह दोषी व्यक्ति को उत्पीड़ित महिला से मिलने पर रोक लगा सकता है, उसके आश्रय स्थान पर जाने पर रोक लगा सकता है, वह यदि किसी कार्यालय या संस्था में सेवारत् है तो वहां जाने के लिए रोक लगा सकता हैं इसी प्रकार उस महिला के किसी संबंधी या बच्चों पर किसी तरह के उत्पीड़न की कार्यवाही करने से रोक लगा सकता है। यदि कोई महिला किसी घरेलू गृह में पहले से ही किसी अलग भाग में रह रही है तो मजिस्ट्रेट का यह भी अधिकार है कि वह दोषी व्यक्ति को आदेश दे सकता है कि पीड़ित महिला को वहां से निष्कासित नहीं किया जायेगा और उसे शांति से उस स्थान पर रहने दिया जायेगा। मजिस्ट्रेट इस तरह का आदेश दे सकता है कि दोषी व्यक्ति न तो महिला की किसी संपत्ति को खुर्द–बुर्द करेगा या उसे बेचेगा, न ही जिस मकान में महिला निवास करती थी उस मकान को हस्तान्तरित करेगा, ताकि गृह निवास से महिला वंचित न हो जाये। मजिस्ट्रेट के अधिकार की सीमा यहां तक जाती है कि वह सम्मिलित परिवार में रह रही महिला के गृहनिवास से दोषी व्यक्ति को ही निष्कासित कर सकता है। अधिनियम में ही मजिस्ट्रेट सभी तरह के आर्थिक सहायता महिला को दे सकता है जैसे उसे जो चिकित्सा में खर्च आया उसकी पूर्ति उसकी संपत्ति की हानि की पूर्ति उसकी कमाई में आयी क्षति की पूर्ति, उसी तरह उसके जीवन निर्वाह के लिए भत्ता जो धारा 125 दण्ड प्रक्रिया संहिता में निर्धारित हो, उसके अतिरिक्त। ये सभी तरह के अनुतोष मजिस्ट्रेट के समक्ष प्रकरण के दौरान ही प्राप्त किये जा सकते हैं, ताकि उत्पीड़ित महिला को तुरन्त उपचार प्राप्त हो सके और वह निराश्रित एवं लाचार न हो जाये।

दोषी व्यक्ति को नोटिस देने के बाद एवं साक्ष्य के आधार पर मजिस्ट्रेट जो निर्णय देता है उसके विरूद्ध अपील सत्र न्यायाधीश के समक्ष तीस दिन में प्रस्तुत करने का प्रावधान है।

कुछ अधिनियम के अन्य महत्वपूर्ण प्रावधान है कि संरक्षक अधिकारी यदि अपने कर्त्तव्यों की अवहेलना या उपेक्षा करता है तो वह दण्ड का भागीदार होगा। उसी प्रकार दोषी व्यक्ति के विरूद्ध मजिस्ट्रेट ने यदि कोई अंतरिम या अंतिम आदेश पारित कर महिला को कुछ उपचार देने या उत्पीड़न से विलग रहने को आदेशित किया है और दोषी व्यक्ति उसका पालन नहीं करता है तो वह सजा का पात्र होगा।

एक और महत्वपूर्ण प्रावधान यह है कि घरेलू हिंसा के प्रकरणों में यह जरूरी नहीं कि महिला के साक्ष्य की पुष्टि में कोई अन्य सबूत भी उपलब्ध हो । यदि महिला के स्वतः के साक्ष्य विश्वसनीय हैं तो उसके अकेले के साक्ष्य के आधार पर न्यायालय भरोसा कर सकता है। इस प्रावधान का कारण यह है कि चारदीवारी (घर) में हुई महिला के साथ हिंसा का कोई साक्ष्य मिलना कठिन है, क्योंकि अन्य कुटुम्ब के सदस्य भी कभी–कभी महिला को मदद नहीं करना चाहते हैं और स्वयं उत्पीड़न के दोषी होते हैं।

इस प्रकार के घरेलू हिंसा पर महिलाओं के हित में पारित अधिनियम महिलाओं को सभी तरह की सहायता देने की क्षमता रखता है और तत्संबंध में अधिकारियों एवं न्यायालयों का संरक्षण भी प्राप्त करवाता है। इन प्रावधानों का उचित उपयोग महिलाओं के हाथ में है और इनका अनुचित उपयोग होकर वह निर्दोष व्यक्ति की उत्पीड़न का जरिया न बन जाये, इसकी भी खबरदारी लेने का उत्तरदायित्व महिलाओं पर ही है।

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DISPENSATION OF QUICK AND QUALITATIVE JUSTICE

Justice S.S. Jha
Judge, Hign Court of M.P.

Today, need of the hour is quick disposal of cases. Today, everybody is in a hurry and he has no time to wait. In the modern times, particularly in the electronic age, quick disposal of cases is necessary, but it is said that "Justice hurried is Justice buried". Therefore, endeavour should be made to provide qualitative justice. Presiding Officer must organize his Court in a manner, so that the cases are disposed of in a smooth manner.

Normally, it is seen that Advocates are late in reaching the court. Therefore, the first hours of the Court, which are very important must be utilized properly. If the Court organizes its work, then it can take the cases in which Advocates are not required, in the early hours, immediately after the presiding officer takes his seat, such as, framing of issues, settlement of issues, framing of charges and the cases in which formal dates are to be fixed for hearing of the case. Then the court should proceed to decide the interlocutory applications fixed for hearing on that date and appeals or revisions pending before the Court. After this work, the presiding officer may proceed with the cases where evidence is required to be recorded and other work of the Court. In the first hour, if the aforesaid practice is followed, then the Court will have sufficient time to concentrate on the cases pending before it for recording the evidence.

Normally, courts are disturbed by the Advocates while recording evidence requesting them to hear their applications fixed for hearing on the same date. If the Court manages its work in a proper manner and the Advocates are informed that this work will be taken up in the first hour of the day, then the Court will be able to concentrate on recording of evidence and deliver qualitative judgments.

I must emphasize on the point that tendency seen now-a-days is that Courts are deciding the cases on the placitums of the judgments without reading the entir5e judgment. The judges must understand that placitum is nothing but the editor's note and it is not the judgment. Many-a-times, what is written in the placitum is not found in the judgment., Therefore, the Presiding Officer must read the whole judgment to understand the reference and context in which th4e judgment is delivered. It is not proper to deliver a judgment by reading few lines here and there in the judgment. I had the occasion to see a case where the Presiding Officer had delivered a judgment relying upon a case and he imposed death sentence, whereas, on whole reading of the case, the ratio of the case was just opposite to the view taken by the Presiding Officer. In another case, in a matter of probate, question was referred to larger Bench of this Court whether it is mandatory for Hindus to get probate of will and without getting probate, their suit based upon the will is not maintainable? The Division Bench after

referring to section 57 of the Indian Succession Act and other relevant provisions where it is specifically provided that the provision is not applicable to Hindus which are not the part which is set out in Schedule III and is applicable to codicils on or first day of September 1870, within the territories which at the said were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay. Therefore, it was held that since state of M.P. falls outside the territorial jurisdiction under the control of Lieutenant-Governor of Bengal or jurisdiction of High Court of judicature at Madras or Bombay, therefore probate is not mandatory for Hindus. In the said case, the Additional District Judge had referred to a Supreme Court judgment delivered in a different context and held that it is mandatory to obtain probate before filing of a suit and stayed the proceeding of the suit. In that case, he has simply referred to some stray lines of the judgment of the Apex Court, whereas Apex Court has held in that case that when proceedings for probate are pending in the court of competent jurisdiction, arbitrator is not competent to decide the question of will and that too, in the case referred by the Additional District Judge, the proceedings related to the presidency town of Bombay where section 57 is not applicable. Therefore the judgment of concerned Additional District Judge, resulted into miscarriage of justice as he had not read the whole judgment of the Apex Court. Reading stray lines here and there may create confusion in the mind of the Presiding Officer which may result into a judgment which is contrary to law and against the settled principles of law. So for the purpose of qualitative justice, it is necessary to read the judgment completely and few lines here and there should not be read.

I would emphasise that the sitting hours of the Court on the Board are less as compared to the volume of work handled by the Presiding Officer. Therefore, it will be proper to do some homework at the residence particularly such as framing of issues and charges.

Judges must keep in mind that punctuality is the key to success. They must take their seat on time. When they will sit on their seat on time, their work will be disposed of automatically if they continue to work during the working hours. Practice of dictating judgments during court hours in chambers should be avoided.

Most of the time, when witnesses are present in the Court in Sessions Trial or in some other criminal case, adjournment is sought by the counsel for the defence on one pretext or the other. The courts without considering the provisions of section 309 Cr.P.C., adjourn the cases, whereas section 309 Cr.P.C. provides that when the examination of the witnesses has once again begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same *beyond*

the following day to be necessary for the reasons to be recorded. Therefore, the trial should not be adjourned just for mere asking by the counsel. Normally, defence counsel have developed a practice to seek adjournment till they are satisfied that the prosecution witnesses will not support the case of prosecution. This practice is to be curbed. Witness must be examined as early as possible. They should not be punished by calling to the Court again and again for recording their evidence. Another practice is developed by the defence of giving application under section 311 Cr.P.C. for recalling the witnesses. Such application should be dealt with strictly and unless Court is satisfied that recalling of witnesses is necessary on the circumstances brought before the Court and for the reasons to be recorded in writing, the application should not be allowed. Normally, complete opportunity is given to the parties when the evidence is recorded and after closure of evidence, recalling of witnesses amounts to miscarriage of justice. In number of cases, it is found that after the evidence of the witnesses is closed, some affidavit of the witnesses who have been examined is filed for recalling the witnesses which indicates that the accused are tampering with the prosecution evidence. Courts should examine the affidavit seriously and such affidavits should not be given any due consideration. The accused, if so advised, may call those witnesses in their defence. The recalling and reopening of the case under the garb of section 311 Cr.P.C., as far as possible, should be avoided for speedy delivery of judgment. However, if in the interest of justice and in the circumstances of the case, it is found that recalling of witnesses is necessary for just decision of the case, then the Court must record the reasons for recalling of witnesses and pass orders, but such applications should not be allowed or rejected mechanically.

Before framing of charges, the Courts must scan the material filed along with the Challan papers and after minutely examining the documents, charges should be framed.

Now-a-days a practice has developed of confronting the witness with his statement recorded under section 161 Cr.P.C. and in most of the cases, the witness denies a particular portion in the statement, and the document is exhibited without following provisions of section 161 Cr.P.C.. The Courts are not looking to the documents whether omission sought in the statement is actually omitted. Before exhibiting the documents, the Court must ask the counsel to seek omission or contradiction of a particular fact mentioned in the statement recorded under Section 161 Cr.P.C.. The omission must be sought under the proviso of Section 162 and explanation under section 162 (2). Documents should not be exhibited as a matter of course as statements under section 161 Cr.P.C. is not an evidence, but it can be used for confronting the witnesses as provided under section 145 of the Evidence Act. It is necessary to read the provisions of

sections 161 and 162 Cr.P.C. coupled with that of section 145 of the Evidence Act.

It is found that whenever suits are filed, it is not examined by the Court whether pleadings are complete and suit discloses cause of action and proper court fee is paid or not. Courts must examine the plaint before issuing notices to the defendants. Another incorrect practice has started whereby notices are issued for filing writing statements which is against the provisions. In civil cases, after filing of plaint, next date of hearing should be for framing of issues and notices must be issued for framing of issues as provided in the prescribed form No. 2 mentioned in Appendix B of the CPC. Order IV Rule 1 provides that suit commences by filing of plaint. Summons are issued for defendants under Order V Rule 1 and Rule 5 CPC. Order V Rule 5 specifies that summons are to be issued either for settlement of issues or for final disposal. Therefore, notices must be issued in terms of Order V Rule 5 CPC either for settlement of issues or for final disposal. The said forms are given in Appendix B as form no. 1 and form no. 2. If defendant is required to appear in person or any party is required to appear in person, summons can be issued under Rule 3 of Order V. It may be mentioned in the summons that written statement, if any, be filed a week before the date fixed for hearing and the courts must insist that the written statements must be filed in time. It is found that courts adjourn the cases time and again for filing of written statement - procedure unknown for CPC. This will save the time of the courts. The courts must strictly follow the procedure for filing of written statements. Order VIII Rule 1 as appended provides that the written statement must be filed within 30 days from the date of service of summons and the period can be extended upto 90 days, but it cannot be extended as a matter of course, but extension shall be subject to the reasons to be recorded in writing by the Courts. Though provision is held to be directory in nature, it does not give a right to the parties to seek maximum adjournment for filing of written statement. Therefore, the courts for speedy disposal, must follow provisions of the Code.

Immediately after the settlement of issues, courts must endeavour whether the dispute can be settled in terms of section 89 of the Code. If the parties are willing to settle the dispute under Section 89, the Courts may on the request of the parties, direct settlement of dispute under Section 89 either through arbitration, conciliation, mediation or settlement through Lok Adalat. If parties agree for such settlement, the courts will fix a date for settlement and pass orders that if the dispute is not settled, the case will be fixed for evidence by fixing a date for recording evidence. It should be made clear that if the dispute is not settled by alternative method, then the Court will record evidence on the date fixed and they will not adjourn the hearing of the parties and the courts must endeavour to decide the case as early as possible. If this method is adopted

strictly, the courts will find that it is not difficult to dispose of the suits at an early date and the quality of the judgment will also be maintained.

In the cases of motor vehicles, it is found that lengthy procedure is adopted by the Courts in recording the evidence. The evidence must be recorded as laid down in the Madhya Pradesh Motor Vehicles Rules, 1994 which will cut short the time of the Courts. If there is any dispute as to exhibit of a document or document exhibited before the commissioner,. it shall finally be adjudicated by the Court while deciding the suit. The court will hear the arguments on the question of admissibility of documents in evidence and pass appropriate orders.

In the appeals, the courts must endeavour to call for the record and decide the appeal as early as possible on the first date of hearing after respondents are noticed. Notices should be issued for hearing of appeal and courts in no uncertain terms apprise the advocates appearing for the defendants that appeals should not be adjourned unnecessarily and they be heard as early as possible and adjournments should not be granted.

Section 397 (2) of the Code of Criminal Procedure provides that powers of revision should not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. It is found in number of cases that criminal revisions are filed against interlocutory order against held up matter. In such cases record of the trial court should not be called as the revisions are filed against interlocutory orders. Revision courts should not entertain such revisions in view of the bar created under Section 397 (2) of the Code.

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Presumption means nothing more than, as stated by Lord Mansfield, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is.

-BEST, J.

MARSHALLING AND APPRECIATION OF EVIDENCE*

VED PRAKASH
Director, JOTRI

After a witness has been found to be competent to depose and his testimony is found to be admissible, two questions arise – whether it should be believed or not; and what value can be attached to it. It is generally not easy to find witnesses on whose testimony implicit reliance can be placed. The observations made in *State of U.P. v. Anil Singh, AIR 1988 SC 1998* are apposite in this respect wherein referring to a decision of the Privy Council it was observed that 'it is our experience that invariably the witness add embroidery to prosecution story, perhaps for the fear of being disbelieved.' Hence, it may not be in consonance with justice and fairness to discard evidence of a witness for some inconsistencies or discrepancies here or there or to reject it by putting levels that a particular witness is a relative witness, partisan witness, police witness or child witness.

Witnesses being eyes and ears of justice, their evidence should not be thrown away on technical grounds, else it may lead to miscarriage of justice; rather the evidence should be appreciated and approached with care and caution keeping in view reasonable probabilities, deficiencies, drawbacks and infirmities. The court should be concerned with basic realities and it should try to find out if there is a ring of truth therein.

While statements given soon after the occurrence are generally nearer the truth, the version of a witness gets embellished or curtailed with the passage of time according to his susceptibility of being influenced by one party or the other and certain other factors. Unless a court takes into consideration all the circumstance, it may lead to failure of justice. What is required is to test the evidence of each witness on the anvil of objective circumstances of the case be it a civil case or criminal one.

The question is each case with respect to each witness should be, whether the witness is truthful and whether there is anything to doubt his/her veracity in any particular manner about what he has deposed. (See- *State of Gujarat v. Raghunath Vamanrao Baxi, AIR 1985 SC 1092*) Throwing overboard the sworn testimony of a witness using phrases 'the statement does not ring true' or 'the statement does not carry conviction' can never be said to be a correct approach. Though the basic proposition happens to be that testimony of a person deposing on oath should be treated as true unless shown otherwise, still a court is required to give reasons for coming to the conclusion as to 'why the statement carries conviction' or why it does not.

While it cannot be disputed that Evidence Act does not lay down a set formula to induce belief regarding testimony of a witness and that even by

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* Note: Part I & II have been published in JOTI - June and August 2006 issues at page Nos. 112 & 175, respectively.

following strict logical process two persons may reach two different, sometimes opposite conclusions, but then what has always to be kept in mind is that matter of believing evidence is not altogether left to the mere intuition of an individual Judge, for a Judge, in believing or disbelieving evidence has to act on his reasons in conformity with his knowledge, observation and experience which always furnish adequate grounds for believing or disbelieving evidence.

Where evidence of a witness tendered by one party is in direct conflict with the evidence put forth by the other, the following test, as laid down in *Lal Harihar Pratap Bakhsh Singh v. Raja Bajrang Bahadur Singh, and ors. AIR 1933 Oudh 197 (ILR 9 Luck. 121)*may be applied for judging the veracity of the witness :

(i) whether the evidence is consistent with the finding which is already established;

(ii) the comparative nearness in relationship of the witness;

(iii) the impartiality of the witness;

(iv) the inherent probability of his statements;

(v) the impression created in the mind of the judge by the demeanour of the witness in the box.

DISCREPANCIES

One of the well recognized tools for appreciating evidence of a particular witness is examination of discrepancies, deficiencies and anomalies which may be there in such evidence. If the evidence is totally non-discrepant, it is argued that it is artificial and the witness is a tutored one. If it suffers from some anomalies here and there, it is argued that the witness is not a witness of truth. In *Anil Singh* (supra) the Apex Court observed that hardly there comes a witness whose evidence does not suffer from some sort of embellishment or embroidery. But then mechanical rejection of such evidence on that ground is not proper. In *State of H.P. v. Lekh Raj, (2000) 1 SCC 247* taking cognizance of various factors including erosion of values in social life as well as the realities of life inherent in prevalent system, the Apex Court observed that in arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper-technicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. It was impressed that the erosion in values of life which is a common feature of the present system cannot be ignored and such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind. These observations do clearly indicate the significance of the role of judge while analyzing and appreciating the testimony of a witness.

Generally, in the deposition of a witness there are always some insignificant discrepancies howsoever honest and truthful he may be. These discrepancies may be due to normal errors of observation, fading away of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and are not expected of a normal person. In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, AIR 1983 SC 753* the Apex Court pointed out that discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be annexed with undue importance and over much importance cannot be attached to minor discrepancies for following precise reasons:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. One cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness may mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the

witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

In the light of the aforesaid, it can well be said that appreciation of evidence should not be divorced from the realities; rather each and every factor should be considered and then the finding regarding truthfulness or otherwise of the version should be recorded. Only then justice can be ensured.

WITNESSES

Though basic parameters for appreciating oral testimony of various type of witnesses may not be different but then there are certain specific considerations which are required to be noticed with respect to each type of witness like relative witness, interested witness, partisan witness, hostile witness, child witness, solitary witness, chance witness etc. These considerations have to be explored from various judicial pronouncements.

RELATIVE WITNESS/INTERESTED WITNESS/PARTISAN WITNESS

Expressions 'relative witness' and 'interested witness' have quite often been used interchangeably. In *State of Rajasthan v. Smt. Kalki and Anr., AIR 1981 SC 1390* wife of the diseased was examined as an eye witness. Repelling the plea that being related to the diseased she is an 'interested witness' the Apex Court observed that a witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished in a criminal case. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested.'.

By now, the law is well settled that evidence of eye witnesses, who are said to be close relatives, cannot be discarded on the ground that they are close relatives of the victim or deceased. As early as in 1953 in *Dalip Singh and others v. State of Punjab, AIR 1953 SC 364,* a four Judge Bench of the Apex Court elaborating the legal position in this respect observed as under:

> "Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is 'personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The aforesaid classical exposition of law by the Apex Court has throughout been followed in a number of subsequent decisions including *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614, Guli Chand v. State of Rajasthan, (1974) 3 SCC 698, Masalti v. State of U.P., AIR 1965 SC 202, State of Rajasthan v. Teja Ram, (1999) 3 SCC 507* and *Hari Ram v. State of U.P., (2004) 8 SCC 146*

In *Rameshwar v. the State of Rajasthan, AIR 1952 SC 54* the mother of an eight year old rape victim to whom the victim narrated the incident was held to be an 'independent' witness and not an 'interested witness'. The court observed that 'independent' merely means independent of sources which are likely to be tainted and in the absence of enmity against the accused there is no reason why the mother would implicate the accused falsely. In its latest decision in *Seeman alias Veeranam v. State by Inspector of Police, (2005) 11 SCC 142* the Apex Court has summed up the law on this point as under:

> "It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness."

An **'interested witness'** as pointed out earlier, is one who either has some enmity against the accused or is interested in result of a case in a particular manner. Time and again it has been argued before the Courts that the evidence of an interested witness cannot be the basis of conviction unless corroborated by independent witness. However, this proposition has not found favour with the Apex Court.

In *Sarwan Singh and Ors. V. State of Punjab, AIR 1976 SC 2304* the Apex Court held that It is not the law that the evidence of an interested witness should be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the Courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the Court is satisfied that the evidence of interested witnesses has a ring of truth such evidence could be relied upon even without corroboration. Indeed there may be circumstances where only interested evidence may be available and no other, e. g. when an occurrence takes place at mid-night in the house when the only witnesses who could see the occurrence may be the family members. In such cases it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness.

Pointing out the methodology to be adopted while appreciating the evidence of an 'interested witness' the Apex Court has observed in *Hari Obula Reddy and Ors. v. The State of Andhra Pradesh, AIR 1981 SC 82* that Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human event, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source.

As regards partisan witness, in the tradition faction ridden Indian society it would be quite hazardous to reject the evidence of such witness solely on the ground that it is of partisan nature. In *Masalti v. State of U.P., AIR 1965 SC 202,* a Four Judge Bench of the Apex Court has dwelt upon this aspect. Their Lordships have observed that often enough, where factions prevailed in villages and murders are committed as a result of such factions criminal courts have to deal with the evidence of partisan witnesses. The mechanical rejection of such evidence that it is partisan would invariably lead to failure of justice. Judicial approach has to be cautious in dealing with such evidence. The plea that such evidence should be rejected because it is partisan cannot be accepted as correct. The criminal Courts while appreciating the evidence given by the partisan witness should be very careful in weighing such evidence.

In *State of U.P. v. Ballabh Das and Ors., AIR 1985 SC 1384* it has been observed that in a faction ridden village, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses.

CHILD WITNESS

Regarding evidence of a child witness we come across two propositions. Firstly, that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shacked and moulded. In *Panchhi v. State of U. P., AIR 1998 SC 2726* it was held that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The second proposition, rather complimentary one, is that, if after careful scrutiny of the evidence the Court comes to the conclusion that there is an element of truth in it then there is no obstacle in the way of accepting the evidence of a child witness. In *Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341* it has been ordained that if a child witness is found competent to depose to the facts and his evidence is found to be reliable one then such evidence

could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under S. 118 of the Evidence Act provided that such witness is able to understand the answers thereof.

Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, S. 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected *per se*; but the Court as a rule of prudence consider such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction on its basis. (See: *Surya Narayana v. State of Karnataka, AIR 2004 SC 482*)

In *Dattu Ramrao Sakhare* (supra.) the Apex court observed that the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution, which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there should not be any likelihood of being tutored.

In *Suryanarayana* (supra) the testimony of a child witness, who was only four years old at the time of incidence was found to be acceptable for recording conviction in the case of murder. Following observations made by the Apex Court in this case in relation to the child witness, are note worthy :

> "The fact of being PW2 a child witness would require the Court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the Courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the Courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

SOLITARY WITNESS

The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. Generally speaking, the testimony of a solitary witness may be classified into the following three categories, namely :

(i) Wholly reliable

(ii) Wholly unreliable.

(iii) Neither wholly reliable nor wholly unreliable.

As held in *Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614* in respect of first category, the court should have no difficulty in coming to conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. Cautioning against insistence for plurality of witnesses for establishing a fact the Apex Court observed in the aforesaid case that, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. This legal position has recently been reiterated in *Lallu Manjhi and another v. State of Jharkhand (2003) 2 SCC 401.*

In *Vadivelu Thevar* (supra.) on a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions were also laid down regarding appreciation of the testimony of solitary witness :

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

HOSTILE WITNESS

A party u/s 154 of the Evidence Act with the permission of the Court put to his own witness such questions which can be put during cross-examination. Such a witness in judicial parlance is referred to as 'hostile witness'. In certain quarters there happens to be some misconception regarding the effect of declaring a witness hostile on his/her testimony. It is perceived that evidence of such a witness is wholly washed off from the record and that it cannot be acted upon by the Court. However, this notion is totally misconceived. As expressed by the Apex Court in *Khujji v. State of M.P., AIR 1991 SC 1853* (Three-Judge Bench) the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

In *Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170* it has been held that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. It is for the Court of fact to consider in each case whether as a result of contradictions the witness stands discredited or can still be believed in regard to *'any part of his testimony'*. In appropriate cases the Court can rely upon that part of testimony of such witness which is found to be creditworthy. To the same effect the are the observations made in *Gurpreet Singh v. State of Haryana, AIR 2002 SC 3217.* The latest amendment in section 154 of the Evidence Act carried out by way of Criminal Law (Amendment) Act, 2005 is also noteworthy here which provides that nothing in section 154 shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness.

However, a note of caution has been made in *Karuppanna Thevar v. State of T.N., AIR 1976 SC 980* (Three-Judge Bench) to the effect that though testimony of a hostile witness may not be rejected outright but the court has at least to be aware that, prima facie, a witness who makes different statements at different times has no regard for truth. The court should, therefore, be slow to act on the testimony of such a witness and, normally, it should look for corroboration to such evidence.

CHANCE WITNESS

A person who happens to be at the place of occurrence at the time of incident by shear co-incidence is known as 'chance witness'. (See - *Bahal Singh v. State of Haryana, AIR 1976 SC 2032.*) Though time and again the Courts have held that the testimony of a chance witneness., although not necessarily false, is proverbially unsafe, (See - *Guli Chand v. State of Rajasthan, AIR 1974 SC 276*) but as explained in *Rana Pratap v. State of Haryana, 1983 SC 680* expression

'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more causal. To discard the evidence of street hawkers and street venders on the ground that they are 'chance witnesses', even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence. Murders are not committed with previous notice to witnesses soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. This view has recently been reiterated in *Thangaiya v. State of Tamil Naidu, (2005) 9SCC 650.*

POLICE WITNESS

Quite often it is argued before the Court that testimony of a police officer, who is interested in the success of the prosecution, cannot be relied upon without corroboration. It is not uncommon to find that *panch* witnesses relating to various steps taken during investigation like seizure, etc. do turn hostile; not always because they were not associated with that particular proceeding. In such a case the uncorroborated testimony of police officer should be examined and evaluated to find out whether it is trustworthy. In *Nathu Singh v. State of M.P., AIR 1973 SC 2783,* a case from M.P. relating to seizure of 59 live cartridges, wherein the accused was convicted u/s 25 (1) (a) of the Arms Act, the defence challenged the evidence of two police officers because the *panch* witnesses turned hostile. Repelling the plea the Apex Court held that the mere fact that these two witnesses are police officers was not enough to discard their evidence.

Elaborating the principle in *Karamjit Singh v. State (Delhi Admn.), (2003) 5 SCC 291* the Apex Court observed that the testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down.

Similar view has been expressed by our own High Court in *Babulal v. State of M.P., 2004 (2) JLJ 425.* Therefore, what can be concluded is that mechanical rejection of the testimony of the police witness cannot be said to be a judicial approach, rather such evidence should be scanned and examined by applying the same parameters, which are applicable to an ordinary witness.

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DIGITAL SIGNATURE AND ITS APPLICATION

C.V. Sirpurkar
Registrar (J)
High Court of M.P.

WHY IS A DIGITAL SIGNATURE NEEDED?

The greatest advantage an electronic record offers over a printed record, is that it can be altered in a hundred different ways without leaving any visible mark of interpolation. For example, a text document created in word-processing software can be altered by changing the font type, font size, correcting a spelling error, highlighting a passage, adding or substituting or deleting words, sentences or even entire paragraphs and so on, without leaving any trace. So, the author may have, as many "second thoughts" as he wants, without bothering about the fact that the document might, in the end, look trashy. This ostensible advantage arising out of amazing flexibility offered by an electronic record, leaves it hopelessly vulnerable to interpolations. Thus, an electronic record could be altered effortlessly and at will by anyone having access to it, even after it was finalized. In this scenario electronic form would be considered useless for creating documents which require permanent authenticity like commercial deals or other transactions. It would also be considered unsatisfactory for communication, where possibility of hacking could not be ruled out. Therefore, there is a crying need to protect electronically created and communicated records. We need an electronic solution, which though not interfering with our freedom to alter an electronic record any which way, until it was finalized, can render it tamperproof once we decide that no more alterations are required. We also need to ensure confidentiality, integrity, authentication and non-repudiation of electronically communicated messages. The solution to this problem has emerged in the form of digital signature.

WHAT IS A DIGITAL SIGNATURE?

As we all know, a conventional signature is used to authenticate the contents of a printed document. In the same manner a digital signature is used to authenticate an electronic record. Section 3 of Chapter II of the Information Technology Act, 2000, provides that any subscriber may authenticate an electronic record by affixing his digital signature thereon. The uninitiated seem to think that digital signature is nothing but electronic image of a conventional signature. Nothing could be farther from truth.

The digital signature comprises a secure, functional key pair consisting of a private key for creating a digital signature and mathematically related public key for verifying the same (Section 2 (i) and (x) of Chapter I of Information Technology Act, 2000). Private key is accessible only to the subscriber to ensure

confidentiality but the public key is within the public domain to facilitate verification (Section 3 of Chapter II Information Technology Act and Rules 3, 4 and 5 of Information Technology (Certifying Authorities Rules, 2000).

HOW CAN A DIGITAL SIGNATURE BE USED?

Whenever a Digital Signature Certificate is issued in the name of an individual, he receives intimation of the same by e-mail, which contains instructions for downloading the private key. The private key is generally accompanied by a card reader and customized software. The individual may either store the key in the Web browser of the computer or download it in the U.S.B. Token. It is advisable to store the private key in the U.S.B. Token, since it affords better security. The USB token is guarded by a password known only to the owner of the private key. The private key cannot be downloaded from the USB token. Whereas it can be copied from the web browser. If the security of the private key is compromised the subscriber has to report immediately to the certifying authority to prevent misuse thereof.

When the private key is used to authenticate a message, the corresponding public key is generally attached to it and can be used by the recipient of the message for the purpose of verification. When it is used for the purpose of some transaction the public key generally has to be downloaded from the web site of the certifying authority.

WHERE AND HOW CAN A DIGITAL SIGNATURE BE OBTAINED?

Section 17 of the Information Technology Act envisages appointment of a Controller of Certifying Authorities for exercising supervision over the activities of the Certifying Authorities. Section 21 of the Information Technology Act provides that any person may apply to Controller for a licence to issue digital signature certificate. A person in whose favour a licence to issue digital signature certificates is issued by the Controller is called Certifying Authority. A subscriber has to apply to a Certifying Authority to obtain a digital signature certificate. National Informatics Centre (N.I.C.) is one such Certifying Authority, which supplies digital signatures to the government sector.

WHAT IS A DIGITAL SIGNATURE CERTIFICATE?

A digital Signature Certificate is used to establish the identity of a person in the cyberspace or electronic world. It provides proof for verifying the identity of online entities. The certificate contains some basic information like the person's name, his public key, date of expiry of the certificate, name of the certifying authority, Digital Signature of the Certifying Authority using the certificate etc. The certificate is made public by means of directories, public folders or web pages on the server of the certifying authority.

HOW DOES THE SYSTEM WORK?

The private key is security encryption algorithm, which is unique to an individual. The authentication of electronic record is effected by the use of asymmetric crypto system. It involves transformation of initial electronic record into a seemingly unintelligible form by using algorithm. This process is called hashing. This unintelligible form consists of generally smaller set of bits known as hash value or hash result or message digest. With the use of private key, the signer's software encrypts (scrambles up) the hash result into a digital signature. The digital signature is attached to the electronic record and stored and transmitted with it. The recipient of the electronic record, decrypts (unscrambles) the digital signature by using the public key of the signer, converting it back into message digest or hash result. If the two hash results match, it signifies that- (a) the digital signature was created using corresponding private key and (b) electronic record was not altered after digital signature was affixed thereon. Either of the two keys can be used for encryption as well as decryption.

Every time the algorithm is executed with the same electronic record it yields the same hash result. The system works in such a manner that it is computationally infeasible to derive same hash result using the algorithm on two even slightly different electronic records. It is this unique feature of the concept that makes it foolproof and therefore totally effective.

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The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise.

-FRANKFURTHER, Felix.

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of April, 2006. The Institute has received articles from various districts. Articles regarding topic no. 1 & 2 received from Tikamgarh & Betul respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 3,4 & 5; Institutional Articles are being published on topics No. 3 & 5. Topic No. 4 shall be sent in future to other group of districts for discussion:

1. What is the ambit and scope of Section 163-A of Motor Vehicles Act, 1988? Whether compensation u/s 163-A is payable where accident has taken place due to negligence of the complainant?

   मोटर यान अधिनियम, 1988 की धारा 163–ए की परिधि एवं प्रयोज्यता का स्वरूप क्या है? क्या उस दशा में भी उक्त धारा के अन्तर्गत प्रतिकर देय है जहां दुर्घटना आवेदक की स्वयं की लापरवाही से कारित हुई?

2. What is the ambit and scope of Sections 34 and 149 Indian Penal Code?

   भारतीय दण्ड संहिता की धारा 34 एवं 149 की परिधि एवं प्रयोज्यता का स्वरूप क्या है?

3. What is the procedure for hearing of the consolidated civil suits?

   समेकित सिविल वादों के विचारण की प्रक्रिया क्या है?

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

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

5. Whether Trial Court in exercise of power u/s 389 (3) of the Cr.P.C. can suspend sentence of fine alongwith sentence of imprisonment?

   क्या विचारण न्यायालय द.प्र.सं. की धारा 389 (3) के अन्तर्गत प्रदत्ताक्ति का प्रयोग करते हुए कारावास के दण्डादेश के साथ अधिरोपित अर्थदण्ड भी निलंबित कर सकता है?

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AMBIT, SCOPE AND APPLICABILITY OF SECTION 163-A OF MOTOR VEHICLES ACT, 1988 – ITS APPLICABILITY WHERE ACCIDENT HAS TAKEN PLACE DUE TO NEGLIGENCE OF THE COMPLAINANT

Judicial Officers,
District Tikamgarh (M.P.)

Before 1914 in India, a claim for damage owing to injuries suffered by reason of negligence on the part of the driver of a motor vehicle used to be governed only by law of tort. The Indian Motor Vehicles Act, 1914 is the first enactment relating to motor vehicles. The Motor Vehicles Act, 1939 which replaced the 1914 Act consolidated and amended the law relating to motor vehicles in India. The Civil Courts had the jurisdiction to try a suit claiming compensation by the plaintiff for the injury. In the year 1956, the Motor Vehicles Accidents claims Tribunals purporting to be providing for speedy trial were established to deal with such claims. The Law Commission submitted its report in 1987 and in view of the recommendations of the Law Commission, the present 'Motor Vehicles Act, 1988' was enacted. However, having regard to number of representations received from various quarters, a Review committee was constituted by the Government of India in the year 1990 to examine the Motor Vehicles Act, 1988. In terms of recommendations of the Review Committee as also the Transport Development Council, the Motor Vehicles Act, 1988 was amended.

Section 163-A was inserted by Act No. 54 of 1994 which came into force from 14th November, 1994. The said provision has been inserted to provide for a new pre-determined structured formula for payment of compensation to road accident victims on the basis of age, income of the deceased or the person suffering permanent disablement. Section 163-A is as under :—

> *163-A . Special provisions as to payment of compensation on structured formula basis - (*1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victims, as the case may be.
>
> *Explanation* :— For the purpose of this sub-section, 'permanent disability' shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-clause (1) the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

A perusal of Section 163-A shows that the compensation under this provision is to be determined as provided in the Second Schedule. A multiplier system was introduced according to which the amount of compensation is required to be calculated having regard to the age of the victims and his annual income. A note is appended to the Second Schedule in terms that the amount of compensation so arrived at in the case of fatal accident, is to be reduced by one-third, in consideration of the expenses which the victim would have incurred towards maintaining himself, had he been alive. The Schedule also provide that the amount of compensation shall not be less that Rs. 50,000/-. It also provides for grant of compensation under several heads; namely (a) general damages in case of death, (b) general damages in case of injuries and disabilities, (c) disability in non-fatal accidents and (d) notional income for compensation to those who had no income prior to accident. However, the maximum amount which is to be paid under the different heads, has also been provided.

Section 163-A appears to have been inserted having regard to the fact that the road accidents in India are touching a new height and at least in some of the cases it is found that rash or negligent driving causing death or injury to the innocent persons cannot be proved or is very difficult to prove. By inserting Section 163-A, the Parliament has provided for making of an award consisting of a pre-determined sum without insisting on a long-drawn trial or without proof of negligence in causing the accident.

The Apex Court had considered the ambit and scope of Section 163-A of Motor Vehicles Act in case of *Deepal Girish Bhai Soni v. United India Insurance Co. Ltd., 2004 (2) T.A.C. 289.* A Bench of 3 Hon'ble Judges of the Apex Court has held in this case that Section 163-A was enacted for grant of immediate relief to a section of people whose annual income is not more than Rs. 40,000/- having regard to the fact that in terms of the Section read with the Second Schedule appended thereto; compensation is to be paid on a structured formula not only having regard to the age of the victims and his income but also other factors relevant thereof. An award made thereunder shall be in full and final settlement of the claim. The same is not interim in nature. It is also held that the provisions leave no manner of doubt that the Parliament intended to lay a comprehensive

scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicles or any other fault arising out of use of a motor vehicle.

In the case of *Deepal Girishbhai Soni* (supra), it is held that one must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both. As far as the question of conversion of an application u/s 166 M.V. Act into one u/s 163-A is concerned, it was laid down by a Division Bench in the case of *Guddibai and others v. Mishrilal Ahirwar and another, 2005 ACJ 253* that claimants are not entitled to convert their claim from Section 166 to one under Section 163-A after applying and getting benefit under Section 140 in view of express prohibition u/s 163-B.

In Section 163-A, the expression 'notwithstanding anything contained in this Act or in any other law for the time being in force' has been used, which goes to show that Parliament intended to insert a *non obstante* clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. In *Deepal Girishbhai Soni's case* (supra), it is held that Section 163-A covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of. Looking to the provisions of Section 163-A and the proposition laid down as above, compensation is payable even where accident has taken place due to negligence of the complainant.

CONCLUSIONS :

(1) A claimant whose annual income is not more than Rs. 40,000/- can submit application under Section 163-A of Motor Vehicles Act.

(2) Application submitted under Section 166/140 cannot be converted to or treated as an application under Section 163-A.

(3) The claimant while claiming compensation u/s 163-A is required to prove the *factum* of accident alone and wrongful act or negligence or default of the owner of the vehicle or any other person is neither required to be pleaded nor established. In such a case, the scope of enquiry is a limited one.

(4) The compensation is to be determined having regard to the age and annual income of the victim/deceased as provided in the Second Schedule of the Section.

(5) Section 163-A covers cases where even negligence is on the part of the victim.

Institutional note :

A two Judge Bench of the Apex Court in *Oriental Insurance Co. Ltd. v. Hansarajbhai v. Kodala. (2001) 5 SCC 175* had held that S. 163-A was an exception to S. 166 of Motor Vehicles Act and was not an additional or interim remedy like S.140. This view was challenged in *Deepal Girishbhai Soni* (supra) in which a larger Bench approved the view expressed in *Kodala's case* (supra). However the other view formed by the Apex Court in *Kodala's case* (supra) did not find favour with the larger Bench in *Deepal Girishbhai Soni* (supra). In *Kodala's case* (supra) it had been held that even those persons can claim compensation u/s 163-A whose income is more than Rs. 40,000 but for the purpose of calculating compensation their maximum income would be assumed to be not more than Rs. 40,000/- per annum. This view was dissented with in *Deepal Girishbhai Soni* (supra) wherein it was held that S. 163-A being a social security provsion providing for a distinct scheme, this provision will not be applicable if the annual income of the person is found to be more than Rs. 40,000/- p.a. Thus as per the viewpoint of the larger Bench benefit u/s 163-A Motor Vehicles Act can be claimed only when the annual income of the applicant (in case of permanent disability) or deceased is upto a maximum of Rs. 40,000/-.

In view of this opinion of the larger Bench, it appears that if the non-applicants are able to prove that the income of the deceased or the victim, as the case may be, was more than Rs. 40,000/- p.a. then no remedy u/s 163-A shall be available to the applicant.

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Of course, it is embarrassing to confess a blunder, it may prove more embarrassing to adhere to it.

-JACKSON, Robert H.

भारतीय दंड संहिता की धारा 34 एवं 149 की परिधि एवं प्रयोज्यता का स्वरूप

न्यायिक अधिकारीगण
जिला बैतूल

किसी मामले में आपराधिक दायित्व का विनिश्चय इस बात पर निर्भर करता है कि कोई व्यक्ति आपराधिक कृत्य से किस प्रकार जुड़ा हुआ है। सामान्यतः एक व्यक्ति किसी आपराधिक कार्य में अग्रलिखित रूप से संबंधित हो सकता है। प्रथम, जबकि वह स्वयं ही आपराधिक कार्य करे। द्वितीय, जबकि वह उस आपराधिक कार्य में भागीदार हो, यद्यपि वह उस कार्य को स्वतः न करे। तृतीय, जबकि वह उस आपराधिक कृत्य को करने के लिये किसी अन्य अभिकरण का प्रयोग करे।

स्वयं अभियुक्त द्वारा किया गया कार्य प्रथम श्रेणी के अंतर्गत आता है । ऐसे मामलों में दायित्व निर्धारित करने में कठिनाई नहीं है। तृतीय श्रेणी दुष्प्रेरण विधि से संबंधित है। श्रेणी क्रमांक दो संयुक्त दायित्व के सिद्धान्त पर आधरित है जहां आपराधिक कृत्य छोटे तथा बड़े अनेक कृत्यों से पूरा होता है तथा ऐसा कृत्य किसी एक व्यक्ति द्वारा नहीं अपितु एक वर्ग द्वारा किया जाता है। ऐसे मामलों में उस वर्ग के प्रत्येक व्यक्ति के दायित्व को निर्धारित करने में किंचित समस्या उत्पन्न होती है। धारा 34 एवं 149 भा.दं.सं. ऐसी परिस्थितियों में संयुक्त दायित्व के सिद्धांत को प्रतिपादित करती है।

धारा 34 भारतीय दण्ड संहिता

धारा–34 भा.दं.सं. यह उपबंध करती है कि

> ''जबकि कोई आपराधिक कार्य कई व्यक्तियों द्वारा अपने सबके सामान्य आशय को अग्रसर करने में किया जाता है, तब ऐसे व्यक्तियों में से हर व्यक्ति उस कार्य के लिये उसी प्रकार दायित्व के अधीन है, मानों वह कार्य अकेले उसी ने किया हो।''

बी.एम.दाना विरूद्ध मुम्बई राज्य, ए.आई.आर. 1960 सुप्रीम कोर्ट 289 के न्याय दृष्टांत में माननीय उच्चतम न्यायालय द्वारा धारा 34 भा.दं सं. के उददेश्य एवं सिद्धांत को इंगित करते हुए यह स्पष्ट किया गया है कि:

> "The Section is intended to meet a case in which it may be difficult to distinguish between the act of individual member of a party who act in furtherance of common intention of all or to prove exactly what part was taken by each of them. The principle which this section embodies is participation in some action with the common intention of committing a crime. Once such participation is established S. 34 IPC is at once attracted."

''सामान्य आशय'' को माननीय उच्चतम न्यायालय ने *कृष्ण गोविंद पाटिल विरूद्ध महाराष्ट्र राज्य, ए.आई.आर.1963 सुप्रीम कोर्ट 1413* के मामले में वर्णित करते हुए यह उल्लेख किया है कि :

> "It is well settled that common intention within the meaning of section 34 IPC implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence, but the crucial circumstances is that said plan must precede the act constituting the offence."

सामान्य आशय का अर्थ है ''विचारों का पूर्व मिलन'' अथवा ''मति का संगम'' परन्तु ये समान आशय अथवा तत्सम आशय से भिन्न है। सीमांकन की रेखा जो सामान्य आशय एवं समान आशय के क्षेत्र को विभक्त करती है, वह अतिसूक्ष्म है तथापित सुभिन्नता वास्तविक एवं सारवान है। यदि असभव न हो तो भी यह कठिन है कि किसी व्यक्ति के आशय को अथवा ''सामान्य आशय'' को सिद्ध करने के लिये प्रत्यक्ष साक्ष्य प्रस्तुत किया जा सके। अतः यह अभियुक्त के कार्य आचरण एवं अन्य सुसंगत परिस्थितियों से अनुमानित किया जाता है – *(देखें : महबूब शाह विरूद्ध एम्परर, ए.आई.आर. 1945 पी. सी. 118.)*

कई व्यक्ति एक ही साथ किसी एक व्यक्ति पर आक्रमण कर सकते हैं तथा प्रत्येक व्यक्ति का मृत्यु कारित करने का आशय हो सकता है। प्रत्येक व्यक्ति अलग–अलग घातक प्रहार कर सकता है, तब भी कोई व्यक्ति धारा 34 भा.द.सं. में इच्छित सामान्य आशय से युक्त नहीं हो सकता जब तक कि मस्तिष्क का पूर्व मिलन निर्धारित योजना को निर्मित करने हेतु न हुआ हो। ऐसे मामलों में प्रत्येक व्यक्ति जो उपहति कारित करता है उसके लिये वह स्वतः उत्तरदायी होगा। कोई अन्य प्रतिनिधिक रूप से उत्तरदायी नहीं होगा। ऐसी स्थिति में यदि यह प्रमाणित नहीं हो पाता कि किस व्यक्ति का प्रहार वह घातक प्रहार था जिससे मृत्यु हुई तो उसे हत्या के लिये दंडित नहीं किया जा सकता, चाहे कितना ही स्पष्ट रूप से मृत्यु कारित करने के आशय को क्यों न प्रमाणित किया गया हो। (देखें : *पांडूरंग व अन्य विरूद्ध हैदराबाद राज्य ए.आई.आर. 1955 सुप्रीम कोर्ट 216.*)

वरेन्द्र कुमार घोष विरूद्ध इम्परर, ए.आई.आर. 1925 पी.सी.1 के प्रसिद्ध मामले में अपीलार्थी ने तर्क किया था कि कुछ भी नहीं किया था अपितु वह दरवाजे पर खड़ा था जिसके परिप्रेक्ष्य में प्रिवी काउंसिल द्वारा यह अभिमत प्रकट किया गया है कि यह ध्यान में रखना चाहिए कि ''अपराध में वे भी कार्य करते हैं जो मात्र खड़े रहते हैं तथा प्रतीक्षा करते है ।'' अपराधिक कृत्य का अर्थ है आपराधिक आचरण की एकता जिसकी परिणति किसी कृत्य में होती है। धारा 34 भा.द.सं. अनेक व्यक्तियों द्वारा अलग–अलग किये गये कार्य, एक जैसे या भिन्न, से संबंधित है। यदि सभी कार्य सामान्य आशय को अग्रसरित करने हेतु किया गया है तो प्रत्येक व्यक्ति सभी कार्य के परिणाम के लिये उत्तरदायी हैं, क्योंकि धारा के बाद वाले भाग में प्रयुक्त ''वह कार्य'' आपराधिक कृत्य द्वारा किये गये सम्पूर्ण कार्यवाही को सम्मिलित करता है। अतः *चौ. पुलारेड्डी व अन्य विरूद्ध आन्ध्रप्रदेश राज्य, ए.आई.आर. 1993 एस.सी. 1899* में किये गये प्रतिपादन के अनुसार इस धारा के प्रभाव से दायित्व निर्धारण हेतु किसी व्यक्ति द्वारा कारित उपहति अथवा क्षति विशेष दर्शित किया जाना आवश्यक नहीं है।

''सामान्य आशय के अग्रसरण में'' एवं ''आपराधिक कृत्य'' को *शंकरलाल कचराभाई व अन्य विरूद्ध गुजरात राज्य, ए.आई.आर.1965 एस. सी. 1260* के प्रकरण में माननीय उच्चतम न्यायालय ने स्पष्ट करते हुए यह प्रतिपादित किया है कि यदि चार अभियुक्त ''एम'' की मृत्यु कारित करने के सामान्य आशय के अग्रसरण में सद्भावनापूर्वक वह विश्वास करते हुए कि ''आर'' ही ''एम'' है, ''आर'' पर गोली चलाते हैं । ऐसी स्थिति में अभियुक्तगण का कृत्य धारा 34 भा.द.सं. की परिधि में ''एम'' की सामान्य आशय के अग्रसरण में मृत्यु कारित करने का आपराधिक कृत्य होगा। ऐसे मामलों में प्रश्न यह नहीं है कि क्या इस प्रकार की भूल सामान्य आशय का भाग था, महत्वपूर्ण तथ्य यह है कि क्या ऐसा कार्य सामान्य आशय के अग्रसरण में किया गया। यदि गोली लगने का परिणाम ''आर'' की मृत्यु कारित करने में होता है तो सामान्य आशय विस्थापित नहीं होगा तथा सभी अभियुक्तगण धारा 302 सहपठित धारा 34 भा.द.सं. के अपराध के दोषी होंगे। धारा 301 भा.द.सं. उक्त परिस्थिति में प्रयोज्य नहीं है। इस सिद्धान्त को माननीय उच्चतम न्यायालय ने *हेतुभा व अन्य विरूद्ध गुजरात राज्य, ए.आई.आर.1970 सुप्रीम कोर्ट 1266* के मामले में भी अनुसरित किया है ।

क्या सामान्य आशय उस कार्य के लिए आकर्षित होगा जिसमें अपराध का आवश्यक अवयव "आशय" न होकर "ज्ञान" पर आधारित है। इस बिन्दु पर माननीय उच्चतम न्यायालय द्वारा *अब्राहिम शेख विरूद्ध पश्चिम बंगाल राज्य, ए.आई.आर. 1964 एस.सी. 1263.* के मामले में प्रकट किये गये अभिमत को अनुसरित करते हुये *बेनी फ्रेंसिस व अन्य विरूद्ध केरला राज्य, 1991 क्रि.ला.ज. 2411* के मामले में यह संप्रेक्षित किया गया है '

> "An offence punishable under the second part of S-304 IPC of the Penal Code does not require any intention to cause death or intention to cause such bodily injury as is likely to cause death. What is required is only knowledge of the likelihood of death. That does not mean that for that reason, Section 34 is excluded. Knowledge is only regarding the possible result of the act. Every act is done with an intention which can take in common intention also. An act done with common intention even if it is done without the intention to bring about the particular result but only with the knowledge of the likelihood of that result happening can also attract Section 34 IPC. Each of the persons could have had such knowledge when they were doing the act. Common intention required for the application of Section 34 IPC is only the common intention of perpetrating the act. When common intention along with knowledge available is taken into account, Section 34 IPC is attracted."

क्या प्रत्येक व्यक्ति की घटना स्थल पर उपस्थिति आवश्यक है ? इस बिन्दु पर विस्तार से विचार करने का अवसर माननीय उच्चतम न्यायालय को *जे. एम. देसाई. विरूद्ध मुम्बई राज्य, ए.आई.आर.1960 एस. सी. 889* के मामले में प्राप्त हुआ जिसमें यह अभिमत प्रकट किया गया है कि धारा 34 भा.द.सं. के अंतर्गत दायित्व का सार सामान्य आशय की विद्यमानता में पाया जाता है। इस धारा के आकृष्ट होने के लिये आरोपित अभियुक्त की उपस्थिति कानून की भाषा में आवश्यक शर्त नहीं है। वास्तव में अपराध के संयुक्त दायित्व को स्थापित करने के लिये यह प्रमाणित करना आवश्यक है कि आपराधिक कृत्य कई व्यक्तियों द्वारा किया गया था तथा सहभागिता आपराधिक कार्य के किये जाने में जरूरी है न कि केवल उसकी परियोजना में, किन्तु यह सहभागिता प्रत्येक मामले में शारीरिक उपस्थिति द्वारा होना आवश्यक नहीं है। उस अपराध में, जिसमें शारीरिक हिंसा अंतर्वलित है, साधारणतया उन अभियुक्तों की जिनको संयुक्त दायित्व के सिद्धान्त के आधार पर उत्तरदायी बनाना इप्सित है, घटना स्थल पर उपस्थिति आवश्यक हो सकती है, किन्तु ऐसा अन्य अपराधों में नहीं है जहां कि अपराध भिन्न कार्यो से निर्मित होता है जो कि विभिन्न काल में तथा विभिन्न स्थान में किये जा सकते हैं, जैसे कि आपराधिक न्यास भंग एवं छल के अपराध में।

क्या संयुक्त विचारण में अन्य अभियुक्त को दोषमुक्त कर एकल अभियुक्त की दोषसिद्धि की जा सकती है ? इस बिन्दु पर विस्तार से प्रकाश डालते हुए माननीय उच्चतम न्यायालय ने *कृष्ण गोविन्द पाटिल विरूद्ध महाराष्ट्र राज्य, ए.आई.आर. 1963 सुप्रीम कोर्ट 1413* के न्याय दृष्टांत में तीन परिस्थितियों का उल्लेख करते हुए स्थिति को स्पष्ट किया है।

प्रथम :– ए, बी, सी, डी, को "इ" की हत्या कारित करने के लिये धारा 302 सह पठित धारा 34 भा.द.सं. के लिये आरोपित किया गया। साक्ष्य यह स्थापित करने हेतु प्रस्तुत किया गया कि चारों व्यक्ति ने "इ" की हत्या करने में संयुक्त रूप से भाग लिया।

द्वितीय :– ए, बी, सी, डी, तथा कुछ अन्य अनामित व्यक्ति को उक्त धारा के अंतर्गत आरोपित किया गया। साक्ष्य यह प्रमाणित करने हेतु प्रस्तुत किया गया कि उक्त व्यक्तियों ने अन्य व्यक्तियों, नामित या अनामित, के साथ संयुक्त रूप से अपराध कारित करने में भाग लिया।

तृतीय :– ए, बी, सी, डी को उक्त धारा के अंतर्गत आरोपित किया गया। साक्ष्य यह स्थापित करने हेतु प्रस्तुत किया गया कि ए, बी, सी, डी, ने तीन अन्य व्यक्तियों के साथ संयुक्त रूप से अपराध कारित किया।

तृतीय परिस्थिति में निश्चित रूप से न्यायालय इस निष्कर्ष पर पहुंच सकता है कि एक नामित अभियुक्त अर्थात् ए, बी, सी, डी, में से कोई हत्या के लिये धारा 302 सहपठित धारा 34 भा.द.सं. के अपराध का दोषी है तथा शेष तीन अन्य दोषमुक्त होने योग्य है, परन्तु यह स्थापित होना आवश्यक है कि एकल अभियुक्त, दोषमुक्त हुए अभियुक्तगण के अतिरिक्त अन्य व्यक्ति, नामित या अनामित के साथ संयुक्त रूप से अपराध कारित किया है। द्वितीय परिस्थिति में भी न्यायालय समान निष्कर्ष पर उपरोक्तानुसार पहुंच सकता है तथा एकल अभियुक्त को दोषसिद्ध कर सकता है, यदि न्यायालय का यह समाधान हो जाता है कि आरोप में किसी त्रुटि से अभियुक्त के प्रतिरक्षा पर कोई प्रतिकूल प्रभाव नहीं पड़ा है।

प्रथम परिस्थिति में निश्चित रूप से न्यायालय दो या अधिक नामित व्यक्तियों को दोषसिद्ध कर सकता है, यदि यह स्थापित हो जाता है कि उनके द्वारा सामान्य आशय के अग्रसरण में अपराध कारित किया गया है परन्तु यदि न्यायालय चार में से तीन अभियुक्त को अभियोजन साक्ष्य विश्वास योग्य न होने से या संदेह का लाभ देकर दोषमुक्त कर देता है तो स्थिति क्या होगी ? विनिर्दिष्ट आरोप एवं साक्ष्य के बिना क्या यह संप्रेक्षित किया जा सकता है कि यघपि तीन अभियुक्तों को दोषमुक्त किया गया है परन्तु अन्य बिना पहचान वाले व्यक्तियों के साथ मिलकर एकल नामित अभियुक्त ने संयुक्त रूप से आपराधिक कृत्य किया ? यदि न्यायालय ऐसा करती है तो यह निश्चित रूप से अभियुक्त के लिये नया मामला होगा, जिसके लिये न ही आरोप है और न ही कोई साक्ष्य।

अतः उक्त पृष्ठभूमि में माननीय न्यायालय ने यह अभिमत प्रकट किया है कि जहां चार में से तीन अभियुक्त को इस आधार पर दोषमुक्त कर दिया जाता है कि उनके संबंध में साक्ष्य स्वीकार योग्य नहीं है अथवा उन्हें संदेह का लाभ दिया जाता है, इसका विधि में प्रभाव यह होगा कि उक्त तीन अभियुक्त ने अपराध कारित करने में भाग नहीं लिया, जिसका प्रभाव यह भी होगा कि उक्त तीन अभियुक्त ने चौथे अभियुक्त के साथ मिलकर संयुक्त रूप से हत्या कारित करने का अपराध नहीं किया। परिणामतः एकल रूप से चौथे अभियुक्त को धारा 302 सहपठित धारा 34 भा.द.सं. के प्रभाव से दोषसिद्ध नहीं किया जा सकता है।

अतः सामान्य रूप से यह निष्कर्ष उदित होता है कि यदि अन्य अभियुक्त की दोषमुक्ति के बाद केवल एक ऐसा अभियुक्त रह जाता है जिसकी पहचान अनन्य रूप से स्थापित हो जाती है तो उसको केवल तब दोषसिद्ध किया जा सकता है, जब युक्तियुक्त संदेह से परे यह प्रमाणित हो जाये कि उसने दोषमुक्त अभियुक्त के अतिरिक्त कुछ अन्य व्यक्ति, नामित या अनामित के साथ मिलकर सामान्य आशय को अग्रसर करने में कोई अपराध कारित किया है ।

धारा 149 भारतीय दण्ड संहिता

धारा 149 भा.द.सं. यह उपबंध करती है कि –

> ''यदि विधि विरूद्ध जमाव के किसी सदस्य द्वारा उस जमाव के सामान्य उद्देश्य को अग्रसर करने में अपराध किया जाता है, या कोई ऐसा अपराध किया जाता है, जिसका किया जाना उस जमाव के सदस्य उस उद्देश्य को अग्रसर करने में संभाव्य जानते थे, तो हर व्यक्ति, जो उस अपराध के किये जाने के समय उस जमाव का सदस्य है, उस अपराध का दोषी होगा।''

उक्त धारा के अन्तर्गत दायित्व का आधार यह है कि अपराध कारित होते समय कोई व्यक्ति विधि विरूद्ध जमाव का सदस्य था तथा जमाव के किसी सदस्य द्वारा सामान्य उद्देश्य को अग्रसर करने में कोई अपराध कारित किया गया या ऐसा अपराध कारित किया गया जिसका किया जाना वह सदस्य संभाव्य जानता हो। धारा 141 भा.द.सं. में 'विधि विरूद्ध जमाव' को परिभाषित किया गया है। ''पांच या अधिक व्यक्तियों का जमाव विधि विरूद्ध जमाव कहा जाता है, यदि उन व्यक्तियों का, जिनसे वह जमाव गठित हुआ हो, सामान्य उद्देश्य उक्त धारा में यथा परिभाषित पांच उद्देश्यों के लिये हो।'' धारा 142 भा.द.सं. के अनुसार –

> ''जो कोई उन तथ्यों से परिचित होते हुये जो किसी जमाव को विधि विरूद्ध जमाव बनाते हैं, उस जमाव में साक्ष्य सम्मिलित होता है या उसमें बना रहता है, वह विधि विरूद्ध जमाव का सदस्य है, यह कहा जाता है।''

क्या कोई व्यक्ति विधि विरूद्ध जमाव का सदस्य है ? इसके परीक्षण की कसौटी का उल्लेख *मसल्ती विरूद्ध उत्तरप्रदेश राज्य, ए.आई.आर. 1965 सुप्रीम कोर्ट 202* के मामले में माननीय उच्चतम न्यायालय की संविधान पीठ ने इस रूप में किया है :–

> "What has to be proved against a person who is alleged to be a member of unlawful assembly is that he was one of the persons constituting the assembly and he entertained alongwith the other member of the assembly the common object as defined by Sec 141 IPC. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141 IPC is an unlawful assembly.

धारा 149 भा.द.सं. के दो भाग हैं ।प्रथम, यदि विधि विरूद्ध जमाव के किसी सदस्य द्वारा उस जमाव के सामान्य उद्देश्य को अग्रसर करने में अपराध किया जाता है। द्वितीय, यदि विधि विरूद्ध जमाव के किसी सदस्य द्वारा कोई ऐसा अपराध किया जाता है जिसका किया जाना उस जमाव के सदस्य उस उद्देश्य को अग्रसर करने में संभाव्य जानते थे। विधि विरूद्ध जमाव के सामान्य उद्देश्य को अग्रसर करने में किया गया कार्य प्रथम श्रेणी के अंतर्गत आता है अथवा द्वितीय श्रेणी से संबंधित है यह एक महत्वपूर्ण प्रश्न है जिसका विनिश्चय प्रत्येक मामले में होना चाहिए। माननीय उच्चतम न्यायालय *ने सुनील कुमार व अन्य विरूद्ध राजस्थान राज्य, (2005) 9 एस.सी.सी. 283* के मामले में यह अभिमत प्रकट किया है :–

> In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Sec. 149 IPC, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the Section..... The word "knew" used in the second limb of the Section implies something more than a possibility and it can not be made to bear the sense of "might have been known". Positive knowledge is necessary.

एक जमाव जो आरंभ में विधि अनुकूल हो, अपने सदस्यों के पश्चातवर्ती कार्य द्वारा विधि विरूद्ध जमाव में परिवर्तित हो सकता है। धारा 141 भा.द.सं. के साथ संलग्न स्पष्टीकरण में यह उपबंध है कि ''कोई जमाव जो इकट्ठा होते समय विधि विरूद्ध नहीं था, बाद में विधि विरूद्ध जमाव हो सकेगा।'' अतः महत्वपूर्ण यह है कि

क्या आपराधिक कृत्य के समय पांच या अधिक व्यक्ति धारा 141 भा.द.सं. में यथा उल्लेखित उद्देश्य के लिए एकत्रित थे। सामान्य आशय की तरह सामान्य उद्देश्य को भी प्रमाणित करने के लिए प्रत्यक्ष साक्ष्य प्रस्तुत किया जाना अत्यन्त कठिन है। अतः इस संबध में कोई निष्कर्ष प्रत्येक मामले के सुसंगत परिस्थिति के आधार पर उद्भूत होता है। "सामान्य उद्देश्य" को माननीय उच्चतम न्यायालय ने *सुनील कुमार व अन्य विरूद्ध राजस्थान राज्य, (2005) 9 एस.सी.सी. 283* के मामले में वर्णित करते हुए यह उल्लेख किया गया है:

> The common object of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident...
>
> It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming as unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can dvelop during the course of incident at the spot *ex instanti*....., An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence.

धारा 149 भा.द.सं. के अंतर्गत दायित्व निर्धारण हेतु प्रत्यक्ष कार्य (overt act) दर्शित करना आवश्यक नहीं है *(देखें : राजस्थान राज्य विरूद्ध नाथु व अन्य (2003) 5 एस.सी.सी.537)*। इस प्रश्न पर विस्तार से विचार करने का अवसर माननीय न्यायालय को *मसल्ती विरूद्ध उत्तरप्रदेश राज्य, ए. आई. आर. 1965 सुप्रीम कोर्ट 202* के मामले में प्राप्त हुआ जिसमें माननीय न्यायालय ने यह उल्लेख किया है :

> It appears that in the case of *Baladin Vs State of UP, AIR 1956 SC 181* the members of the family of the appellants and other residents of the village had assembled together, some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly..... The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by S.141 IPC. While determining this question, it becomes relavant to

consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this court in the case of *Baladin* (Supra) assume significance, otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guity of some illegal omission in pursuance of the common object of the assembly.

आन्वयिक उत्तरदायित्व के आधार पर आरोप

धारा 34 भा.द.सं. का उपबंध साक्ष्य का एक नियम है। यह कोई सारवान अपराध निर्मित नहीं करता। जबकि धारा 149 भा.द.सं. एक सारवान अपराध गठित करता है। जिसका प्रभाव यह है कि धारा 34 भा.द.सं. का आरोप विनिर्दिष्ट रूप से न होने पर भी यदि साक्ष्य से अन्य अवयव स्थापित हो जाते हैं तो अभियुक्त को आन्वयिक उत्तरदायित्व के आधार पर धारा 34 भा.द.सं. के प्रभाव से दोष सिद्ध किया जा सकता है। परन्तु विनिर्दिष्ट आरोप के अभाव में धारा 149 भा.द.सं. के प्रभाव से अभियुक्त को दोष सिद्ध नहीं किया जा सकता। इस विधिक स्थति को स्पष्ट करने हेतु *बेनी फेन्सीस व अन्य विरूद्ध केरला राज्य, 1991 कि.ला.ज. 2411* के मामले में प्रकट किए अभिमत का उल्लेख समीचीन है :

It is always proper for a fair trial that even in cases involving vicarious liability, the accusd is specifically informed of the nature of charge that he has to answer. But Section 34 IPC does not create a substantive offence. It is only a rule of evidence to assess criminality. When unlawful assembly and common object were not alleged, but Section 34 IPC alone was invoked, conviction with the aid of section 149 IPC may be illegal. Membership of an unlawful assembly itself is a substantive offence.... Both sections deal with constructive criminal liability. In a case where the aid of Section 149 IPC alone was invoked and Section 34 IPC was not alleged, if unlawful assembly and common object are found against, conviction with the aid of Section 34 IPC will be legal if the evidence discloses that the acts were done by the accused in furtherance of their common intention. In such cases, normally there may not be any question of prejudice resulting.

संयुक्त विचारण में अभियुक्तगण की संख्या पांच से कम हो जाती है तो क्या उन्हें धारा 149 भा.द.सं. के प्रभाव से आन्वयिक उत्तरदायित्व के आधार पर दोषसिद्ध किया जा सकता है? इस बिंदु पर विस्तार से माननीय उच्चतम न्यायालय ने मोहनसिंह व अन्य विरूद्ध पंजाब राज्य, ए.आई.आर. 1963 एस.सी. 174 के मामले में विभिन्न परिस्थितियों का उल्लेख करते हुये संप्रेक्षित किया है :

In order to bring home a charge under S.149 IPC. it is not necessary that five or more persons must necessary be brought before the court and convicted. Similarly, less than five perons may be charged under S.149 IPC if the prosecution case is that the persons before the court & others numbering in all more than five composed an unlawful assembly these others being persons not identified & so not named. In such a case, if evidence shows that the persons before the court

along with unidentified and un-named assailants or members composed an unlawful assembly, those before the court can be convicted under section 149 IPC though the un-named & un-identified persons are not traced & charged.

Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried then S.149 IPC can not be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing as unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named.... In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 IPC because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.

उक्त मामले में माननीय सर्वोच्च न्यायालय ने प्रकरण में स्थापित तथ्यों के आधार पर अभियुक्त की दोषसिद्धि धारा 302 सहपठित धारा 149 भा.द.सं. के स्थान पर धारा 302 सहपठित धारा 34 भा.द.सं. के अन्तर्गत परिवर्तित किया है। *वैतालसिंह व अन्य विरूद्ध उत्तरप्रदेश राज्य, ए.आई.आर. 1990 सुप्रीम कोर्ट 1982* के मामले में न्यायालय द्वारा यह अभिमत प्रकट किया गया है कि यदि धारा 302 सपठित धारा 34 भा.द.सं. का आरोप नहीं लगाया गया है, लेकिन प्रकरण के तथ्य ऐसे हैं कि अभियुक्त पर वैकल्पिक रूप से धारा 302 सहपठित धारा 149 भा.द.सं. या धारा 302 सहपठित धारा 34 भा.द.सं. का आरोप लगाया जा सकता था, तो प्रकरण के तथ्यों के आधार पर धारा 302 सहपठित धारा 149 के अन्तर्गत अभियुक्त की दोषसिद्धि को धारा 302 सहपठित धारा 34 के अन्तर्गत प्रतिस्थापित किया जा सकता है, परन्तु यह तथ्य हमेशा विचार योग्य रहेगा कि अभियुक्त की प्रतिरक्षा पर कोई प्रतिकूल प्रभाव (Prejudice) न पड़ा हो।

अतः सामान्य निष्कर्ष यह उद्‌भूत होता है कि संयुक्त विचारण में कुछ अभियुक्तों के संबंध में साक्ष्य विश्वसनीय न होने से अथवा उनकी अनन्यता स्थापित न होने के कारण दोषमुक्त हो जाने से यदि अभियुक्तगण की संख्या पांच से कम हो जाती है तब भी धारा 149 भा.द.सं. के आधार पर आन्वयिक उत्तरदायित्व हेतु दोषिता सुनिश्चित करने में वैधानिक बाधा नहीं है, यदि साक्ष्य से यह युक्तियुक्त संदेह से परे स्थापित हो कि कुछ अन्य व्यक्ति, नामित या अनामित, सामान्य उद्‌देश्य के अग्रसरण में विधि विरूद्ध जमाव के सदस्य थे। इसके अतिरिक्त धारा 34 भा.द.सं. का उपबंध साक्ष्य का एक नियम है। अतः यदि ऐसे मामलों में प्रमाणित तथ्यों से यह स्थापित होता है कि आपराधिक कृत्य सामान्य आशय के अग्रसरण में किया गया था तो अभियुक्त गण को धारा 34 भा.द.सं. के प्रभाव से आन्वयिक उत्तरदायित्व के आधार पर दोषसिद्ध किया जा सकता है तथा तद् आधार पर धारा 149 भा.द.सं. के स्थान पर धारा 34 भा.द.सं. के प्रभाव से दोषसिद्धि को परिवर्तित (Alter) भी किया जा सकता है। परन्तु ऐसे निष्कर्षों पर पहुंचने के लिये अभियुक्त की प्रतिरक्षा पर प्रतिकूल प्रभाव (Prejudice) के तथ्य पर विचार अवश्यमेव अपेक्षित है।

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PROCEDURE FOR HEARING OF CONSOLIDATED SUITS

Institutional Article
VED PRAKASH
Director, JOTRI

Basic rule stipulating procedure to be followed in respect of a suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties is to be found in Section 10 of Code of Civil Procedure which says that no Court shall proceed with the later suit. However as explained by the Apex Court in *Pukhraj D. Jain v. G. Gopalakrishna, (2004) 7 SCC 251*, Section 10 enacts merely a rule of procedure and the decree passed in contravention thereof is not a nullity. It was further pointed out in this case that the litigant cannot dictate to the Court as to how the procedure should be conducted and it is for the Court to decide what would be the best course to be adopted for expeditious disposal of the case. In *Anantram v. Mahesh Prasad, AIR 1984 Patna 161* it has clearly been held that the rule incorporated in Section 10 of CPC being a rule of procedure can be waived and Court can in appropriate cases order consolidation of suit when it is desirable. No doubt, a contrary view has been expressed in this respect by High Court of Jammu & Kashmir in *Mugli v. Khaliq, AIR 1979 J&K 84* to the effect that in a case where Section 10 CPC is applicable, there cannot be an order consolidating the suits, but if we examine the aforesaid view in the light of view expressed in *Pukhraj D. Jain's case* (supra) then it can safely be concluded that the view expressed by Patna High Court is much more logical.

Dealing with the question as to whether applicability of Section 10 C.P.C. divests the Court of its inherent jurisdiction to consolidate two suits, it has been held by the Orissa High Court in *Dr. Guru Prasad Mohanty and others v. Bijoy Kumar Das, AIR 1984 Orissa 209* that the object of consolidation of suits is to avoid multiplicity of proceedings and unnecessary delay and protraction of litigation. These objects are not in conflict with the principles of S.10 of the Civil Procedure Code, but in the aid of the object of the said Section. In *Motilal Chunnilal Rathore v. Pani Bai and others, AIR 1992 Orissa 155* it has clearly been held that where matter in issue was directly and substantially same in both suits which were pending in the same Court, it was competent to grant relief in the subsequent suit and in both suits parties being the same, public policy of early finality would call for exercise of inherent power u/s 151 Code of Civil Procedure to direct analogous hearing by consolidating the two suits.

The question of consolidation would largely depend, as poin'ed out in *Mohd. Yusuf v. Ahmed Miya, AIR 1987 All. 335* on the identity of the subject matters, the parties and convenience in proceeding with the trial having regard to the

nature of the evidence which is to be led in the suits and the precise controversy for trial in the two suits. In such a situation the parties shall be required to disclose their cases to enable the Court to come to a conclusion whether it would be expedient to try the two suits together and hence a direction for consolidation before filing of written statement will not be proper. If the Court is of the view that consolidation of suits is necessary for the ends of justice it can proceed *suo motu* and it is immaterial as to whether parties are consenting to it or not. (See : *Harinarain Choudhary and others v. Ram Ashish Singh and others, AIR 1957 Pat. 124*)

In *M/s Chitivalasa Jute Mills v. M/s Jaypee Rewa Cement, AIR 2004 SC 1687* there was a dispute between the parties regarding price of jute bags supplied by Willard India Ltd. a part and parcel of M/s Chitivalasa Jute Mills to M/s Jaypee Rewa Cement. Willard India Ltd. had filed a suit against M/s Jaypee Rewa Cement at Visakhapatnam seeking a decree of Rs. 48,00630/-. Subsequently, another suit was filed by M/s Jaypee Rewa Cement before the District Court, Rewa claiming a decree of Rs. 44,08,625/- An application for stay of the later suit u/s 10 CPC was rejected by the District Court Rewa. Thereafter on a petition for transfer of the suit pending before the District Court Rewa to the Court of Visakhapatnam, the Apex Court observed in para 9 as under :

> "**9.** ...The issues arising for decision would be substantially common. Almost the same set of oral and documentary evidence would be needed to be adduced for the purpose of determining the issues of facts and law arising for decision in the two suits before two different Courts. Thus, there will be duplication of recording of evidence if separate trials are held. The two Courts would be writing two judgments. The possibility that the two Courts may record finding inconsistent with each other and conflicting decrees may come to be passed cannot be ruled out."

Regarding consolidation of suits, three pertinent questions arise for consideration. Firstly, what factors should be kept in mind to arrive at a decision to consolidate two suits. Secondly, what should be the appropriate methodology to be followed after consolidation of suits and thirdly, what will be the legal effect of consolidation.

RELEVANT FACTORS :

The relevant factors which may have a bearing on the issue of consolidation of two suits were considered by the Their Lordships of the Patna High Court in *M/s Bokaro and Ramgur Ltd. v. The State of Bihar and others, AIR 1973 Pat. 340.* In this case it was held that in deciding whether two or more suits are to be consolidated or not the whole question is whether or not in the long run, it will be expeditious and advantageous to all concerned to have the two suits tried

together as analogous cases, and where it appears that there is sufficient unity or similarity in the matter in issue in the suits or that the determination of the suits rests mainly on a common question, it is convenient to have them tried as analogous cases. The Court further observed that the question to be considered should also be as to whether or not the non-consolidation of the two or more suits is likely to lead, apart from multiplicity of suits, to leaving the door open for conflicting decisions on the same issue which may be common to the two or more suits sought to be consolidated. The convenience of the parties and the expenses in the two suits are subsidiary to the more important consideration namely, whether it will avoid multiplicity of suits and eliminate the chance of conflicting decisions on the same point.

METHODOLOGY :

The issue regarding appropriate methodology to be followed in such cases was considered at length by the Apex Court in *M/s Chitivalasa Jute Mills's case* (supra) wherein it has been ordained that where it is necessary in the interest of justice or to prevent abuse of the process of the Court, such suits should be consolidated for the purpose of trial and decision. The Court may frame consolidated issues. Complete or even substantial and sufficient similarity on issues for decision in the two suits will be sufficient to consolidate the suits. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need be addressed followed by one common judgment. However, as the suits are two, the Court may, based on the common judgment, draw two different decrees or one common decree to be placed on the record of the two suits.

CONCLUSION:

To sum up, though there is no express provision in C.P.C. enclothing a Court with the jurisdiction to consolidate two suits having identical issue involved therein and same or similar parties still such a jurisdiction can be traced from the inherent powers exercisable u/s 151 of the Code. It is obvious that this power should be exercised in the interest of justice to avoid conflicting findings in two different suits. To put it differently, in such a situation the Court should go for consolidation rather allowing the parties to litigate in different directions with different ends so that there may not be failure of justice.

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धारा 389 (3) दं.प्र.सं. के अंतर्गत विचारण न्यायालय द्वारा अर्थदण्ड को निलंबित करने की अधिकारिता

सांस्थानिक आलेख
शैलेन्द्र शुक्ला
अति. संचालक

किसी भी अभियुक्त को कारावास अथवा अर्थदण्ड से दण्डादिष्ट किए जाने के पश्चात् स्वाभाविकतः अभियुक्त उस दण्डादेश के विरूद्ध अपील करने हेतु अग्रसर होता है। अपील लंबित रहने के दौरान दण्डादेश को स्थगित रखे जाने का प्रावधान धारा 389 दं.प्र.सं. एवं धारा 424 दं.प्र.सं. में उपबंधित है। इन प्रावधानों के माध्यम से अपीलीय न्यायालयों को वह विवेकाधिकार प्रदान किया गया है कि दण्डादेश के विरूद्ध अभियुक्त द्वारा अपील किये जाने की स्थिति में अपील के निराकरण तक दण्डादेश स्थगित किया जा सके ताकि अभियुक्त को अपील में सफलता मिलने की दशा में उसका पूर्ण लाभ उसे दिलाया जा सके जो कि दण्डादेश के निष्पादन के स्थगित न करने की दशा में सम्भव नहीं हो सकता है। इन प्रावधानों के अवलोकन से स्पष्ट है कि अपीलीय न्यायालय को कारावास के दण्डादेश को स्थगित करने का अधिकार धारा 389 (1) दं.प्र.सं. के अंतर्गत है, एवं अर्थदण्ड का भुगतान न किए जाने की स्थिति में आरोपित कारावास के दण्ड को स्थगित किए जाने का प्रावधान धारा 424 दं.प्र.सं. में है। जहां अभियुक्त को कारावास के साथ–साथ अर्थदण्ड से भी दण्डादिष्ट किया गया हो क्या वहां अभियुक्त को कारावास के दण्डादेश के निलम्बन के साथ–साथ अर्थदण्ड के दण्डादेश का निलंबन विचारण न्यायालय द्वारा किया जा सकता है अथवा नहीं, यही विचारणीय बिन्दु है। इस बिन्दु के संबंध में वैधानिक स्थिति स्पष्ट करने हेतु प्रथमतः धारा 389 दं.प्र.सं. के प्रावधानों पर दृष्टिपात उचित होगा, जो निम्नवत् है :

"389, अपील लम्बित रहने तक दण्डादेश का निलम्बन, अपीलार्थी का जमानत पर छोड़ा जाना–

(1) अपील न्यायालय, ऐसे कारणों से, जो उसके द्वारा अभिलिखित किए जाएंगे, आदेश दे सकता है कि उस दण्डादेश या आदेश का निष्पादन, जिसके विरूद्ध अपील की गई है, दोषसिद्ध व्यक्ति द्वारा की गई अपील के लम्बित रहने तक निलम्बित किया जाए और यदि वह व्यक्ति परिरोध में है तो वह भी आदेश दे सकता है कि उसे जमानत पर या उसके अपने बन्धपत्र पर छोड़ दिया जाए।

(2) अपील न्यायालय को इस धारा द्वारा प्रदत्त शक्ति का प्रयोग उच्च न्यायालय भी किसी ऐसी अपील के मामले में कर सकता है जो किसी दोषसिद्ध व्यक्ति द्वारा उसके अधीनस्थ न्यायालय में की गई है।

(3) जहां दोषसिद्ध व्यक्ति ऐसे न्यायालय का जिसके द्वारा वह दोषसिद्ध किया गया है यह समाधान कर देता है कि वह अपील प्रस्तुत करना चाहता है वहां वह न्यायालय–

(i) उस दशा में जब ऐसा व्यक्ति, जमानत पर होते हुए, तीन वर्ष से अनधिक की अवधि के लिए कारावास से दण्डादिष्ट किया गया है, या

(ii) उस दशा में जब वह अपराध, जिसके लिए ऐसा व्यक्ति दोषसिद्ध किया गया है, जमानतीय है और वह जमानत पर है,

यह आदेश देगा कि दोषसिद्ध व्यक्ति को इतनी अवधि के लिए जितनी से अपील प्रस्तुत करने और उपधारा (1) के अधीन अपील न्यायालय के आदेश प्राप्त करने के लिए पर्याप्त समय मिल जाएगा जमानत पर छोड़ा जाए जब तक कि जमानत से इन्कार करने के विशेष कारण न हों और जब तक वह ऐसे जमानत पर छूटा रहता है तब तक कारावास का दण्डादेश निलम्बित समझा जाएगा।

(4) जब अंततोगत्वा अपीलार्थी को किसी अवधि के कारावास या आजीवन कारावास का दण्डादेश दिया जाता है, तब वह समय, जिसके दौरान वह ऐसे छूटा रहता है, उस अवधि की संगणना करने में, जिसके लिए उसे ऐसा दण्डादेश दिया गया है, हिसाब में नहीं लिया जाएगा।

प्रश्नाधीन बिन्दु के संबंध में वैधानिक स्थिति समझने हेतु धारा 389 (1) द.प्र.सं. एवं धारा 389 (3) दं.प्र.सं. का तुलानात्मक अध्ययन आवश्यक है । 389 (1) दं.प्र.सं. के अंतर्गत अपीलीय न्यायालय को यह अधिकार दिया गया है कि अपील के लंबित रहने के दौरान अभियुक्त को न केवल जमानत पर मुक्त किये जाने का आदेश दिया जा सकेगा, अपितु, दण्डादेश का निष्पादन भी लंबित किए जाने का आदेश पारित किया जा सकेगा। धारा 389 (3) दं.प्र.सं. के अंतर्गत वह न्यायालय जिसके द्वारा दण्डादेश पारित किया गया है, अभियुक्त को अपील प्रस्तुत करने से लेकर अपीलीय न्यायालय द्वारा आदेश प्राप्त करने तक के लिए जमानत पर छोड़ेगा बशर्ते कि (अ) अभियुक्त उस प्रकरण में पूर्व से जमानत पर था एवं (ब) अभियुक्त को उक्त प्रकरण में तीन वर्ष से अनधिक के कारावास से दण्डित किया गया हो।

धारा 389 (3) दं.प्र.सं. के अंतर्गत जमानत पर छोड़े जाने का प्रभाव इस प्रावधान में यह बताया गया है कि कारावास का दण्डादेश निलंबित रहेगा। इस प्रकार धारा 389 (3) द.प्र.सं. के सूक्ष्म अध्ययन से स्पष्ट है कि कारावास के दण्डादेश का निलंबन, उसे इस प्रावधान के अंतर्गत जमानत पर छोड़े जाने का "परिणाम" अथवा "प्रभाव" है एवं यदि न्यायालय जमानत के आदेश में, जो कि धारा 389 (3) द.प्र.सं. के अंतर्गत पारित किया गया है, पृथक से यह न भी लिखे के कारावास का दण्डादेश स्थगित किया जाता है, तो भी कारावास का दण्डादेश स्वयंमेव निलंबित माना जाएगा।

इस प्रकार धारा 389 (1) दं.प्र.सं. एवं धारा 389 (3) दं.प्र.सं. में एक स्पष्ट अंतर यह है कि जहां पूर्व प्रावधान में अपीलीय न्यायालय द्वारा दण्डादेश के निलंबन संबंधी स्पष्ट आदेश दिया जाना अनिवार्य है वहीं धारा 389 (3) दं.प्र.सं. में दण्डादेश के निलंबन का आदेश पृथक से पारित करने की आवश्यकता नहीं होती है क्योंकि यह जमानत पर अभियुक्त को छोड़े जाने का प्रभाव माना गया है।

इस प्रकार यह स्पष्ट है कि धारा 389 (3) दं.प्र.सं. के अंतर्गत न्यायालय द्वारा दण्डादिष्ट अभियुक्त को इस प्रावधान में दर्शित अर्हता पूर्ण होने की स्थिति में अभियुक्त को जमानत पर छोड़ दिया जाएगा बशर्ते कि वर्णित अपराध या अभियुक्त की परिस्थितियाँ इस प्रकृति की न हो कि उसे जमानत पर छोड़ा जाना उचित न समझा जाए। धारा 389 (3) दं.प्र.सं. न्यायालय को ऐसी कोई शक्ति प्रदान नहीं करता है कि कारावास का दण्डादेश स्थगित किए जाने बाबत् कोई आदेश न्यायालय पारित करें क्योंकि पूर्वोक्तानुसार दण्डादेश का निलंबन, अभियुक्त को जमानत पर छोड़े जाने का प्रभाव मात्र है।

धारा 389 (1) दं.प्र.सं. एवं धारा 389 (3) दं.प्र.सं. के मध्य एक महत्वपूर्ण अंतर यह भी है कि जहां 389 (1) में दण्डादेश के निलंबन का प्रावधान है, वही 389 (3) दं.प्र.सं. में कारावास के दण्डादेश का निलंबन ही वर्णित है । जैसा कि माननीय उच्च न्यायालय ने न्याय दृष्टांत *रमेशचंद्र विरूद्ध मध्यप्रदेश राज्य 1999 (1) जे एल.जे. 223* में व्यवस्था दी है, "दण्डादेश" में कारावास एवं अर्थदण्ड दोनों समाविष्ट है। ऐसी स्थिति में धारा 389 (1) दं.प्र.सं. में कारावास के साथ–साथ अर्थदण्ड के निलंबन की व्यवस्था दी गई है दूसरी ओर धारा 389 (3) दं.प्र.सं. में मात्र कारावास के दण्डादेश के स्थगन की बात कही गयी है । इसी से स्पष्ट है कि अर्थदण्ड के दण्डादेश के स्थगन की कोई व्यवस्था धारा 389 (3) दं.प्र.सं. में नहीं है ।

इससे यह स्पष्ट है कि यदि किसी अभियुक्त को कारावास की सजा के साथ अर्थदण्ड की भी सजा से दण्डित किया गया हो एवं उक्त अभियुक्त दोषसिद्धि के पूर्व से ही जमानत पर रहा हो एवं उसे दी गई कारावास की सजा 3 वर्ष से अनधिक हो तो धारा 389 (3) द.प्र.सं. का आवेदन प्रस्तुत करने पर न्यायालय उसे जमानत पर छोड़ने हेतु बाध्य होगा जब तक कि किन्हीं पर्याप्त कारणों से जमानत आवेदन अस्वीकार न किया जाए। इस प्रकार जमानत पर छोड़े जाने का प्रभाव यह होगा कि कारावास का दण्डादेश निलंबित माना जाएगा अर्थात् अर्थदण्ड के आदेश का निलंबन नहीं होगा एवं अभियुक्त सम्पूर्ण अर्थदण्ड की राशि का भुगतान करने हेतु आबद्ध रहेगा। ऐसी स्थिति में अभियुक्त के लिए एक ही उपाय है कि वह दण्डादेश के तत्काल उपरांत धारा 389 (1) दं.प्र.सं. का आवेदन अपीलीय न्यायालय के समक्ष प्रस्तुत करे ताकि वह कारावास एवं अर्थदण्ड दोनों के निलंबन का आदेश प्राप्त कर सके । ध्यान देने योग्य बात है कि वह उपरोक्त वर्णित परिस्थितियों में धारा 424 दं.प्र.सं. का लाभ भी नहीं ले सकता है क्योंकि उक्त प्रावधान उन्हीं परिस्थितियों में लागू होगा जबकि अभियुक्त को केवल अर्थदण्ड से ही दण्डादिष्ट किया गया हो।

अतः यदि अभियुक्त को अर्थदण्ड के साथ–साथ कारावास से भी दण्डादिष्ट किया गया हो तो विशिष्ट प्रावधान के अभाव में विचारण न्यायालय द्वारा अर्थदण्ड का निलंबन संभव नहीं है। दं.प्र.सं. के अंतर्गत न्यायालय को ऐसी अन्तर्भूत शक्तियां प्राप्त नहीं है जो कि व्य.प्र.सं. के समरूप हों एवं निर्धारित प्रावधान के अभाव में न्यायालय आदेश पारित करने में सक्षम नहीं रहता है।

इस प्रकार यह वैधानिक स्थिति प्रकट होती है कि धारा 389 (3) दं.प्र.सं. के अंतर्गत विचारण न्यायालय को अर्थदण्ड के दण्डादेश को निलंबित करने का आदेश पारित करने की अधिकारिता नहीं है।

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The law cannot make all men equal, but they are equal before the law in the sense that their rights are equally the subject of protection and their duties of enforcement.

-POLLOCK, Frederick

विधिक समस्याऐं एवं समाधान

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

क्या सत्र न्यायालय किशोर न्यायबोर्ड से किशोरवयता के संबंध में जॉंच प्रतिवेदन बुलाने की अधिकारिता रखता है?

किशोर न्याय (बालकों के सम्बन्ध में सावधानी एवं सुरक्षा) अधिनियम, 2006 को संशोधन अधिनियम क्र. 33 वर्ष 2006 द्वारा (दिनांक 22.8.2006 से प्रभावशील) संशोधित कर उसमें धारा 7–A जोड़ी गयी है जो यह प्रावधित करती है कि जब भी किसी न्यायालय के समक्ष किसी अभियुक्त द्वारा किशोरवयता का अभिवाक किया जाता है अथवा न्यायालय को यह लगता है कि अपराध दिनांक को अभियुक्त किशोरवय था तो ऐसी दशा में न्यायालय का यह दायित्व है (The Court shall make an enquiry) कि वह साक्ष्य के आधार पर ऐसे व्यक्ति की आयु के विषय में जांच कर यह निष्कर्ष अभिलिखित करे कि ऐसा व्यक्ति 'किशोरवय' है अथवा नहीं। उक्त अधिनियम में ऐसा कोई प्रावधान नहीं है जो सत्र न्यायालय को 'किशोरवयता' की जांच स्वयं न करते हुए इस हेतु किशोर न्याय बोर्ड को जांच कर प्रतिवेदन प्रस्तुत करने के लिये निर्देश देने की अधिकारिता प्रदान करता हो।

अतः यह नहीं कहा जा सकता है कि सत्र न्यायालय किशोर न्याय बोर्ड से अभियुक्त की 'किशोरवयता' के सम्बन्ध में प्रतिवेदन बुलाने की अधिकारिता रखता है।

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क्या किराएदार के निष्कासन हेतु लंबित वाद में किराए की नियमित अदायगी के अभाव में धारा 12 (1) ए. का आधार निष्कासन हेतु उपलब्ध हो जाएगा?

विहित सूचना के पत्र के बावजूद अवशेष किराए की अदायगी न किए जाने पर भवन स्वामी को किराएदार के विरूद्ध मध्यप्रदेश स्थान नियंत्रण अधिनियम, 1961 की धारा 12 (1) (अ) के अंतर्गत निष्कासन का आधार प्राप्त होता है और इस हेतु वाद संस्थित किया जा सकता है। इस हेतु यह आवश्यक है कि किराएदार को बकाया किराये की मांग सूचनापत्र भेजा जाए। सूचनापत्र निर्वाह दिनांक से दो माह के अंदर अदायगी न करने पर निष्कासन का वाद प्रस्तुत किया जा सकता है। प्रश्न यह है कि यदि निष्कासन का वाद अन्य आधारों पर लंबित हो एवं उस दौरान यदि किरायेदार द्वारा वाद संस्थित के बाद का किराया प्रतिमाह अधिनियम की धारा 13 (1) के अन्तर्गत नियमित रूप से न्यायालय में निक्षिप्त न किया जा रहा हो तो क्या वादी धारा 12 (1) (अ) के अंतर्गत निष्कासन की प्रार्थना कर सकेगा ?

इस संदर्भ में मध्यप्रदेश स्थान नियंत्रण अधिनियम की धारा 13 (1) एवं धारा 13 (6) के प्रावधान समीचीन है। धारा 13 (1) के अनुसार धारा 12 में दर्शाए किसी भी आधार पर वाद संस्थित करने पर समन्स प्राप्त होने के एक माह के अंदर किराएदार समस्त अवशेष किराए की राशि न्यायालय के समक्ष जमा करेगा एवं इसके पश्चात् प्रत्येक माह की 15 तारीख तक नियमित रूप से किराये की राशि वाद निराकरण तक जमा करता रहेगा। ऐसा न करने का परिणाम धारा 13 (6) में दर्शाया गया है जिसके अनुसार न्यायालय को उसका बचाव समाप्त करने का अधिकार होगा। इस प्रकार वाद संस्थित करने के उपरांत किराया न देने का परिणाम धारा 13 (6) में स्पष्टतः संदर्भित हैं एवं इसी से यह निष्कर्ष निकलता है कि अन्य आधार पर वाद संस्थित करने की दशा

में अवशेष किराया अदा न करने पर प्रतिवादी का बचाव ही समाप्त किया जा सकेगा, लेकिन वादी को अधिनियम की धारा 12 (1) (अ) का आधार निष्कासन हेतु उपलब्ध नहीं होगा।

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क्या शासकीय सेवकों से संबंधित सेवा विवाद के मामलों में सिविल न्यायालय की अधिकारिता बाधित हैं ?

धारा 9 व्यवहार प्रक्रिया संहिता, 1908 के अनुसार न्यायालयों को उन व्यवहार वादों को छोड़कर जिनका संज्ञान लेने से वे प्रत्यक्ष या विवक्षित रूप से बाधित हैं, हर प्रकार के व्यवहार प्रकृति के वादों को श्रवण करने की अधिकारिता है।

प्रशासनिक अधिकरण अधिनियम, 1985 के अन्तर्गत दिनांक 02.08.1988 को मध्य प्रदेश में राज्य प्रशासनिक अधिकरण के गठन के साथ ही उक्त अधिनियम की धारा 28 के प्रभाव स्वरूप मध्यप्रदेश के शासकीय सेवकों के सेवा विवादों के विषय में सिविल न्यायालयों की श्रवणाधिकारिता तद्दिनांक से समाप्त हो गयी तथा धारा 29 के प्रभावस्वरूप सिविल न्यायालयों में शासकीय सेवकों के सेवा विवादों से सम्बन्धित सभी मामले भी स्वमेव राज्य प्रशासनिक अधिकरण को अन्तरित हो गये।

केन्द्र सरकार के कार्मिक एवं प्रशिक्षण विभाग से संबंधित मंत्रालय द्वारा दिनांक 17.4.03 को प्रकाशित अधिसूचना (क्रमांक GSR 753 (E) दिनांक 29.6.1988 भारत के असाधारण राजपत्र में प्रकाशित) के अनुसार मध्यप्रदेश के राज्य प्रशासनिक अधिकरण को उत्सादित कर दिया गया है। अतः शासकीय सेवकों के सेवा विवाद से जुड़े मामलों के विषय में सिविल न्यायालय की अधिकारिता बाधित करने के विषय में प्रशासनिक अधिकरण अधिनियम, 1985 की धारा 28 के प्रावधान प्रयोज्य नहीं रह जाते हैं। परिणामस्वरूप शासकीय सेवकों के सेवा संबंधी वादो का श्रवणाधिकार सिविल न्यायालय को पुनः प्राप्त हो गया है।

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क्या धारा 164 दण्ड प्रक्रिया संहिता के प्रावधानों के अन्तर्गत मजिस्ट्रेट के समक्ष ऐसा व्यक्ति कथन लिपिबद्ध कराने का अधिकार रखते हैं जो न तो अभियुक्त है और न हीं पुलिस (विवेचक) पक्ष द्वारा प्रायोजित है ?

कई बार न्यायालय के समक्ष ऐसे व्यक्ति उपस्थित होकर अपना कथन धारा 164 दण्ड प्रक्रिया संहिता के अन्तर्गत लिपिबद्ध करने का निवेदन करते हैं जो न तो अभियुक्त है आर न ही विवेचक पक्ष द्वारा उनके कथन लिपिबद्ध करने हेतु प्रार्थना की गयी है। दण्ड प्रक्रिया संहिता की धारा 164 के प्रावधानों के सहजदृश्य अवलोकन से यह स्पष्ट नहीं होता है कि धारा 164 दण्ड प्रक्रिया संहिता के प्रावधानों के अन्तर्गत स्वयं आरोपी के कथनों/संस्वीकृति एवं विवेचक पक्ष द्वारा अपेक्षित किसी व्यक्ति के कथन के अतिरिक्त किसी अन्य पक्ष या व्यक्ति के निवेदन पर मजिस्ट्रेट कथन लिपिबद्ध कर सकता है या नहीं ?

इस विषय में अर्न्तवलित सभी आयामों को दृष्टिगत रखते हुए माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत जोगेन्द्र नाहक विरूद्ध उड़ीसा राज्य, (2000) 1 एस. एस.सी. 272 में धारा 164 दण्ड प्रक्रिया संहिता के प्रावधानों की व्याख्या करते हुए यह विधि प्रतिपादित की गई है कि धारा 164 दण्ड प्रक्रिया संहिता के अन्तर्गत ऐसे किसी व्यक्ति को मजिस्ट्रेट के समक्ष कथन लिपिबद्ध कराने की अधिकारिता प्राप्त नहीं है जो न तो अभियुक्त है और ना ही अभियोजन पक्ष द्वारा प्रायोजित है।

माननीय सर्वोच्च न्यायालय द्वारा यह भी व्यक्त किया गया है कि ऐसे तीसरे पक्ष या व्यक्ति के कथन लिपिबद्ध करने संबंधी अतिरिक्त कार्य का बोझ मजिस्ट्रेट पर नहीं डाला जाना चाहिये तथा ऐसे व्यक्ति के कथन दोनों में से किसी भी पक्ष के निवेदन पर प्रकरण के विचारण के समय संबंधित न्यायालय द्वारा लिपिबद्ध किये जा सकते हैं।

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BOOK REVIEW

DIGEST OF FULL BENCH CASES OF HIGH COURT OF MADHYA PRADESH (1956-2005) BY ADVOCATE IMTIAZ HUSSAIN

The book under review is a noble attempt which satisfies the quest of readers to find all the Full Bench pronouncements of the Madhya Pradesh High Court under one umbrella. Another very significant aspect of this digest is that it also contains the list of overruled/reversed cases of Supreme Court and High Court from the year 1950 to 2005. Easy access to Full Bench Judgments facilitates locating the final word of the High Court on particular topic and this is the most important attribute of this digest. It is a very well thought of project, which is bound to prove of immense help to the lawyers as well as Judicial officers.

The digest is priced reasonably at Rs. 280/- and is brought out by Suvidha Law House Pvt. Ltd and comes with a hard bound edition, which makes the volume quite sturdy as well.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

266. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)
Cruelty as a ground for divorce, concept of – Law explained.
Vinita Saxena v. Pankaj Pandit
Judgment dated 21.03.2006 passed by the Supreme Court in Civil Appeal No. 1687 of 2006, reported in (2006) 3 SCC 778

Held :

It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word "cruelty" has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by the standard of modern civilisation in the background of the cultural heritage and traditions of our society, a young and well-educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony are irrelevant. This view was taken by the Kerala High Court in *Rajani v. Subramonian, AIR 1990 Ker 1.*

In *(1993) 2 Hindu LR 637 (sic)*, the Court had gone to the further extent of observing as follows :

> "Sometime even a gesture, the angry look, a sugar-coated joke, an ironic overlook may be more cruel than actual beating."

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

The modern view of cruelty of one spouse to another in the eye of the law has been summarised as follows in (1977) 42 DRJ 270 (sic) *Halsbury's Law of England,* Vol. 12, 3rd Edn., pp. 270-71:

"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

This Court in *N.G. Dastane (Dr.) v. S. Dastane, (1975) 2 SCC 326* observed as under: (SCC p. 338, para 32)

"The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures."

267. CRIMINAL PROCEDURE CODE, 1973 – Section 197
Nature of power exercised by Court u/s 197 and extent of protection available.
Rakesh Kumar Mishra v. State of Bihar and others
Judgment dated 03.01.2006 passed by the Supreme Court in Criminal Appeal No. 12 of 2006, reported in (2006) 1 SCC 557

Held:

It would be appropriate to examine the nature of power exercised by the Court under Section 197 of the Code and the extent of protection it affords to public servants, who, apart from various hazards in discharge of their duties, in the absence of a provision like the one mentioned, may be exposed to vexatious prosecutions. Sections 197(1) and (2) of the Code read as under:

"197. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction –

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged, offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

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(2) No court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Session under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or unless the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression "no court shall take cognizance of such offence except with the previous sanction". Use of the words "no" and "shall" make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during the discharge of his official duty.

Such being the nature of the provision the question is how should the expression "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", be understood? What does it mean? "Official" according to the dictionary, means pertaining to an office, and "official act" or "official duty" means an act or duty done by an officer in his official capacity. In *B. Saha v. M.S. Kochar (1979) 4 SCC 177* it was held: (SCC pp. 184-85, para 17)

"17. The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197 (1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, *directly and reasonably* connected with his official duty will require sanction for prosecution under the said provision."

(emphasis supplied)

Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or ommission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty; that is under the colour of office. Official duty, therefore, implies that the act or omission must have been done by the public servant in the course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in the discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that an act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in the discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in the course of service but not in the discharge of his duty and without any justification therefor then the

bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in the discharge of his duty can be deemed to be official was explained by this Court in *Matajog Dobey v. H.C. Bhari (1955) 2 SCR 925* thus: (SCR pp. 933 & 934-35)

> "The offence alleged to have been committed [by the accused] must have something to do, or must be related in some manner, with the discharge of official duty...
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> ★ ★ ★
>
> There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim), but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

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268. CRIMINAL PROCEDURE CODE, 1973 – Generally

Code of Criminal Procedure – Scheme regarding correction of errors to prevent failure of justice or abuse of process of Court – The Code provides exhaustive machinery to correct errors, failure of justice or to prevent abuse of process of Court – Law explained. Popular Muthiah v. State represented by Inspector of Police
Judgment dated 04.07.2006 by the Supreme Court in Criminal Appeal No. 107 of 2003, reported in (2006) 7 SCC 296

Held :

The Code of Criminal Procedure is an exhaustive Code providing a complete machinery to investigate and try cases, appeals against the judgments. It has provisions at each stage to correct errors, failures of justice and abuse of process under the supervision and superintendence of the High Court as would be evident from the following:

> (i) The Court has the power to direct investigation in cognizable cases under Section 156 (3) read with Section 190 of the Code of Criminal Procedure.
>
> (ii) A Magistrate can postpone the issue of proces and inquire into the case himself under Section 202(1) of the Code of Criminal Procedure.
>
> (iii) When a charge-sheet is filed, the court can refuse to accept the same and proceed to take cognizance of the offence on the basis of the materials on record. The court can direct further investigation into the matter.

(iv) The Magistrate may treat a protest petition as a complaint and proceed to deal therewith in terms of Chapter XV of the Code of Criminal Procedure.

(v) Once the case is committed, the Sessions Judge may refer the matter to the High Court.

(vi) In the event, without taking any further evidence, it is found that while passing the order of commitment, the Magistrate has committed an error in not referring the case of an accused or left out an accused after evidence is adduced, the court may proceed against a person who was not an accused provided it appears from the evidence that he should be tried with the accused.

(vii) The Revisional Court during pendency of the trial may exercise its revisional jurisdiction under Section 397 in which case, it may direct further inquiry in terms of Section 398 of the Code of Criminal Procedure.

(viii) The revisional powers of the High Court and the Sessions Court are pointed out in the Code separately from a perusal whereof it would appear that the High Court exercises larger power.

(ix) In the event of any conviction by a Court of Session, an appeal thereagainst would lie to the High Court. The appellate court exercises the power laid down under Section 386 of the Code of Criminal Procedure in which event it may also take further evidence or direct it to be taken in terms of Section 391 thereof.

(x) The High Court has inherent power under Section 482 of the Code of Criminal Procedure to correct errors of the courts below and pass such orders as may be necessary to do justice to the parties and/or to prevent the abuse of process of court.

The Code of Criminal Procedure, thus, provides for a corrective mechanism at each stage viz. (i) investigation; (ii) trial; (iii) appeal; and (iv) revision.

The Code of Criminal Procedure, 1973 in contrast to the old Code provides for cognizance of an offence and committal of a case as contradistinguished from cognizance of an offender or committal of an accused to the Court of Session.

In *Ranjit Singh v. State of Punjab, (1998) 7 SCC 149* this Court held : (SCC p. 156, para 23)

> "23. Though such situations may arise only in extremely rare cases, the Sessions Court is not altogether powerless to deal with such situations to prevent a miscarriage of justce. It is then open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left-out accused. But we hasten to add that

the said procedure need be resorted to only for rectifying or correcting such grave mistakes."

(See also *Municipal Corpn. of Delhi v. Ram Kishan Rohtagi (1983) 1 SCC 1*

Such a power evidently can be exercised even after the trial is over.

In *Kishori Singh v. State of Bihar, (2004) 13 SCC 11* referring to *Raj Kishore Prasad v. State of Bihar, (1996) 4 SCC 495* and *Ranjit Singh* (supra) this Court held: (SCC p. 13, paras 9-10)

> "9. After going through the provisions of the Code of Criminal Procedure and the aforesaid two judgments and on examining the order dated 10.6.1997 passed by the Magistrate, we have no hestitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in the FIR as acccused persons, but not charge-sheeted in the charge-sheet that was filed by the police under Section 173 CrPC.
>
> 10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as 'accused persons' only when a reference is made either by the Magistrate whie passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

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The correctness or otherwise of the decision of this Court in *Ranjit Singh* (supra) was doubted and the matter was referred to a larger Bench in *Dharam Pal v. State of Haryana, (2004) 13 SCC 9* wherein one of us (Naolekar, J.) was a member, stating: (*Dharam Pal case* (supra) SCC pp. 10-11, para 2)

> "According to the decision in *Kishun Singh v. State of Bihar, (1993) 2 SCC 16* the Sessions Court has such a powe under Section 193 of the Code. As per *Ranjit Singh case* (Supra) from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code and there is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused. The effect of this conclusion is that the accused named in column 2 and not put up for trial cannot be tried while exercising power under Section 193 read with Section 228 of the Code. This means that even when the Sessions Court applies its mind at the time of framing of charge and comes to the conclusion from the

material available on record that, in fact, offence is made out against even those who are shown in column 2, it has no power to proceed against them and has to wait till the stage under Section 319 of the Code reaches, namely, commencement of the prosecution evidence. The effect is that in less serious offences triable by a Magistrate, he would have the power to proceed against those who are mentioned in column 2, if on the basis of material on record he disagress with the police conclusion, but, as far as serious offences triable by the Court of Session are concerned, that court will have to wait till the stage of Section 319 of the Code is reached. It, however, appears that in a case triable by the Court of Session, in law, a Magistrate would have no power to summon for trial an accused mentioned in column 2 to be tried with other accused and, to that extent, the impugned order of the High Court may have to be set aside but immediately the question involved herein would arise when the matter would be placed before the Sessions Court."

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269. ARBITRATION AND CONCILATION ACT, 1996 – Section 8
Ambit and scope of Section 8 – Expression "first statement on substance of the dispute" as used in Section 8 (1) of the Act, meaning and connotation of.
Rashtriya Ispat Nigam Ltd. and another v. Verma Transport Co. Judgment dated 18.08.2006 by the Supreme Court in Civil Appeal No. 3420 of 2006, reported in (2006) 7 SCC 275

Held:

Section 8 confers a power on the judicial authority. He must refer the dispute which is the subject-matter of an arbitration agreement if an action is pending before him, subject to the fulfilment of the conditions precedent. The said power, however, shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute.

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Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. (See O.P. Malhotra's *The Law and Practice of Arbitration and Conciliaiton,* 2nd Edn., pp. 346-47.)

Scope of the said provision fell for consideration before a Division Bench of this Court in *P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539* wherein this Court held: (SCC pp. 542-43, para 8)

"8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is premptory. It is, therefore, obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recouse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act."

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The expression "first statement on the substance of the dispute" contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable....

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270. COURT FEES ACT, 1870 – Section 7 (x)

Specific performance of contract – Suit for specific performance of part of the property involved in contract – Whether court fee payable on full consideration? Held, No. – Law explained.

Darshan Singh and another v. Gurubachan Singh and others

Judgment dated 05.07.2006 passed by the High Court of Madhya Pradesh (Jabalpur Main Seat) in Writ Petition No. 4770 of 2005

Held:

It was pleaded that the property belonged to joint family and all the co-

owners of the property executed an agreement in their favour and thereafter 70% of the shares were transferred by the joint owners of the property by executing a sale-deed in their favour. 30% of the share was not transferred by the respondent No.3 who was also a joint owner of the property. it is setforth that respondents Nos.1 and 2 had not stated that there were two agreements one providing 70% shares of the property and the other 30% of the property. It is putforth that there was a singular agreement which was executed for aforementioned consideration. As 70% shares were transferred by the joint owners through sale-deeds the suit was valued for 30% share and not for the entire consideration mentioned in the agreement.

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It is urged in the writ petition that when a suit for specific performance of contract is filed by a party the whole agreement is sought to be enforced and hence, the suit has to be valued on the amount of consideration. Emphasis has been laid on the factum that Section 7(iv)(x) clearly provides that the suit for specific performance of contract is valued according to the amount of consideration and not otherwise. It is contended that even though the part of the property has been alienated through sale-deed, yet agreement as a whole is sought to be enforced and, therefore, the court fee is to be paid on the entire consideration. It is contended that 30% as putforth by the plaintiff, is Rs. 2,52,000 - and the whole amount is Rs. 8,40,000/- but the Court fee is not paid on the entire agreed amount on the ground that 70% share has been sold by co-owners and hence, the learned trial Judge should have been well advised to reject the plaint.

The singular question that arises for consideration is whether under the given circumstance what should be the valuation of the suit. To appreciate the rival submissions raised at the Bar it is appropriate to reproduce Section 7(x) of the Court Fees Act which reads as under :-

> **"7(x) for specific performance. -** in suits for specific performance -
>
> (a) of a contract of sale-according to the amount of the consideration;
>
> (b) of a contract of mortgage- according to the amount agreed to be secured;
>
> (c) of a contract of lease - according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term;
>
> (d) of an award-according to the amount or value of the property in dispute:"

In this regard I may refer with profit to a Single Judge decision rendered in the case of *Smt. Saroj Gupta and others vs. IVth Additional District Judge, Etah and others. AIR 1994 Allahabad 22.* The learned Single Judge referred to the relevant provisions and the law laid down in the case of *S.P. Gupta vs. Abdulrahman, AIR 1958 Allahabad 851* and *Gudia Dullabho Sahu v. Cinni Adinarayana and others, AIR 1937 Madras (3).* In the said case the plaintiff had entered into an agreement for

sale of a shop for a sum of Rs. 30,000/-. The defendants executed a sale-deed regarding half port of the said shop in favour of the wife of the plaintiff for a consideration of Rs. 24,500/-. The defendants did not execute the sale-deed with regard to the remaining half portion of the suit. In the suit he claimed the relief for specific performance of contract of sale regarding half portion of the shop which was not sold by the respondents. In the written statement the defendants raised a plea of deficiency of court fee. The learned trial Judge came to hold that the plaintiff rightly valued the suit and the court fee had been paid according to the relief claimed. The learned Single Judge posed the question what should be the value of the suit for the purpose of court fee. The court took cognizance of the fact that the suit was filed for specific performance of contract of sale. The learned trial Judge referred to the decision rendered in the case of *S.P. Gupta* (supra) and came to hold that in the said case the words "amount of consideration" was interpreted as the amount which has been indicated as consideration in a contract of sale. The same was distinguished on the ground that the plaintiff did not claim relief in respect of the entire property which is the subject-matter of contract of sale and has confined to a portion of the property and accordingly had valued the suit on the basis of the valuation of such property. The learned Judge expressed the opinion that there is no bar for plaintiff for confining his relief to a part of the property which is subject matter of specific performance and value of such property. It is worth noting that the Court in paragraph 11 expressed the view as under :-

> "11. The words "the amount of the consideration" used in clause (x) of Section 7 of the Court-fees Act contemplates the consideration of the property which is subject matter of sale under the agreement. The consideration is correlated with the property. The contract relates to property and the amount of the consideration relates for such property."

After so stating the Court adverted to the decision rendered in the case of *Gudia Dullabho Sahu (supra)* and in paragraphs 14 and 15 held as under :-

> "14. The question as to what should be the consideration regarding the valuation of the property for which relief was claimed in the suit was not taken into consideration. The amount of consideration as disclosed in the agreement relating to the property has to be taken into consideration for the purpose of valuation of suit and payment of court-fee.
>
> 15. In the present case the plaintiff has claimed the relief that the suit may be decreed with regard to half portion of the property which is subject matter of the agreement. According to him half portion of the property has been sold in the name of his wife under the mutual agreement with the defendant and remaining half portion is to be sold. He valued half portion of property at Rs. 5,550/-. He stated that southern half portion was already sold for Rs. 24,500/- and the remaining half portion was to be sold for Rs. 5,500/-. He, however, did not disclose any basis for valuing half portion of the property. The fact that another half portion was sold for Rs. 24,500/- does not

reduce the value of half of portion of the shop in question. The plaintiff may establish in the suit as to how much amount he is liable to pay for reming half portion of the shop but for the purpose of the valuation of the suit and payment of court-fee the valuation of half portion of the shop in question is to be taken at Rs. 15,000/-."

It is worth while to note that the learned Single Judge has taken note of the terms "amount of consideration" used in Clause (x) of Section 7 which contemplates that the consideration of the property which is the subject-matter of sale under the agreement. The real question has to be what should be the consideration regarding the valuation of the property for which the relief is claimed and whether there is any attempt to evade the court fee. In the case of *S.P. Gupta* (supra) the controversy centred around the issue whether the court fee has to be paid in full consideration mentioned in the agreement or the consideration which has remained payable. It was held that court fee on the consideration mentioned in the agreement irrespective of the fact that part of it was assailed. Thus, in my considered opinion the view of learned Judges in the case of *S.P. Gupta* (supra) is rational, logical and sub-serve the purpose of legislature and I am in respectful agreement with the said view. Hence, I am inclined to think that the plaintiff is required to pay the court fee in respect of that contract which sought to be specifically performed.

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271. MOTOR VEHICLES ACT, 1988 – Sections 142 and 149

Liability of insurance company – Whether Insurance Company liable in respect of accidents occurring after amendment of 1994 where tractor insured for agricultural purpose was being used for different purpose? Held, Insurance Company liable to pay compensation to the injured and may recover the same from the owner (insurer) – Law explained.

Jugal Kishore and another v. Ramlesh Devi and others

Judgment dated 29.06.2003 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Misc. Appeal No. 44 of 1999 (F.B.)

Held:

Both these appeals are referred to the Larger Bench by the Division Bench to determine the question :

> Whether insurance company can be held liable in the case of death / bodily injuries caused in a motor accident involving a tractor which was insured only for agricultural purpose and the sitting capacity was also shown to be one only but used for different purpose at the time of the accident ?

Opposite view has been taken by two Division Benches which resulted into the reference before this Bench. In the case of *Baburam vs. Om Prakash and others [2000 ACJ 393]*, it is held that in such circumstances, insurance company cannot be held liable to pay the compensation jointly and severally with the

insurer. Similar view was taken by this Court in the case of *Sukhhandan vs. Oriental Insurance Co. & others [1999 (1) TAC 24]* and in the case of *Ramji Lal and others vs. Omkar Lal and others, M.A. No. 86/92 decided on 7.1.2003.* However, contrary view has been taken by another Division Bench of this Court in the case of *Pushpa Devi vs. Kamalsingh [2002 (2) TAC 374].* In this case, it is held that even if the tractor is used for the purpose other than agricultural or forestry, insurance company is liable to pay entire compensation which may however be recovered by the insurance company from the owner (insurer). In the light of the aforesaid contrary view of the Division Benches, the matter is referred to Larger Bench.

We have heard counsel for the parties. Admittedly claim petitions are arising out of three categories of cases. For category No (i) where date of accident is under the Motor Vehicles Act, 1939 it shall be governed by Section 95 of the Act as held in the case of *New India Assurance Co. vs. Satpal Singh (2000) 1 SCC 237]* and the insurance company is liable to indemnify the insurer and recover the amount from the owner. Question of third party risk and the liability of the insurance company is considered by the Apex Court in the case of *New India Assurance Co. Ltd. vs. Kamla [2001 ACJ 843].* Apex Court has held in para 25 of the Judgment as under :

> "The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, in any breach of policy conditions on account of the vehicle being driven without a valid driving licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due enquiries and believed bonafide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the insurance company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimants-third parties) from the insured person."

Though this case relates to the accident where the driver of the vehicle did not possess valid licence, yet the Apex Court while considering the amendment in Section 149 (2) and import of the language has held that at the instance of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the

community who become sufferers on account of accidents arising from use of motor vehicles. This statutory protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'etre* for the legislature making it prohibitory for motor vehicles being used in public places without covering third party risks by a policy of insurance.

Thus, even if there is violation of condition of policy and the vehicle is driven by a person not having a valid lience, in that event, the Apex Court while considering the amendment in the year 1994 held that the insurance company will be liable to indemnify the victim in the event of accident. While considering the amendment in the Motor vehicles Act, 1988, it is laid down in the case of *New India Assurance Co. Ltd. vs. Kamla* (supra) 'that if the vehicle is used for the purpose other than for which it is insured other than the conditions mentioned in Section 149 (2) of the Motor Vehicles Act,' the insurance company is liable to indemnify the victim and will be entitled to recover the amount from the insured pointing out the breach of the conditions of policy. In other words, insurance company will be absolved of its liability if the vehicle is being driven in breach of the conditions under Section 149 (2) of the Motor Vehicles Act, 1988.

Reference is answered and it is held that the judgment in the case of *Pushpadevi* (supra) lays down the correct law in respect of the accidents which have occurred after 1994 amendment in the Motor Vehicles Act.

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272. CRIMINAL TRIAL

Sentencing – Principle of proportionality – Object of Law being protection of society sentence must be proportionate to the gravity of crime.

State of M.P. v. Santosh Kumar

Judgment dated 14.07.2006 by the Supreme Court in Criminal Appeal No. 762 of 2006, reported in (2006) 6 SCC 1

Held:

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that, "state of criminal law continues to be – as it should be a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or

the deterrence based on factual matrix. By deft modulation the sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instances, a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In *Mahesh v. State of M.P., (1987) 3 SCC 80* this Court while refusing to reduce the death sentence observed thus: (SCC p. 82, para 6)

> "[I]t will be a mockery of justice to permit [the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for (the accused) would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of T.N., (1991) 3 SCC 471.*

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273. NATURAL JUSTICE

Doctrine "No man can be a Judge in his own case" – Scope and applicability of.

Crawford Bayley & Co. and others v. Union of India and others Judgment dated 05.07.2006 by the Supreme Court in Civil Appeal No. 171 of 2004, reported in (2006) 6 SCC 25

Held:

... However, this Court in *Delhi Financial Corpn. v. Rajiv Anand, (2004) 11 SCC 625* held that the doctrine "No man can be a judge in his own Cause" can be applied only to cases where the person concerned has a personal interest or has himself already done some act or taken a decision in the matter concerned. Merely because an officer of a corporation is named to be the authority, does not by itself bring into operation the doctrine, "no man can be a judge in his own cause". For that doctrine to come into play it must be shown that the officer concerned has a personal bias or connection or a personal interest or has personally acted in the matter concerned and/or has already taken a decision one way or the other which he may be interested in supporting.

In view of the aforesaid observation made by this Court that "no man can be a judge in his own cause" certain parameters have to be observed i.e. a

personal bias of the person concerned or personal interest or (sic) person acted in the matter concerned and has already taken a decision which he may be interested in supporting the same. These parameters have to be observed before coming to the conclusion that "no man can be a judge in his own cause". This is a matter of factual inquiry....

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274. CONSTITUTION OF INDIA – Article 226

Writ jurisdiction, exercise of – Jurisdiction ought not to be exercised so as to reach conclusions beyond pleadings – Law explained.

Union of India v. R. Bhusal

Judgment dated 12.07.2006 by the Supreme Court in Civil Appeal No. 1622 of 2004, reported in (2006) 6 SCC 36

Held:

We find that the High Court's consideration of the writ petition filed by the respondent and conclusions arrived at were beyond the pleadings. The High Court acted on certain materials and purported concession without examining whether that concession was well founded and whether the appellant got an opportunity to clarify the position as regards the applicability of the regulations which according to the High Court had application. The basic challenge in the writ petition was that the medical deficiency found by the appellant was not property assessed. In the counter-affidavit, the specific stand of the appellant Union of India was that the medical deficiency was only one of the factors while assessing suitability for permanent commission. The Union of India's specific stand was that the performance criteria fixed under the applicable policy regulations were not fulfilled by the respondent. In the rejoinder-affidavit filed, there was no specific challenge as to the applicability of either criteria or policy regulations.

Therefore we find no substance in the plea of learned counsel for the respondent that though the High Court apparently travelled beyond the pleadings, its conclusions are justified in law.

In the fitness of things, the High Court should rehear the matter. We make it clear that we have not expressed any opinion on the acceptability of the plea raised by the respondent in the writ petition. If the High Court so feels, it may permit the parties to place further materials in respect of their respective stand...

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275. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 139

(i) Presumption available u/s 139, nature of – Standard of proof required to rebut the presumption – Law explained.

(ii) Cheque issued for security –Whether such cheque can be treated as a cheque issued in discharge of debt? Held, No.

M.S. Narayana Menon alias Mani v. State of Kerala and another

Judgment dated 04.07.2006 by the Supreme Court in Criminal Appeal No. 1012 of 1999, reported in (2006) 6 SCC 39

Held:

(i) In *Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16* a three-Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a three-Judge Bench, however, opined: (SCC pp. 24-25, paras 22-23)

> "22. ... Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.
>
> 23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,
>
> > 'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

The court, however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on record by the complainant himself. Evidently in law he is entitled to do so.

In *Goaplast (P) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232* upon which reliance was placed by the learned counsel, this Court held that the presumption arising under Section 139 of the Act can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. The question which arose for consideration therein was as to whether closure of accounts or stoppage of payment is sufficient defence to escape from the penal liability under Section 138 of the Act. The answer to the question was rendered in the negative. Such a question does not arise in the instant case.

In *Kundan Lal Rallaram v. Custodian, Evacuee Property, AIR 1961 SC 1316* Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been

discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced, it might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating: (AIR p. 1319, para 5)

> "Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not, only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

(ii) We, in the facts and circumstances of this case, need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of the debt was not owing and due to the complaint by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of section 138 of the Act.

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276. WORDS AND PHRASES

Expression "touching the business of the society", meaning and expanse of.

Morinda Coop. Sugar Mills Ltd. v. Morinda Coop. Sugar Mills Workers' Union

Judgment dated 12.07.2006 by the Supreme Court in Civil Appeal No. 4488 of 2004, reported in (2006) 6 SCC 80

Held:

In *Deccan Merchants Coop. Bank Ltd. v. Dalichand Jugraj Jain, (1969) 1 SCR 887* it was held as follows: (SCR p. 896 A-C)

> "Five kinds of disputes are mentioned in sub-section (1): first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly disputes touching the business of a society. It is clear that the word 'business' in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word

'business' has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws."

In *Coop. Central Bank Ltd. v. Addl. Industrial Tribunal, (1969) 2 SCC 43* it was held that alteration of the conditions of the service of the workman would not be covered by the expression "touching the business of the society". It was held inter alia as follows: (SCC p. 51, para 7)

"7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under Section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. it is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society; but the meaning given to the expression 'touching the business of the society', in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. *Since the word 'business' is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society."*

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277. EVIDENCE ACT, 1872 – Section 110

Burden of proof – The issue of burden of proof becomes immaterial when entire evidence is before the Court – Law explained.

Standard Chartered Bank v. Andhra Bank Financial Services Ltd. and others

Judgment dated 05.05.2006 by the Supreme Court in Civil Appeal no. 225 of 2006, reported in (2006) 6 SCC 94

Held:

Rebutting these arguments, Mr Jethmalani contends that Section 110 is

contained in Chapter VII of the Evidence Act, 1872, which deals with the burden of proof. As a matter of fact, Section 110 merely enunciates the burden of proof as to ownership. He rightly submits that any rule of burden of proof is irrelevant when the parties have actually led evidence and that evidence has to be considered. Reliance is placed by him on *Sita Ram Bhau Patil v. Ramchandra Nago Patil, (1977) 2 SCC 49* for the proposition that when the entire evidence is before the court, the burden of proof becomes immaterial. Even assuming that the rule of burden of proof in Section 110 is relevant, Mr Jethmalani contended that Section 110 would be applicable only to a "thing", which is capable of being possessed. He rightly submits that a chose-in-action is not a "thing", as by definition, it is not in the possession of someone, but that possession has to be acquired by some action which is why it is called a chose-in-action. He rightly distinguished the judgment of this Court in *Chuharmal v. CIT, (1988) 3 SCC 588* as wholly inapplicable to a stitutation of a chose-in-action. In the said judgment, the possession was with respect to certain wrist watches, which were obviously not choses-in-action. According to him, Section 137 of the TP Act makes Section 132 inapplicable to debentures but the principles of common law and equity must surely govern even such transactions of transfer of debentures.

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278. SERVICE LAW

Promotion – Rule of "seniority-cum-merit and merit-cum-seniority" – Distinction between.

Hargovind Yadav v. Rewa Sidhi Gramin Bank and others

Judgment dated 09.05.2006 by the Supreme Court in Civil Appeal No. 1153 of 2003, reported in (2006) 6 SCC 145

Held:

This Court also noted that while the principle "seniority-cum-merit" lays grater emphasis on seniority, "merit-cum-seniority" laid greater emphasis on merit and ability and seniority plays a less significant role, becoming relevant only when merit is approximately equal. After referring to several decisions bearing on the issue, this Court enunciated the following general principle in regard to promotions by seniority-cum-merit *(B.V. Sivaiah v. K. Addan Ki Babu, (1998) 6 SCC 720 at SCC P-730, Para 18)* which is relied on by the appellant:

> "18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis

of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

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279. CRIMINAL PROCEDURE CODE, 1973 – Section 360/361
PROBATION OF OFFENDERS ACT, 1958 – Sections 3 and 4
Applicability of Rules of Law of Probation – S. 360/361 Cr.P.C. not applicable where Probation Act has been made applicable – Distinction between scope of S. 360 Cr.P.C. and Ss. 3 and 4 Probation Act.
Daljit Singh and others v. State of Punjab through Secretary Home Affairs
Judgment dated 27.07. 2006 by the Supreme Court in Criminal Appeal No. 797 of 2006, reported in (2006) 6 SCC 159

Held:

Where the provisions of the Probation Act are applicable, the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, that gave birth to the Probation Act and the Code, wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code to apply one of the other beneficial provisions; be it Section 360 of the Code or the provisions of the Probation Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the Probation Act is further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said section shall affect the provisions of the Probation Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any women convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for the probation officers in assisting the courts in relation to supervision and other matters while the Probation Act does make such a provision. While Section 12 of the Probation Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the Probation Act shall not suffer disqualification, if any, attached to conviction for an offence under any law, the Code does not contain parallel provision. Two statues with such significant differences could not be intended to coexist at the same time in the same area. Such coexistence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the

provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable.

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280. PUBLIC INTEREST LITIGATION

Public Interest Litigation – Desirability to filter out frivolous petition in the name of PIL – Duty of the Court – Law explained.
Kushum Lata v. Union of India and others
Judgment dated 12.07.2006 by the Supreme Court in Civil Appeal No. 6525 of 2004, reported in (2006) 6 SCC 180

Held:

The court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. The court has to strike a balance between two conflicting interests: (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono publico though they have no interest of the public or even of their own to protect.

The courts must do justice by promotion of good faith and prevent law from crafty invasions. The courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See – *State of Mahasrashtra v. Prabhu, (1994) 2 SCC 481* and *A.P. State Financial Corpn. v. GAR Re-Rolling Mills, (1994) 2 SCC 647*). No litigant has a right to unlimited draught on the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. [See – *Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530*]. Today people rush to the courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in the courts and among the public.

As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that the courts are flooded with a large number of so-called public interest litigations where only a minuscule percentage can legitimately be called as public

interest litigation. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, the courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilised for disposal of genuine cases. Though in *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra, (1998) 7 SCC 273* this Court held, that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters by competitors continue unabated in the courts and strangely are entertained. The least the High Court could do is to throw them out on the basis of the said decision. The other interesting aspect is that in PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copies, the real brain or force behind such cases would get exposed to find out the truth and motive behind the petition. Whenever such frivolous pleas, as noted, are taken to explain possession, the court should do well not only to dismiss the petitions but also to impose exemplary costs. It is also noticed that the petitions are based on newspaper reports without any attempt to verify their authenticity. As observed by this Court in several cases, newspaper reports do not constitute evidence. A petition based on unconfirmed news reports, without verifying their authenticity should not normally be entertained. As noted above, such petitions do not provide any basis for verifying the correctness of statements made and information given in the petition. It would be desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts.

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281. SERVICE LAW :

Dismissal of delinquent employee from service for misappropriation of Public fund – Amount of money misappropriated not much important – Employer losing confidence in employee because of misappropriation – Dismissal justified.

Divisional Controller, N.E.K.R.T.C. v. H. Amaresh

Judgment dated 17.07.2006 by the Supreme Court in Civil Appeal No. 7993 of 2004, reported in (2006) 6 SCC 187

Held:

In the instant case, the misappropriation of the funds by the delinquent employee was only Rs. 360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the factors to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the

amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment. The judgment in *Karnataka SRTC v. B.S. Hullikatti, (2001) 2 SCC 574* was also relied on in this judgment among others. Examination of the passengers of the vehicle from whom the said sum was collected was also not essential. In our view, possession of the said excess sum of money on the part of the respondent, a fact proved, is itself a misconduct and hence the Labour Court and the learned Judges of the High Court misdirected themselves in insisting on the evidence of the passengers which is wholly not essential. This apart, the respondent did not have any explanation for having carried the said excess amount. This omission was sufficient to hold him guilty. This act was so grossly negligent that the respondent was not fit to be retained as a conductor because such action or inaction of his was bound to result in financial loss to the appellant irrespective of the quantum.

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282. CONSTITUTION OF INDIA – Article 226 (2)

Writ jurisdiction –Territorial limits of writ jurisdiction – Law explained.

Om Prakash Shrivastava v. Union of India and another

Judgment dated 24.07.2006 by the Supreme Court in Criminal Appeal No. 786 of 2006, reported in (2006) 6 SCC 207

Held :

Clause (2) of Article 226 of the Constitution is of great importance. It reads as follows :

> **"226 (2).** The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also by exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

The question whether or not cause of action wholly or in part for filling a writ petition has arisen within the territorial limits of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

Two clauses of Article 226 of the Constitution on plain reading give clear indication that the High Court can exercise power to issue direction, order or writs for enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action wholly or in part had arisen within the territories in relation to which it exercises jurisdiction notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. (See – *ONGC v. Utpal Kumar Basu, (1994) 4 SCC 711*)

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283. ARBITRATION AND CONCILIATION ACT, 1996 – Section 43
LIMITATION ACT, 1963 – Section 14
Whether S.14 Limitation Act applicable in respect of proceedings u/s 34 of the Act of 1996 ? Held, Yes – Law explained.
State of Goa v. Western Builders
Judgment dated 05.07.2006 by the Supreme Court in Civil Appeal No. 1457 of 2004, reported in (2006) 6 SCC 239

Held :

The question is whether Section 14 of the Limitation Act has been excluded by this special enactment i.e. the Arbitration and Conciliation Act, 1996. Section 43 of the Arbitration and Conciliation Act, 1996 clearly says that the Limitation Act, 1963 shall apply to arbitration as it applies to the proceedings in the court.

Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the Limitation Act, 1963 applies to the Act of 1996 but by virtue of sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay i.e. 30 days in the proviso.

But there is no provision made in the Arbitration and Conciliation Act, 1996 that if any party has bona fidely prosecuted its remedy before the other forum which had no jurisdiction then in that case whether the period spent in prosecuting the remedy bona fidely in that court can be excluded or not. As per the provision, sub-section (3) of Section 34 which prescribes the period of limitation (3 months) for moving the application for setting aside the award before the court then that period of limitation will be applicable and not the period of limitation prescribed in the Schedule under Section 3 of the Limitation Act, 1963. Thus, the provision of moving the application prescribed in the Limitation Act, shall stand excluded by virtue of sub-section (2) of Section 29 as under this special enactment the period of limitation has already been prescribed. Likewise the period of condonation of delay i.e. 30 days by virtue of the proviso.

Therfore, by virtue of Sub-Section (2) of Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and u/s 3 read with the Schedule which prescribes the period for moving application.

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By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (*sic* not) be read in the Act of 1996, which will advance the cause of justice.

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.... As a result of the above discussion we are of the opinion that the view taken by the court below excluding the applicability of Section 14 in this proceeding is not correct. We hold that Section 14 of the Limitation Act, 1963 is applicable in (*sic* to) the Arbitration and Conciliation Act, 1996...

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284. MOTOR VEHICLES ACT, 1988 – Section 168
Compensation, determination of – Appropriate multiplier – Rational behind choosing appropriate multiplier – Law explained.
U.P. State Road Transport Corpn. v. Krishna Bala and others
Judgment dated 13.07.2006 by the Supreme Court in Civil Appeal No. 4267 of 2002, reported in (2006) 6 SCC 249

Held :

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* (supra) after reference to the Second Schedule to the Act, it was noticed that the same suffiers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to be an 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. (See – *New India Assurance Co. Ltd. v. Charlie, (2005) 10 SCC 720*)

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285. PRACTICE AND PROCEDURE :

Whether larger Bench can consider and adjudicate upon question not referred to it? Held, No.

Kerala State Science & Technology Museum v. Rambal Co. and others Judgment dated 02.08.2006 by the Supreme Court in Civil Appeal No. 4854 of 2000, reported in (2006) 6 SCC 258

Held :

It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to. (See *Kesho Nath Khurana v. Union of India, 1981 supp SCC 38, Samaresh Chandra Bose v. District Magistrate, Burdwan, (1972) 2 SCC 476* and *K.C.P. Ltd. v. State Trading Corpn. of India, 1995 supp (3) SCC 466.*)

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286. INDIAN PENAL CODE, 1860 – Sections 375 and 376 (2) (g)

Whether a woman can be prosecuted for gang rape u/s 376 (2) (g)? Held, No – Law explained.

Priya Patel v. State of M.P. and another

Judgment dated 12.07.2006 by the Supreme Court in Criminal Appeal No. 754 of 2006, reported in (2006) 6 SCC 263

Held :

A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more, severe punishment. One of them relates to "gang rape". The language of sub-section (2) (g) provides that whoever commits "gang rape" shall be punished, etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by serveral persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in

character, but must be actuated by the same common intention, which is different from the same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC is that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376 (2) relates to the intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376 (2) (g).

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287. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal – Formulation of substantial question of law is *sine qua non* for admissibility of second appeal – Law explained.

Gian Dass v. Gram Panchayat, Village Sunner Kalan and others

Judgment dated 21.07.2006 by the Supreme Court in Civil Appeal No. 3086 of 2006, reported in (2006) 6 SCC 271

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-finding 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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288. CRIMINAL PROCEDURE CODE, 1973–Section 167 (2)
INDIAN PENAL CODE, 1860 – Section 304-B
Period of detention in custody u/s 167 (2) Cr.P.C. for offence u/s 304-B IPC – Whether 90 days or 60 days? Held, accused can be detained upto 90 days – Contra view expressed by some High Courts over-ruled – Law explained.
Bhupinder Singh and others v. Jarnail Singh and another
Judgment dated 13.07.2006 by the Supreme Court in Criminal Appeal No. 757 of 2006, reported in (2006) 6 SCC 277

Held :

A bare reading of Section 304-B IPC shows that whoever commits "dowry death" in terms of Section 304-B IPC shall be punished with imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life. In other words, the minimum sentence is 7 years but in a given case sentence of imprisonment for life can be awarded. Put differently, sentence of imprisonment for life can be awarded in respect of an offence punishable under Section 304-B IPC. The proviso to sub-section (2) of Section 167 consists of three parts. The first part relates to power of the Magistrate to authorise detention of the accused person. This part consists of two sub-parts. In positive terms it prescribes that no Magistrate shall authorise detention of the accused in custody, under this paragraph [meaning sub-section (2) (a)] for a total period exceeding (i) 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and (ii) 60 days where the investigation relates to any other offences. The period of 90 days is applicable to cases where the investigation relates to the three categories of offences which are punishable with (i) death, (ii) imprisonment for life, or (iii) imprisonment for a term of not less than ten years. The question is whether Section 304-B is an offence "punishable" with imprisonment for life. Strong reliance was placed by Mr. D.K. Garg, learned counsel appearing for the appellant on *Rajeev Chaudhary v. State (NCT) of Delhi, (2001) 5 SCC 34.* A reference is also made to decisions of the Jharkhand, the Delhi and the Karnataka High Courts where the ratio in *Rajeev Chaudhary case* (supra) has been made applicable to cases involving offence punishable under Section 304-B IPC. The Jharkhand High Court's decision is *Sunil Kumar*

v. State of Jharkhand, (2003) 2 Rec Cri R 135 (2002) Cri LJ 2507 (Jhar). Contrary views appear to have been taken by the Rajasthan and the Himachal Pradesh High Courts in *Keshav Dev v. State of Rajasthan, 2005 Cri LJ 3306 (Raj)* and *State of H.P. v. Lal Singh, 2003 Cri LJ 1668 (HP).* The Punjab and Haryana High Court appears to have taken a somewhat different view in two different cases. In *Kuldeep Singh v. State of Punjab, (2005) 3 RCR 599 (P&H)* it was held that the period is 90 days, as has been held in the case at hand. But a different view (though in relation to some other offences) was taken in *Abdul Hamid (Crl. Misc. No. 40599 M of 2005* disposed of on 21-9-2005). A bare reading of Rajeev Chaudhary case (supra) shows that the same related to an offence punishable under Section 386 IPC and the sentence in respect of the said offence is not less than 10 years. This Court held that the expression "not less than" means that the imprisonment should be 10 years or more to attract 90 days' period. In that context it was said that for the purpose of clause (i) proviso (a) of Section 167 (2) CrPC the imprisonment should be for a clear period of 10 years or more. The position is different in respect of the offence punishable under Section 304-B IPC. In the case of Section 304-B the range varies between 7 years and imprisonment for life. What should be the adequate punishment in a given case has to be decided by the court on the basis of the facts and circumstances involved in the particular case. The stage of imposing a sentence comes only after recording the order of conviction of the accused person. The significant word in the proviso is "punishable". The word "punishable" as used in statutes which declare that certain offences are punishable in a certain way means liable to be punished in the way designated. It is ordinarily defined as deserving of or capable of liable to punishment, capable of being punished by law or right, may be punished or liable to be punished, and not must be punished.

In *Bouvier's Law Dictionary* meaning of the word "punishable" has been given as "liable to punishment". In *Words and Phrases* (Permanent Edn.) the following meaning is given:

> "The word 'punishable' in a statute stating that a crime is punishable by a designated penalty or term of years in the State prison limits the penalty or term of years to the amount or term of years stated in the statute."

Corpus Juris Secundum gives the meaning as :

> "Deserving of, or liable to, punishment; capable of being punished by law or right; said of persons or offences. The meaning of the term is not 'must be punished', but 'may be punished', or 'liable to be punished'."

While dealing with a case relating to the Punjab Borstal Act, 1926, this Court held that a person convicted under Section 302 IPC and sentenced to life imprisonment is not entitled to the benefit of Section 5 of the said Act as the offence of murder is punishable with death. (See *Sube Singh v. State of Haryana, (1989) 1 SCC 235*).

Where minimum and maximum sentences are prescribed, both are imposable depending on the facts of the cases. It is for the court, after recording conviction, to impose appropriate sentence. It cannot, therefore, be accepted that only the minimum sentence is imposable and not the maximum sentence. Merely because minimum sentence is provided that does not mean that the sentence imposable is only the minimum sentence. The High Court's view in the impugned order that permissible period of filing of challan is 90 days is the correct view. Contrary view expressed by the Jharkhand, the Delhi and the Karnataka High Courts is not correct. The Himachal Pradesh, the Rajasthan and the Punjab and Haryana High Courts taking the view that 90 days is the period, have expressed the correct view....

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289. WORDS AND PHRASES

Expression "public policy" meaning and connotation of

Indian Financial Association of Seventh Day Adventists v. M.A. Unnerikutty and another

Judgment dated 20.07.2006 by the Supreme Court in Civil Appeal No. 4262 of 2001, reported in (2006) 6 SCC 351

Held :

The term "public policy" has an entirely different and more extensive meaning from the policy of the law. Winfield defined it as a principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and varies from generation to generation. Judges, as trusted interpreters of the law, have to interpret it. While doing so, precedents will also guide them to a substantial extent.

The following passage from *Maxwell, Interpretation of Statutes*, may also be quoted to advantage here:

> "Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Where there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether it is an Act which is intended as a matter of public policy ...."

The doctrine of public policy may be summarised thus: (Gherulal Parekh v. Mahadeodas Maiya, AIR 1959 SC 781)

> "Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one, 'unruly horse', etc.; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the

court may relieve them of their duty on a rule founded on what is called the public policy, ... but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for the courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public."

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290. SERVICE LAW :

Departmental proceedings and criminal prosecution based on identical facts – Whether departmental proceedings should be stayed till the completion of criminal proceedings – Law explained.
Uttaranchal Road Transport Corpn. and others v. Mansaram Nainwal Judgment dated 28.07.2006 by the Supreme Court in Civil Appeal No. 3179 of 2006, reported in (2006) 6 SCC 366

Held :

The ratio of *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., (1999) 3 SCC 679* can be culled out from para 22 of the judgment which reads as follows : (SCC p. 691)

"22. The conclusions which are deducible from various decisions of this Court referred to above are :

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings, cannot be unduly delayed.

(v) If the Criminal Case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

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291. ENVIRONMENTAL LAW:

Environmental degradation and its consequences – Stockholm Declaration, importance of – Being magna carta of environment it should be given due importance.

Karnataka Industrial Areas Development Board v. C. Kenchappa and others

Judgment dated 12.05.2006 by the Supreme Court in Civil Appeal No. 7405 of 2000, reported in (2006) 6 SCC 371

Held :

Experience of the recent past has brought to us the realisation of the deadly effects of development on the ecosystem. The entire world is facing a serious problem of environmental degradation due to indiscriminate development. Industrialisation, burning of fossil fuels and massive deforestation are leading to degradation of environment. Today the atmospheric level of carbon dioxide, the principal source of global warming, is 26% higher than pre-industrial concentration.

The earth's surface reached its record level of warming in 1990. In fact, six of the seven warmest years on record have occurred since 1980, according to the World Watch Institute's 1992 Report. The rise in global temperature has also been confirmed by the Inter-Governmental Panel on Climate Change set up by the United Nations in its final report published in August 1990. The global warming has led to unprecedented rise in the sea level. Apart from melting of the polar ice it has led to inundation of law-lying coastal regions. Global warming is expected to profoundly affect species and ecosystem. Melting of polar ice and glaciers, thermal expansion of seas would cause worldwide flooding and unprecedented rise in the sea level if gas emissions continue at the present rate. Enormous amount of gases and chemicals emitted by the industrial plants and automobiles have led to depletion of ozone layers which serve as a shield to protect life on the earth from the ultraviolet rays of the sun.

The dumping of hazardous and toxic wastes, solid and liquid, released by the industrial plants is also the result of environmental degradation in our country.

The problem of "acid rain" which is caused mainly by the emissions of sulphur dioxide and nitrogen oxides from power stations and industrial installations is a graphic example of it. The ill-effects of acid rain can be found

on vegetation, soil, marine resources, monuments as well as on humans. Air pollutants and acids generated by the industrial activities are now entering forests at an unprecedented scale.

Sir Edmund Hillary (Tenzing and Edmund Hillary, who scaled Mount Everest for the first time in world history) in his article "Learning About the Problems" published in *Ecology 2000– The Changing Face of Earth,* has mentioned as under :

> "Thirty years ago conservation had not really been heard of. On our 1953 Everest expedition we just threw our empty tins and any trash into a heap on the rubble-covered ice at base camp. We cut huge quantities of the beautiful juniper shrub for our fires; and on the South Col at 26,000 feet we left a scattered pile of empty oxygen bottles, torn tents and the remnants of food containers.
>
> The expeditions of today are not much better in this respect, with only a few expectations (*sic* exceptions) Mount Everest is littered with junk from the bottom to the top."

He also mentioned that, "one thing that has deeply concerned me has been the severe destruction that is taking place in the natural environment."

The 1972 Stockholm Conference on "Human Environment" secured its place in the history of our times with the adoption of the first global action plan for the environment. Yet, as increasingly grim statistics indicate, over the past decades our global environment and the living conditions for most of the inhabitants of the planet continue to deteriorate. This process has meant significant setback for both rich and poor.

The Declaration of the 1972 Stockholm Conference referred obliquely to man's environment, adding that "both aspects of man's environment, the natural and the man-made, are essential for his well-being and enjoyment of basic human rights".

In *Essar Oil Ltd. v. Halar Utkarsh Samiti, (2004) 2 SCC 392* this Court aptly observed Stockholm Declarations as "magna carta of our environment". First time at the international level importance of environment has been articulated.

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292. JUDICIARY :

Qualities of a Judicial Officer – A Judicial Officer, apart from having academic knowledge must have capacity to communciate, ability to diffuse situation and control examination of witness.

K.H. Siraj v. High Court of Kerala and others

Judgment dated 23.05.2006 by the Supreme Court in Civil Appeal No. 2539 of 2005, reported in (2006) 6 SCC 395

Held:

The qualities which a judicial officier would possess are delineated by this Court in *Delhi Bar Assn. v. Union of India, (2002) 10 SCC 159.* A judicial officer

must, apart from academic knowledge, have the capacity to communicate his thoughts, he must be tactful, he must be diplomatic, he must have a sense of humour, he must have the ability to defuse situations, to control the examination of witnesses and also lengthy irrelevant arguments and the like.

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293. NEGOTIABILE INSTRUMENTS ACT, 1881 – Section 138
Notice, service of – In a given situation endorsement on the postal envelop that 'premises found closed' or 'addressee not available' may amount to refusal of notice – Law explained.
D. Vinod Shivappa v. Nanda Belliappa
Judgment dated 25.05.2006 by the Supreme Court in Criminal Appeal No. 1255 of 2004, reported in (2006) 6 SCC 456

Held:

The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non-availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under clause (c) of provisio to Section 138 of the Act. In our view this question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice.

It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in *Heydon's case, (1584) 76 ER 637* also known as the rule of purposive construction or mischief rule.

Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was domonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days' time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great injustice and hardship to an honest drawer. One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make

necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.

If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non-availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere, etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for some time after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postment for about a month or two, or a person who can get a fake endorsement made regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endoresement that the addressess is not available on the given address.

We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the permises has been found locked or that the addressee was not available at the time when postman went for delivery of the latter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of

the notice. If the complaint is able to prove that the drawer of the cheque knew about the notice and deliveratly evaded service and got a false endorsement made only to defeat the process of law, the court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endoresement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namaly, the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice...

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294. CIVIL PROCEDURE CODE, 1908 – O. VI Rule 17

Amendment of pleadings – Amendment in plaint and written statement, distinction between basic principles applicable to – Amendment seeking to raise a time barred plea – Permissibility of – Expression "commencement of trial", meaning of – Law explained.

Baldev Singh and others v. Manohar Singh and another

Judgment dated 03.08.2006 by the Supreme Court in Civil Appeal No. 3362 of 2006, reported in (2006) 6 SCC 498

Held:

Before we take up this question for our decision, we must consider some of the principles that govern allowing an amendment of the pleadings.

It is well settled by various decisions of this Court as well as the High Courts in India that courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference can be made to a decision of the Privy Council in *Ma Shwe Mya v. Maung Mo Hnaung, (1920-21) 48 1A 214* in which the Privy Council observed: (IA pp. 216-17)

> "All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment *must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given* to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit."
>
> (emphasis supplied)

Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. From a bare perusal of this provision, it is

pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 CPC it cannot be doubted that wide power and unnfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been added to Order 6 Rule 17 which restricts the courts from permitting an amendment to be allowed in the pleadings of either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, the court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial...

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So far as the second ground for rejection of the amendment of the written statement is concerned, we do not like to delve in detail in view of the decision of this Court in *Ragu Thilak D. John v. S. Rayappan, (2001) 2 SCC 472.* In para 6, this Court observed: (SCC p. 474)

> "6. If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. *We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for."*

In view of this decision, it can be said that the plea of limitation can be allowed to be raised as an additional defence by the appellants. Accordingly, we do not find any reason as to why amendment of the written statement introducing an additional plea of limitation could not be allowed...

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... That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence

does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

This being the position, we are therefore of the view that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of plaint. In *Modi Spg. and Wvg. Mills Co. Ltd. v. Ladha Ram & Co., (1976) 4 SCC 320* this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in ths written statement.

... We may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet comenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.

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295. PRECEDENTS

Doctrine of prospective over-ruling of the judgment – Law expalined. Employees' State Insurance Corpn. and others v. Jardine Henderson Staff Association and others

Judgment dated 25.07.2006 by the Supreme Court in Civil Appeal No. 1726 of 2005, reported in (2006) 6 SCC 581

Held:

That it is well settled that declaration of law can be made prospective i.e. operative from the date of the judgment. This Court in several decisions has laid down the law and declared it to be operative only prospectively. The Constitution Bench of this Court in *Somaiya Organics (India) Ltd. v. State of U.P., (2001) 5 SCC 519* has discussed at length the principles of prospective overruling which are enunciated in the following paras: (SCCp. 532, paras 27-28)

> "27. In the ultimate analysis, propective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case – justice not in its logical but in its equitable sense. As far as this country – is concerned,

the power has been expressly conferred by Article 142 of the Constitution which allows this Court to 'pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'. In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do 'complete justice'.

Given this constitutional discretion, it was perhaps unnecessary to resort to any principle of prospective overruling, a view which was expressed in *Narayanibai v. State of Maharashtra, (1969) 3 SCC 468 at SCC p. 470* and in *Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201.* In the latter case, while dealing with the 'doctrine of prospective overruling', this Court said that it was a method evolved by the courts to adjust competing rights of parties so as to save transactions 'whether statutory or otherwise, that were effected by the earlier law'. According to this Court, it was a rule of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law.'

Ultimately, it is a question of this Court's discretion and is, for this reason, relatable directly to the words of the Court granting the relief."

In *Harsh Dhingra v. State of Haryana, (2001) 9 SCC 550* this Court held as follows: (SCC p. 556, para 7)

> "7. Prospective declaration of law is a device innovated by this Court to avoid reopeing of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of declaration are validated. This is done in larger public interest."

This proposition of prospective overruling has been followed in several other decisions as well.

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296. CIVIL PROCEDURE CODE, 1908 – O.VI R.17

Amendment of pleadings – Discretion of Court – Amendment not working injustice to other side and necessary for determining real controversy should be allowed – Law explained.

Kishorilal v. Balkishan & Anr.

Reported in 2006 (II) MPJR 223

Held:

Question is as to whether, by allowing the aforesaid amendment, learned court has acted in excess of jurisdiction whether amendment allowed amounts to withdrawal of the admission made in favour of the petitioner displacing his case completely and causing serious prejudice to the petitioner.

In the case of *Hansa Devi v. Bachchalal, 2002 (1) MPLJ 122* relied upon by Shri Bhardwaj, it has been held that only such amendment can be refused which have the effect of withdrawing admission and which would cause irretrievable prejudice to one of the parties. However, it has been held in the same case that while considering an application under Order 6 Rule 17 of CPC, wide discretion is available to the court to permit amendment if it is required for advancing cause of justice and is necessary for just and fair decision of the case. Supreme Court has wayback in the year 1957 considered the question of allowing an application for amendment and in the case of *Pregonda Hongonda Patil vs. Kalgonda Shidgonda Patil and others* reported in *AIR 1957 SC 363,* so also in the case of *L.J. Leach and Co. Ltd. and Another v. Jardine Skinner and Co. reported* in *AIR 1957 SC 357* has laid down the principle that all amendments are to be allowed which satisfy the following conditions namely (a) Not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. It has been held by Supreme Court in the aforesaid case that amendment would be refused only where the other party cannot be placed in the same position as if pleading had been originally correct. Thereafter, aforesaid principle has been followed in the series of cases and in the case of *M/s Estralla Rubber vs. Dass Estate (Pvt.) Ltd., reported in 2001 SC 3295,* the same question has again been considered by Supreme Court and the principle affirmed. It has been held by Supreme Court that amendment of pleading under Order 6 Rule 17 of CPC is to be allowed if such an amendment is required for proper and effective adjudication of the controversies between the parties so also to avoid multiplicity of judicial proceedings. However, it has been held that the amendment should not result in injustice to other side. In the case of *Estrella Rubbers* (supra), the plaintiff had filed the suit against the defendants in respect of the suit property for eviction on the ground of reasonable requirement of building for rebuilding so also on the ground of default in payment of rent. The defendants raised certain grounds including the ground regarding existence of the relationship of landlord and tenant, the defendants, filed application for amendment in his written statement and by proposed amendment, defendants wanted to show that the plaintiff landlord was permissive occupier instead of owner. It was held by Supreme Court that if such an amendment is allowed, it is not shown as to how, it would cause prejudice to the plaintiff. It has been held that no accruable right is tried to be taken away by the proposed amendment. Considering all these aspects of the matter allowing the application for amendment was held to be proper by the Supreme Court.

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297. CRIMINAL PROCEDURE CODE, 1973 – Section 233 (3) & 311
Whether a person examined as prosecution witness can be later on examined as defence witness u/s 233 (3)? Held, No – Further held, a witness cannot be allowed to perjure himself by filing affidavit and resiling from earlier statement made before the Court – Law explained.
State of M.P. v. Badri Yadav & Anr.
Reported in 2006 (II) MPJR 227 (S.C.)

Held:

In this case the application under Section 311 Cr.P.C. for recalling PW-8 and PW-9 and re-examining them was rejected by the Court on 2.9.1994. Therefore, the question with regard to recalling PW-8 and PW-9 and re-examining them stood closed. There is no provision in the Code of Criminal Procedure that by filing affidavit the witnesses examined as PWs (PW-8 and PW-9 in this case) could be juxtaposed as DW-1 and DW-2 and be examined as defence witnesses on behalf of the accused.

Mr. A.T.M. Rangaramanujam, learned senior counsel for the respondent, however, contended that the accused is entitled to enter upon defence and adduce evidence in support of his case as provided under Section 233 Cr.P.C. particularly Sub-section (3) of Section 233. Sub-section (3) of Section 233 reads:-

> "(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for *defeating the ends of justice.*"
>
> (emphasis supplied)

Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub-section 3 of Section 233 Cr.P.C.

When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should have used his discretionary power and should have refused relief on the ground that is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by prosecution as eyewitnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section 311 Cr.P.C. was rejected. They were purportedly in exercise of power under sub-section (3) of Section 233 Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under of law.

In the case of *Yakub Ismail Bhai Patel vs. State of Gujarat, (2004) 12 SCC 229* in which one of us Dr. A.R. Lakshmanan, J. was the author of the judgment, in somewhat similar case to the facts of the present case it was held that once a witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in court on oath by filing affidavit stating that whatever he had deposed before court as PW was not true and was done so at the instance of the police. In that case the evidence of PW-1 was relied upon by the Trial Court and also by the High Court. He was examined by the prosecution as an eyewitness. He also identified the appellants and the co-accused in the Court. After a long lapse of time he filed an affidavit stating that whatever he had stated before the Court was not true and had done so at the instance of the police. In those facts and circumstances this Court in paragraphs 38 and 39 at SCC pp. 240-241 held as under:-

> "38. Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he has deposed before Court as PW1 was not true and it was so done at the instance of the police".
>
> "39. The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resliling from the testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in court later, he was in jail in a narcotic case and that the accused persons were also fellow inmates there."

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298. CRIMINAL TRIAL :

Injuries on the body of accused, explaination of – No absolute rule that whenever accused sustains injury, prosecution is obliged to explain the same – Law explained.

Heerala & Ors. v. State of M.P.

Reported in 2006 (II) MPJR 243

Held:

Learned counsel for the appellants has further submitted that the accused had also sufferred injuries in the same incident. Injuries found on the body of accused persons were not explained by the prosecution witnesses, therefore, the evidence of prosecution witnesses cannot be relied upon or at least their evidence should be disbelieved on the point of genesis of the occurrence. For appreciating the contention of learned counsel we will have to examine the legal position which has been settled by the Apex Court. It is relevant to refer here the ratio of the case *Takhaji Hiraji Versus Thakore Kubersingh Chamansingh and others* reported in *[(2001)* 6 SCC 145]:

> "The first question which arises for consideration is what is the effect of non-explaination of injuries sustained by the accused persons. In *Rajender Singh v. State of Bihar, Ram Sunder Yadav v. State of Bihar*

and Vijayee Singh v. State of U.P., all three-Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosection is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explaination of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

In view of the above settled position while examining the present case it is apparent that the injuries sustained by accused persons as discussed in para 9 and 10 of this judgment are not serious injuries rather they are minor injuries. In the light of the evidence of prosecution witnesses including the evidence of Radheshyam (PW4) who happened to have suffered injuries in the same incident, it cannot be said that the non-explaination of injuries was of much significance...

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299. CRIMINAL PROCEDURE CODE, 1973 – Section 102
Bank account – Whether bank account is "property" and can be seized during investigation – Held, Yes – Law explained.
Ashok Kumar Jain v. Central Bureau of Investigation & Anr.
Reported in 2006 (II) MPJR 253

Held:

The petitioner's challenge to the order issued by the CBI to the Bank on the ground that the CBI cannot issue such direction placing reliance on *M/s Purbanchal Road Service Vs: State , 1991 Cr LJ 2798* cannot be accepted as the said judgment passed by Gauhati High Court has been overruled by the Supreme Court in the case of *State of Maharashtra Vs. Tapas D. Neogy [(1999) 7 SCC 685].* In this case the Supreme Court after considering the divergent views taken by different High Courts with regard to the power of seizure under Section 102 (1) of the Cr.P.C. and whether the bank account can be held to be "property" within the meaning of the Section 102 (1) of the Cr.P.C. held that the bank account of the accused or any of his relation is "property" within the meaning of Section

102 of the Cr.P.C. and a Police Officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the Police Officer is investigating into. The Supreme Court also observed that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trial is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Cr.P.C. and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the Courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer.

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300. MOTOR VEHICLES ACT, 1988 – Sections 166 & 168

Whether Claims Tribunal can award compensation more than the amount claimed? Held, Tribunal can award just compensation irrespective of the fact that it exceeds the amount claimed – Law explained.

Babu & Anr. v. Progressive Engineering Cons. Ltd. & two others
Reported in 2006 (II) MPJR 262

Held:

So far question whether the claimants could be awarded compansation more than the amount prayed by them is concerned, in view of the aforesaid it is apparent that the appellants are illiterate rustic villagers and due to this advertence the claim was not properly initiated but in any circumstances the court or claims tribunal to award the just claim may award more than that which has been prayed in claim petition. My aforesaid view is fully supported by the precedent of Apex Court in the matter of *Nagappa v. Gurudayal Singh and others reported* in *2003 ACJ 12* in which it was held as under:

> "7. Firstly under the provisions of Motor Vehicles Act, 1988 (hereinafter referred as the M.V. Act.), there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to more compensation then claimed, the tribunal may pass such award. Only embargo is it should be 'just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both could be made (a) by the person who has

sustained the injury or (b) by the owner of the property; or (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accident forwarded to it under sub-section (5) of section 158 as an application for compensation under this Act". Hence Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed."

"10. Therefore, section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just." Therefore, only requirement for determining the compensation is that it must be 'Just'. There is no other limitation or restriction on its power for awarding just compensation".

This question was also answered by the Division Bench of this Court in the matter of *Vijay Kumar Arya v. Ashok Rathore and others* reported *in 2005 ACJ 327* in which it was held as under:

"5. The claimant has claimed compensation of Rs. 1,42,550/-. In our opinion; in the circumstances narrated above, the claimant's claim is on the lower side. Therefore, we award compensation of Rs. 1,50,000/- (rupees one lakh fifty thousand) payable with interest at the rate of 9% on the enhanced amount of compensation from the date of application till payment. Joint and several liabilities of owner and driver of the vehicle, payable by Oriental Insurance Co. Ltd. Betul with which the vehicle was insured".

It was again decided by the other Division Bench of this Court in the matter of *New India Assurance Co. Ltd. v. Hari Kishan and others* reported *in 2005 ACJ 1368* which says as under:

"3. Thus there is no ambiguity that to meet the ends of justice, so also to arrive at the 'Just' compensation, the court is empowered to award an amount exceeding the amount claimed."

●

301. MOTOR VEHICLES ACT, 1988 – Sections 158 & 166
Whether claim in respect of accident taking place in the year 1994 but filed after 1994 can be rejected as being time barred? Held, No – Law explained.
Jankibai & Ors. v. Satish Chandra & Ors.
Reportd in 2006 (II) MPJR 272

Held:

Learned counsel submits that only because there is nothing in the Act and the omission of the limitation of six months prescribed under the Act of 1939, further extended for six months upon showing the sufficient cause in the Act of 1988 will not debar the appellant from filing the claim petition, when there was no limitation prescribed thereafter. Learned counsel submits that whether the claim petition is genuine or not may be examined on merits, but at the threshold the petition could not be dismissed.

... In the case of *Dhannalal v. D.P. Vijay Vargiya & others, 1996 ACJ 1013* accident took place on 4.12.1990 and the claim petition was filed on 7.12.1991 i.e. four days beyond the period prescribed under Section 166 of the Amendment Act of 1988 and for that also an application for condonation of delay was filed. Therefore, the case of *Dhannalal* (supra) is not applicable to the present case because in the present case accident has taken place prior to the commencement of the Amendment Act, 1994 and admittedly no claim petition was filed before commencement of the Amendment Act, 1994. Learned counsel submits that the law laid down by this Court reported in 2000 (1) Vidhi Bhasvar 42 in the matter of *Divisional Manager MPSRTC Vs. Munna Singh* will also be of no help to the appellant as in that case though the claim petition was filed after twenty years, but the claimant was minor of three years therefore, otherwise also he was entitled to file the claim petition after attaining the age of majority, therefore, this court allowed the claimant to prosecute the claim petition. It is submitted that the benefit of Amendment Act of 1994 cannot be given retrospectively. It was further submitted that if it would have been the intention of the Parliament then it would have made specifically in the Act itself.

It is also submitted that so far as the contention that there is no necessity to file any claim petition and it is duty of the State to report the matter to the Claims Tribunal is concerned, sub-section (6) of Section 158 of the Act has come in force with effect from 14.11.1994, therefore, it cannot be expected that in all the accidents which has taken place prior to the Amendment Act the concerned station officer is bound to report the matter to the Claims Tribunal. In the matter of *New India Assurance Co. Ltd. Vs. C. Padma and another* reported in *2003 ACJ 1999* Hon'ble Supreme Court placed reliance on the ratio laid down in *Dhannalal's case,* (supra) 1996 ACJ 1013 (SC) and further observed that Parliament realized the grave injustice and injury caused to heirs and legal representatives the victims of accidents if the claim petition was rejected only on ground of limitation. Thus 'the different intention' clearly appears and section 6-A of the General Clauses Act would not apply. In the case of *Dhannalal* (supra) the Hon'ble Apex Court has considered this aspect where no claim petition was filed when the old Act was in force and limitation expired and after enforcement of Amendment Act, if claim petition filed then Hon'ble Apex Court held that claim petition cannot be rejected by the Tribunal on the ground of limitation saying that time prescribed under sub-section (3) of Section 166 of the Act 1988 has expired.

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302. INDIAN PENAL CODE, 1860 – Section 403

Criminal misappropriation, offence of – Necessary ingredients – Law explained.

Mohammad Ali vs. State of M.P.

Reported in 2006 (II) MPJR 301

Held:

Section 403, IPC speaks about dishonest misappropriation of property. This section defines criminal misappropriation and prescribed penalty for it. Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the accused was not previously acquainted, the retaining becomes wrongful and fraudulent. The essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused. If Section 403, IPC is analysed, it is gathered that it has following ingredients which reads thus:

"(i) The property must belong to a person other than accused;

(ii) The accused must have misappropriated property or converted it to his own use; and

(iii) there must be dishonest intention on the part of the accused."

If the above said tests and ingredients are tested in the present factual scenario, it would reveal that there is nothing on record in order to show that the impugned electric wire belong to any another person other than the accused. On the contrary it has come on record that applicant has purchased if from one Rubben Kabadi. The police has not taken any pains to record the statement of Rubban Kabadi and there is nothing on record in order to show that Rubban Kabadi did not sell the electric wire to the applicant. Merely because the applicant was not having any receipt of the wire, would not be a ground to hold that he committed offence under Section 403, IPC. On the record it has come that the wire was purchased by the applicant from Rubban Kabadi. It is a matter of common knowledge that if some articles are purchased from *Kabadi* (one who sells old and broken articles) normally receipts are not taken. In this view of the matter, merely because the applicant was not having any receipt of purchase of the impugned wire, it cannot be said that he is prima facie guilty of the offence punishable under Section 403, IPC.

In the case of *Ramaswamy Nadar Vs. The State of Madras, AIR 1958 SC 56,* in para-7 the Supreme Court has laid down the law when an offence under Section 403, IPC is made out, which reads thus:

> "In order to prove an offence under S.403, Indian Penal Code, the prosecution has to prove that the property, in this case, the net amount of ninety-six thousand odd rupees, was the property of the prosecution witnesses 1 to 3 and others, and (2) that the accused misappropriated that sum or converted it to his own use, and (3) that he did so

dishonestly. In our opinion, none of these constituent elements of the offence can be categorically asserted to have been made out."

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303. CIVIL PROCEDURE CODE, 1908 – Section 39 (1)
Decree, execution of – Whether a Court can execute a decree outside its territorial jurisdiction – Held No – Law explained.
Mohit Bhargava v. Bharat Bhushan Bhargava & Ors.
2006 (II) MPJR SN 27

Held:

From the perusal of the records, it is clear that the judgment and decree which is being executed at Gwalior was not passed by the Court of Special Judge and Additional District Judge Gwalior. It is not in dispute that the court where the execution proceeding number 14-A/ 2002-2003 is pending, is not the court which has passed the original decree. But it has received the decree on transfer. The court which passed the decree namely District Judge, Gwalior. That being so, this is a case where the question of jurisdiction will have to be decided on the basis of provisions as contained in section 39 C.P.C. Section 39(1) C.P.C. contemplates various provisions for execution of a decree by a court of competent jurisdiction. However, the word "May" appearing in sub-section 1 of section 39 had received different interpretation by various High Courts. The Bombay High Court in the case of *Shaba Yaswant Naik vs. Vinod Kumar Gosalia and others, AIR 1985 Bombay 79* held that a court cannot execute the decree if the property is situated entirely out of its jurisdiction. However, the Calcutta High Court and the Rajasthan High Court had taken different views. The amendment made in Section 39 by incorporating sub-section 4 to section 39 w.e.f. 1.7.02 clearly indicates that for the purpose of execution of a decree it is only the court within whose territorial jurisdiction the property is situated which is competent for executing the decree. The aforesaid is also considered by the Supreme Court in para 21 of the judgment in the case of *Salem Advocats Bar Association v. U.O.I., (2005) 6 SCC 344.* Supreme Court has categorically held that section 39 does not authorize a court to execute the decree outside its territorial jurisdiction.

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304. CONSUMER PROTECTION ACT, 1986 – Section 2(1) (d) (ii)
Banking business – Transaction between bank and the customer – Whether customer is a consumer within the meaning of Section 2 (1) (d) (ii) of the Act – Held, Yes.
Standard Chartered Bank Ltd. v. Dr. B.N. Raman
Judgment dated 14.07.2006 passed by the Supreme Court in Civil Appeal No. 2982 of 2006, reported in (2006) 5 SCC 727

Held:

The Consumer Protection Act, 1986 provides for formation of the National Commission, the State Commission and the District Forum. These are remedial agencies. Their functions are quasi-judicial. The purpose of these agencies is to

decide consumer disputes. Activities relating to non-sovereign powers of statutory bodies are within the purview of the Act. The functions of such statutory bodies come under the term "service" under Section 2(1)(o) of the Act. Banking is a commercial function. "Banking" means acceptance, for the purposes of lending or investment of deposit of money from the public, repayable on demand or otherwise [see *Section 5 (b) of the Banking Regulation Act, 1949].* The intention of the 1986 Act is to protect consumers of such services rendered by the banks. Banks provide or render service/facility to its customers or even non-customers. They render facilities/services such as remittances, accepting deposits, providing for lockers, facility for discounting of cheques, collection of cheques, issue of bank drafts, etc. In *Vimal Chandra Grover v. Bank of India, (2000) 5 SCC 122* this Court has held that banking is business transaction between the bank and the customers. Such customers are consumers within the meaning of Section 2(1)(d)(ii) of the Act.

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305. EVIDENCE ACT, 1872 – Section 35

Whether a register maintained in a school having entry about date of birth is admissible u/s 35 of the Act? Held, Yes.

State of Chhattisgarh v. Lekhram

Judgment dated 05.04.2006 passed by the Supreme Court in Criminal Appeal No. 326 of 1999, reported in (2006) 5 SCC 736

Held:

A register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of Section 35 of the Evidence Act. Such dates of births are recorded in the school register by the authorities in discharge of their public duty. PW 5, who was an Assistant Teacher in the said school in the year 1977, categorically stated that the mother of the prosecutrix disclosed her date of birth. The father of the prosecutrix also deposed to the said effect.

The prosecutrix took admission in the year 1977. She was, therefore, about 6-7 years old at that time. She was admitted in Class I. Even by the village standard, she took admission in the school a bit late. She was married in the year 1985 when she was evidently a minor. She stayed in her in-laws' place for some time and after the "gauna" ceremony, she came back. The materials on record as regards the age of the prosecutrix were, therefore required to be considered in the aforementioned backdrop. It may be true that an entry in the school register is not conclusive but it has evidential value. Such evidential value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix.

●

306. INDIAN PENAL CODE, 1860 – Section 366

Whether mere abduction without there being any intention as contemplated by Section 366 is sufficient for imposing penal liability u/s 36? Held, No – Law explained.

Gabbu v. State of M.P.

Judgment dated 12.05.2006 passed by the Supreme Court in Criminal Appeal No. 791 of 1998, reported in (2006) 5 SCC 740

Held:

... Mere abduction does not bring an accused under the ambit of this penal section. So far as a charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold the accused guilty and punish him under Section 366 IPC.

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307. PRECEDENTS :

'Per incuriam', meaning of – Decision rendered without reference to statutory provisions cannot have precedential value – Law explained.
Mayuram Subramanian Srinivasan v. CBI
Judgment dated 16.06.2006 passed by the Supreme Court in Criminal Appeal No. 685 of 2006, reported in (2006) 5 SCC 752

Held:

In State of *Ratan Lal Arora, (2004) 4 SCC 590* it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands on a par, if not on a better footing. The provisions of Section 439 do not appear to have been taken note of.

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in *Young v. Bristol Aeroplane Co. Ltd., (1944) 2 ALL ER 293,* is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short "the Constitution") which embodies the doctrine of precedents as a matter of law. The above position was highlighted in *State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139.* To perpetuate an error is no heroism. To recify it is the compulsion of the judicial conscience. The position was highlighted in *Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558.*

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308. MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Section 307 (5)
WORDS & PHRASES

(i) Scope and applicability of S. 307 (5) – Section applies to a construction made without due sanction from the Municipal Corporation –

(ii) "Building" as defined in Section 7, meaning of – Law explained.
Suresh Agrawal v. Municipal Corporation and anr.
Reported in 2006 (II) MPJR 6

Held:

... Section 307 (5) of the aforesaid Act is reproduced below:-

> Nothing in this section shall affect the right of the Corporation or any other person to apply to the District Court for an injunction for the removal or alteration of any building on the ground that it contravenes any provisions of this Act or the byelaws made thereunder, but if the building is one in respect of which plans have been deposited and the plans have been passed by the Commissioner, or notice that they have been rejected has not been given within the prescribed period after the deposit thereof, and if the work has been executed in accordance with the plans, the District Court on granting an injunction shall have power to order the Corporation to pay to the owner of the work such compensation as the District court thinks just, but before making any such order the District Court cause the Commissioner if not a party to be joined as a party to the proceeding.

A bare perusal of this provision shows that it has an application to every construction which is made without due sanction from the concerned Municipal Corporation. Word "building" is defined in Section 5(7) of the said Act which is as under:-

> "building" includes a house, outhouse, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever, whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, doorsteps, walls including compound walls, and fencing and the like but does not include a tent.

Thus, alleged construction of Chabutra amounts to construction of a building under the definition as contained in the Act. The location of the buildings so long as it is situated within the limits of Municipal Corporation does not divest the court from exercising its powers under Section 307 (5) of the said Act....

●

309. CRIMINAL PROCEDURE CODE, 1973 – Sections 378 and 386
Appeal against acquittal – Exercise of jurisdiction by Appellate Court, mode of – Appeal against acquittal cannot be allowed on the ground that another view possible than the one taken by the Trial Court – Law explained.
State of M.P. v. Anil Kumar
Reported in 2006 (II) MPJR 18

Held:

We are conscious of this fact that this is an appeal against acquittal. It is the settled position under the law that in an appeal against acquittal, the appellate Court is required to consider whether the findings recorded by the trial Court are perverse and contrary to the evidence on record. An appeal against acquittal

simply cannot be allowed on the ground that another view is possible from the same set of evidence on record. If two views are possible from the same set of evidence and if one view is taken by the trial Court, the appeal cannot be allowed simply on the ground that another view is also possible from the same set of evidence on record. In the case of *Hem Raj Vs. State of Punjab (AIR 2003 SC 4259)*, the Hon'ble Supreme Court has held as under :-

> "It is well settled that if on the basis of the same evidence two views are reasonably possible and the trial Court takes the view in favour of the accused, the appellate Court, in an appeal against acquittal, will not be justified in reversing the order of acquittal, unless it comes to the conclusion that the view taken by the trial Court was wholly unreasonable or perverse and it was not possible to take the view in favour of the accused on the basis of evidence on record."

●

310. CRIMINAL TRIAL

Appreciation of evidence – Act of absconding, evidential value of – Such evidence though relevant not conclusive of guilt or guilty conscience – Law explained.

Kalu v. State of Madhya Pradesh

Reported in 2006 (II) MPJR 61

Held:

In the case of *Matru alias Girish Chandra v. The State of U.P. (AIR 1971 SC 1050)*, it has been held that the act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Generally the Courts consider it as a very small item in the evidence for sustaining conviction. It cannot certainly be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused.

In the case of *Rahman v. The State of U.P. (1972 Cr.L.J. 23)*, the Court has held that absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason.

In the case of *Rajinder Singh alias Kada v. State of Punjab (AIR 1992 SC 1433)*, it has been held that the abscondence of the accused is of no consequence. In the first place it is not a determining factor and not one which could outweigh the other material appearing on the record. It by itself does not establish the guilt of the appellant beyond reasonable doubt.

●

311. CIVIL PROCEDURE CODE, 1908 – Section 9
LAND ACQUISITION ACT, 1894 – Sections 4 and 6
Jurisdiction of Civil Court – Suit for declaration that acquisition proceedings have lapsed, maintainability of – Held, suit not maintainable.
Smt. Dev Kumar Ben Shah v. State of Madhya Pradesh and anr.
Reported in 2006 (II) MPJR 77

Held:

Question which requires to be determined in the present appeal is whether civil suit is maintainable.

In this case notification is not under challenge, but declaration is sought that acquisition proceedings have lapsed on the expiry of period of two years after acquisition of land. In the relief clause, plaintiff has prayed that it be declared that after publication of notification under Section 4 of the Act on 15/12/1995 entire proceedings had lapsed as the award was not passed within two years and fresh notification under Section 6 of the Act on 13-8-1998 without publication of notification under Section 4 is void and contrary to law and is unenforceable against the plaintiff.

In this case, proceedings under Section 4 of the Act have not been challenged. What is under challenge is the fresh notification under Section 6 of the Act dated 13-8-1998. Therefore, in such a situation, whether such suit will be maintainable. Apex Court in the case of *State of Bihar vs. Dhirendra Kumar (1995 MPLJ 751)* has held that the Act being a complete Code in itself, jurisdiction of civil court is excluded by necessary implication and jurisdiction under Article 226 of the Constitution of India can be invoked. Thus, in view of the judgment of the Apex Court in the aforesaid case which has been followed by Division Bench of this Court in the case of *Pashu Chikitsa Vibhagiya Sahkari Nirman Samiti Maryadit Bhopal v. State of M.P., [2000 (3) MPLJ 244]*, suit will not be maintainable. Since, direct judgment covering the question of law has been delivered in the matter of the Act, therefore, judgment referred in the case of *Dhulabhai v. State of M.P., AIR 1969 SC 78* will not be applicable to the present case. Therefore the suit as filed itself is not maintainable...

●

312. EVIDENCE ACT, 1872 – Section 32 (1)
Dying declaration, evidential value of – Whether dying declaration can be sole basis for conviction? Held, Yes.
Suraj Prasad Burman v. State of M.P.
Reported in 2006 (II) MPJR 86

Held:

In *State of Assam vs. Mafizuddin Ahmed, AIR 1983 SC 274* it has been held that there can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying

declaration is a truthful dying declaration and not vitiated in any other manner. In the matter of dying declaration under section 32 Evidence Act in *Ram Bihari Yadav vs. State of Bihar and others, AIR 1998 SC 1850* it has been held :

> "Generally, the dying declaration ought to be recorded in the form of questions answers but if a dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in question-answer form cannot be a ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration the certificate of a medically trained person is insisted upon. In the absence of availability of a doctor to certify the above mentioned factors, if there is other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration there is no reason as to why the dying declaration should not be accepted."

●

313. SUITS VALUATION ACT, 1887 – Section 8

Valuation of suit for jurisdiction in respect of suit covered by S.8, mode of – Valuation for jurisdiction is dependent upon the valuation for computation of court fee and not vice versa – Law explained.
Judgish Chandra v. Mohanlal Agrawal and 13 Ors.
Reported in 2006 (I) MPJR 429

Held:

It has been laid down by the Supreme Court in *Sathappa Chattier Vs. Ramanathan Chettiar (AIR 1958 SC 254)* that the effect of the provision of Section 8 of the Act of 1887 is to make the valuation for the purpose of jurisdiction dependent upon the valuation determinable for computation of court-fee. Once the value for the purposes of court fees is determined that decides the valuation for the purposes of pecuniary jurisdiction. In such a case it is the amount on which plaintiff has valued the relief sought for purposes of court fees that determines the value for jurisdiction in the suit and not vice versa.

●

314. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12

Release of juvenile on bail – Relevant considerations – Bail cannot be denied unless case covered by S. 12 – Law explained.
Gaddo@ Vinod v. State of M.P.
Reported in 2006 (I) MPJR SN 35

Held:

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

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

In view of aforesaid mandatory provisions of the Act only on certain grounds the bail application could have been dismissed which were not in existence in the case at hand. So the applicant ought to have been released on bail but the provisions were not considered with its real spirits...

●

315. CRIMINAL PROCEDURE CODE, 1973 – Section 452

Return of valuable property involved in a criminal case – Property not claimed by the accused – Complainant claiming the property entitled for return of the same – Law explained.

Govind Ram v. Stateof M.P. & Ors.

Reported in 2006 (II) MPJR 408

Held :

The trial court has rejected the application for the return of property to the appellant only on the ground that in the judgment of acquittal, it has been directed that the property may be deposited in the government treasury in order to confiscate it and, therefore, merely the application has been filed by the appellant for return of the property no order can be passed in that regard. The view taken by the trial court is ex-facie erroneous and contrary to the law. Under section 452 Cr.P.C. if in the conclusion of a trial the court makes an order to confiscate the property it would mean that a party who is otherwise entitled to it may not file an application for its delivery and if such application is submitted the same would be rejected on the ground that an order has already been passed to

confiscate the property. Under sub section (2) of Section 452 of Cr.P.C. if an application for delivery of the property is submitted by a person claiming and if he is entitled to be in possession of such property the court may without any condition or that he execute a bond with or without surety may pass an order to deliver the property. It appears that the court below without going through this provision has passed the impugned order.

I have already stated herein above that vide Ex. P/20 the complainant submitted an application to the investigating officer to deliver the property. The accused persons have not claimed the property. The accused persons are silent in regard to the ownership of the property. On the other hand, the appellant is claiming the property. The accused persons have also denied the seizure and execution of the seizure memo in their examination under section 313 Cr.P.C. ... In the case of *Kamarlal v. State of M.P., 1992 Cr.L.J. 3407* the accused persons who were tried for theft were acquitted. The complainant submitted an application for delivery of the seized property. The accused persons remained silent about their claim to property. They also denied any seizure of property from them in their examination under section 313 Cr.P.C. In that situation, this court held that the court below rightly delivered the property to the complainant and the revision petition filed by the accused persons in that regard was dismissed. The learned counsel appearing for the appellant also placed reliance on the earlier decision of this Court in *Prakash Chandra Jain v. Jagdish and Another, AIR 1958 M.P. 270* wherein the same principle has been laid down.

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316. SERVICE LAW :

Salary – Salary paid to the employee in revised pay scale without any misrepresentation on his part – Fixation of salary in revised pay scale found faulty – Whether excess pay can be recovered from the employee? Held, No – Law explained.

Purshottam Tank v. State of M.P.

Reported in 2006 (II) MPJR SN 42

Held:

The appellant had been paid his salary on the revised scale, however, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. It was further held that under the circumstance the amount paid till date may not be recovered from the employee concerned. He further placed reliance on a decision reported in *(1994) 2 SCC 521 (Shyam Babu Verma and others vs. Union of Indian and others)* wherein in a case where higher scale was erroneously given to petitioners since 1973 and pay scale of petitioners was reduced in 1984. Three Judges of

Hon'ble Supreme Court has held that since petitioners received the higher scale due to no fault of theirs, it shall only be just and proper not to recover any excess amount already paid to them.

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317. CRIMINAL PROCEDURE CODE, 1973 – Section 378
Exercise of jurisdiction by Appellate Court – If two views possible on the same evidence whether Appellate Court can take the one not taken by trial Court? Held, No – Law explained.
Kallu@ Masih and others v. State of M.P.
Reported in 2006 (2) JLJ 194 (SC)

Held:

The circumstances in which an appellate Court will interfere with the finding of acquittal recorded by a trial Court are reiterated in *Bhim Singh v. State of Haryana [2002 (10) SCC 461],* thus:

> "Before concluding, we would like to point out that this Court in a number of cases has held that an appellate Court entertaining an appeal from the judgment of acquittal by the trial Court though entitled to reappreciate the evidence and come to an independent conclusion, it should not do so as a matter of routine. In other words, if from the same set of evidence two views are possible and if the trial Court has taken one view on the said evidence, unless the appellate Court comes to the conclusion that the view taken by the trial Court is either perverse or such that no reasonable person could come to that conclusion or that such a finding of the trial Court is not based on any material on record, it should not merely because another conclusion is possible reverse the finding of the trial Court."

While deciding an appeal against acquittal, the power of the appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with by an appellate Court where the judgment of the trial Court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial Court merely because a different view is possible. The Appellate Court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial Court.

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318. INDIAN PENAL CODE, 1860 – Section 149

Joint liability – Whether liability with the aid of S.149 can be fastened when some of the accused persons are acquitted because of benefit of doubt and remaining accused are less than five? Law explained.

Kallu@ Masih and others v. State of M.P.

Reported in 2006 (2) JLJ 194 (SC)

Held:

The contention that when only four persons are found guilty, there cannot be conviction under section 149 IPC, has no merit. Section 149 provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is gulity of that offence. Section 141 requires a minimum of five persons for being designated as an "unlawful assembly".

The question has been specifically considered by this Court in *Mohan Singh & Another v. State of Punjab [AIR 1963 SC 174]* and *Ram Bilas Singh & Others v. The State of Bihar, [1964 (1) SCR 775]* and in *Dharam Pal and others v. The State of U.P. (1975) 2 SCC 596* It is sufficient to refer to the principle as stated in Dharam Pal (supra), for our purpose:

> "It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually gulity. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. *On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identify of two of the alleged assailants, and therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt any as to identity of some participants,* and not as to the total number of participants. If may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identify of even one. *But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated*

and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five."

[Emphasis supplied].

The accused before the trial Court were 27 in number. PW4 specifically named 22 persons and further named the four out of them who landed him the blows. PW3 names 12 persons who came as a group. Other eye-witnesses also clearly stated that the appellants with other accused who were present in Court had come to attack Sadruddin. As noticed above, the trial Court chose to acquit all the 27 accused. In the appeal filed by the State leave was granted by the High Court only in regard to five of the accused, as they were specifically named as the persons wielding weapons and causing injuries to Sadruddin and others and as the names of others were mentioned only as being members of the assembly without any specific act being attributed to them. The High Court gave benefit of doubt to one of the five (Anwar) though his presence as a member of the group was accepted. This does not mean that there is no finding that there was an unlawful assembly. When the evidence clearly shows that more than five persons armed with swords, spears etc. had come to the house of Sadruddin with the common object of causing injury, and injured him, the mere fact that serveral accused were acquitted and only four are convicted, does not enable the four who are found guilty to contend that section 149 is inapplicable...

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319. LAND REVENUE CODE, 1959 (M.P.) – Section 117

Khasra entries, evidential value of – Basically such entries are kept for fiscal purposes and cannot decide title – Law explained.

Noor Mohammad v. Dev Bux and others

Reported in 2006 RN 287

Held :

Besides this the Khasra entries in revenue record are always kept for fiscal purpose therefore the same could not be considered to decide the title in favour of either of the parties as law laid down by the Apex Court in the matter of *Jattu Ram V. Hakam Singh,* reported in *AIR 1994 SC 1653* in which it is held as under:

"3. ..... It is settled law that the Jamabandi entries are only for fiscal purpose and they create no title. ....."

This legal position was also considered by the subordinate appellate Court in reversing the decree of the trial Court...

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320. PRE-EMPTION:

Pre-emption, right of – Whether right of pre-emption stands defeated by estoppel ? Held, Yes.

Ravindra Khanwalkar v. Ganpati Khanwalkar and others

Reported in 2006 (3) MPHT 418 (DB)

Held :

The right of pre-emption is a weak right and it can be defeated by estoppel. It is too well settled that the right of pre-emption is lost by estoppel and acquiescence. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of Justice.

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321. RECOVERY OF DEBTS DUETO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

Co-operative Bank – Whether a Co-operative Bank is covered by Act of 1993 ? Held, No – Law explained.

Manoj Tarwala v. State of Madhya Pradesh and others

Reported in 2006 (3) MPHT 434 (DB)

Held :

A reading of Sections 2 (o) and 17 (1) of the 1993 Act would show that the Tribunal constituted under Section 3 (1) of the said Act shall exercise the jurisdiction, powers and authority to entertain and decide applications from the Banks and financial institutions for recovery of debts due to such banks and financial institutions and Section 18 states that no Court or other authority shall have, or be entitled to exercise, any jurisdiction, power or authority (except the Supreme Court and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17. Thus, it is only the Tribunal constituted under the 1993 Act which can exercise the jurisdiction, powers and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such banks and financial institutions. The case of the petitioner is not that the cooperative bank is a financial institution for purposes of the 1993 Act. The case of the petitioner is that the cooperative bank is also a bank for purposes of the 1993 Act. The term 'bank' has been defined under Section 2 (d) of the 1993 Act, quoted above, to mean *inter alia* a 'banking company' and the contention of the petitioner is that the cooperative bank is a 'banking company' and therefore, a bank for purposes of the 1993 Act.

We are unable to accept the aforesaid contention of the petitioner for the reasons that follow. Section 2 (e) of the 1993 Act states that in the 1993 Act a 'banking company' shall have the same meaning assigned to it in clause (c) of

Section 5 of the 1949 Act and therefore, for purposes of the 1993 Act, 'a banking company' would mean a 'banking company' as defined in clause (c) of Section 5 of the 1949 Act and in no other provision of the 1949 Act. Clause (c) of Section 5 of the 1949 Act is quoted herein below :–

> "(c) *'banking company'* means any company which transacts the business of banking."

The term 'company' has also been defined in Section 5 (d) of the 1949 Act, which is quoted herein below :–

> "(d) *'company'* means any company as defined in Section 3 of the Companies Act, 1956, and includes a foreign company within the meaning of Section 591 of that Act."

Hence, *'company'* means a Company as defined in Section 3 of the Companies Act, 1956. Section 3 (1) of the Companies Act,1956 is quoted herein below :–

> "3. (1) *'company'* means a company formed and registered under this Act or an existing company as defined in clause (ii)."

Under Section 3 (1) of the Companies Act, 1956, it is clear that a 'company' means a company formed and registered under the Companies Act, 1956. Thus, a cooperative bank which is not formed and registered under the Companies Act, 1956 is not a company and accordingly not a banking company within the meaning of clause (c) of Section 5 of the 1949 Act. Therefore, a Co-operative Bank does not fall within the definition of 'bank' in Section 2 (d) of the 1993 Act.

The contention of the petitioner, however, is that Section 56 introduced in Part V of the 1949 Act by the Admendment Act 23 of 1965 has also to be looked into for the purpose of finding out the meaning of the expression 'banking company' and 'bank' for purposes of the 1993 Act. It is difficult to accept the aforesaid contention of the petitioner because Section 2 (e) of the 1993 Act states that 'banking company' shall have the meaning assigned to it in clause (c) of Section 5 of the 1949 Act and makes no reference to Section 56 of the 1949 Act. If the legislative intent behind the 1993 Act was to include also a co-operative society carrying on banking business as mentioned in Section 56 of the 1949 Act, Section 2 (e) of the 1993 Act would have given a wider definition of the expression 'banking company' to mean not only a banking company as defined in clause (c) of Section 5 of the 1949 Act but also a co-operative society carrying on the business of banking as mentioned in Section 56 of the 1949 Act. Hence, for the purpose of 1993 Act, a Co-operative Society carrying on the business of banking would not come within the purview of the expressions 'bank' and 'banking company'.

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322. INDIAN PENAL CODE, 1860 – Section 364 -A

Kidnapping for ransom, offence of – Whether simple kidnapping or abduction is an offence u/s 364-A ? Held, No – Law explained.

Surendra Singh @ Pappu Singh v. State of Madhya Pradesh

Reported in 2006 (3) MPHT 486 (DB)

Held :

The question that now arises for our consideration is whether the appellant can be held guilty for offence punishable under Section 364-A of the IPC for which he has been convicted and sentenced. Section 364-A of the IPC reads as under :–

> "**364-A.** Whoever kindnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or cause hurt or death to such person in order to compel the Government or any foreign State or international inter-Governmental organisation or and the other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

In order that a person is held guilty for commission of the offence described under Section 364-A it should be shown that the person who has kidnapped any person, keeps such person in detention after kidnapping or abduction and threatens to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or caused hurt. Even cases where death or hurt is caused in order to compel any other person to do or abstain from doing any act or to pay ransom, the act would be covered. Thus, it is obligatory in the case of demand of ransom to prove that not only ransom was demanded but reasonable apprehension that such person would be put to death or hurt was created or such apprehension was created to compel any other person to act or abstain from doing any act or pay ransom.

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323. CRIMINAL PROCEDURE CODE, 1973 – Section 174

Ambit and scope of inquest report u/s 174 – Details to be mentioned in inquest report – Details as to how the deceased was assaulted, who assaulted him or under what circumstances he was assaulted, held foreign to the scope of S. 174.

Shashi Bhushan and others v. State of M.P.

Reported in 2006 (3) MPHT 527

Held :

The Apex Court considered the object and scope of Section 174, Criminal Procedure Code in its judgment as reported in *AIR 1975 SC 1252, Podda Narayana*

and others Vs. State of Andhra Pradesh. Para 11 of the aforesaid judgment deals with the aspect where similar argument was advanced on behalf of the accused before the Apex Court. It was submitted in the said case before the Apex Court that if in the Merg Intimation the names of the witnesses and the overt act have not been mentioned therein, then the omission as such would have the effect of rejecting the prosecution case. The relevant portion of Para 11 is as under :-

> "A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstance he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report .....
>
> ..... The High Court has thus rightly explained that the omissions in the inquest report are not sufficient to put the prosecution out of Court, and the learned Additional Sessions Judge was not at all justified in rejecting the prosecution case in view of this alleged infirmity."

Another judement in this reference shall be relevant which is reported in *AIR 1987 SC 923, Eqbal Baig Vs. State of Andhra Pradesh,* where a similar question arose for consideration before the Apex Court. The question was raised that if the names of certain witnesses have not been mentioned in the FIR and also in the inquest report, whether the evidence before the Court is liable to be ignored ? Para 5 of the judgment deals with the aforesaid question, which is reproduced as under :-

> "Learned Counsel appearing for the appellant frankly conceded that there are number of witnesses who had named this appellant but the leave was granted mainly on the ground that in the First Information Report and inquest report, the name of this appellant was not mentioned and as this was a case of trade-union rivalry, the possibility that this appellant was implicated as an afterthought could not be ruled out."

In Para 6, the Apex Court came to a conclusion that :-

> "..... In the face of all the evidence, the High Court came to the conclusion that this apellant stabbed deceased Yellaiah with a knife. It was also contended that in the inquest report also the name of this appellant was not mentioned. It could not be contended that the inquest report is the statement of any person wherein all the names ought to have been mentioned."

Thus, on the basis of the aforesaid two judgments of the Apex court it is apparent that the inquest report has not been treated to be a statement of any person wherein everything should be included, including the names of the persons.

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324. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17
Amendment of pleading – Doctrine of relation back in relation to the amended pleading – Law explained.
Kanhaiyalal v. Muktilal
Reported in 2006 (3) MPHT 552 (DB)

Held :

The learned Counsel for the appellant has canvassed that the amendment should date back to the original point of time of filing of the counter claim. He has placed reliance on *Sampath KumarVs. Ayyakannu and another, AIR 2002 SC 3369,* wherein it has been held that in view of the doctrine of relation back an amendment once incorporated relates back to the date of the filing of the suit. The appellant defendant has also sought support from the decision of the Apex Court rendered in the case of *Pankaja and another Vs. Yellappa and others, AIR 2004 SC 4102,* to reinforce that an amendment even if barred by limitation can be allowed and would relate back to the date of filing of the suit.

The learned Counsel for the respondent plaintiff has relied upon the judgment of the Supreme Court in the case of *Vishwambhar and others Vs. Laxminarayana and another, AIR 2001 SC 2607,* wherein a prayer for amending the plaint to incorporate a relief which was barred by time was rejected and was held to be impermissible. It was also held that the doctrine of the amendment relating back to the date of filing of the suit is not applicable when the proposed amendment changes the nature of the relief claimed. It was held that such amendments have to be taken to have been filed on the date the amendment is allowed and not earlier. Paragraph 10 of the judgment may be profitably reporduced :–

> "*10.* From the averments of the plaint it cannot be said that all the necessary averments for setting aside the sale deeds executed by Laxmibai were contained in the plaint and adding specific prayer for setting aside the sale deeds was a mere formality. As noted earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were *ab initio* void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seeking setting aside the alienations of the property by the guardian. In such circumstances the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that."

In the case of *Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, AIR 1996 SC 642,* the Apex Court has held that a person cannot be permitted to amend the plaint if relief and plea sought to be introduced by way of amendment has become barred by limitation during the pendency of the proceedings.

The law as discernable from the judgments of the Supreme Court is that while the normal rule is that amendments in plaint relate back to the date of filing of the suit in view of the doctrine of relation back but in cases like the present one where while allowing the amendment the question as to whether the relief sought by way of amendment was barred by time or not has been left open and where the specific statutory provision of Section 3 (2) (b) of the Limitation Act provides that the counter claim shall be deemed to have been instituted on the date on which it is made in Court the doctrine of relation back does not get attracted and hence, has no applicability.

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325. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)
N.D.P.S. ACT, 1985–Section 20
Period of custody u/s 167 (2) in relation to an offence u/s 20 N.D.P.S. Act for possessing medium quantity of *ganja* – Maximum period u/s 167 (2) is 60 days and not 180 days – Law explained.
Smt. Rama Devi @ Meena Devi v. State of M.P.
Reported in 2006 (4) MPHT 1 (NOC)

Held :

The present case is not of commericial quantity of *Ganja.* As per schedule, the commericial quantity of *Ganja* is 20 Kg. and more. It is alleged that the applicant was found in possession of 12 Kg. of *Ganja.* It means, it is a case of medium quantity of *Ganja* and it has been provided under Section 20 of NDPS Act that for possession of medium quantity of *Ganja,* imprisonment may extend up to 10 years and a fine may extent to Rs. One Lakh.

It has been provided in Section 167 (2) of Cr. PC that the accused can be detained for a period of 90 days where, the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years. It is further provided that where the investigation relates to any other offence, this period would be 60 days.

It was observed in *Rajeev Chaudhary Vs. State (NCT) of Delhi, (2001) 5 SCC 34,* that the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. It would not cover the offence for which punishment could be imprisonment for less than 10 years. It means, where the punishment may extend to 10 years' imprisonment, the

period of filing of charge-sheet would be 60 days, as provided under Section 167 (2) (a) (ii) of the Cr. P.C. and not 180 days as held by the Special Judge.

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326. CRIMINAL PROCEDURE CODE, 1973 – Section 195 (1) (b) (ii)
Forgery of document – Applicability of S. 195 (1) (b) (ii) – Section attracted only when the offence of forgery committed after production of document in Court – Law explained.
Manjla alias Mahendra and another v. State of Madhya Pradesh Reported in 2006 (4) MPHT 12

Held :

After having heard the learned Counsel for the parties, I have perused the record as well as considered the subsequent decisions rendered by the Supreme Court in case of *Sachida Nand Singh Vs. State of Bihar [(1998) 2 SCC 493]* and as well as Constitutional Bench decision in the case of *Iqbal Singh Marwah Vs. Meenakshi Marwah [(2005) 4 SCC 370].* In nutshell, according to the decision of the Constitutional Bench in the case of *Iqbal Singh* (supra), after considering the decision is the case of *Surjit Singh v. Balbir Singh, (1996) 3 SCC 533,* the Constitutional Bench has found that law laid down in the case of *Sachida Nand Singh* (supra), has been correctly decided and the view taken therein is the correct view. Section 195 (1) (b) (ii), Cr PC is attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceedings in any Court, i.e., during the time when the document was a *custodia legis.* In this case, the Apex Court has further held as under :–

> "**23.** In view of the language used in Section 340, Cr. P.C., the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195 (1) (b), as the section is conditioned by the words "Court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195 (1) (b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may

be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b) (ii), as canvassed by learned Counsel for the appellants, would render the victim of such forgery or forged document remediless. Any interpretation which leads to a situation where a victim of a crime rendered remediless, has to be discarded.

25. An enlarged interpretation to Section 195 (1) (b) (ii), whereby the bar cretated by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in Court, is capable of great misuse. As pointed out in *Sachida Nand Singh* after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any Civil, Criminal or Revenue Court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the Court, where the document has been filed itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large.

26. Judicial notice can be taken of the fact that the Courts are normally reluctant to direct filing a criminal complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in clause (b) (ii) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided. In statutory interpretation by Francis Bennion (3rd Edn.). Para 313, the principle has been stated in the following manner :–

"The Court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction, for example, where it appears that Parliament really intended it or the literal meaning is too strong."

●

327. CIVIL PROCEDURE CODE, 1908 – Order XLI

First appeal – Duty of First Appellate Court while arriving at a finding different from one recorded by the Trial Court – Law explained.

State of M.P. and another v. Mohammed deceased through Nisar Ahmed and others

Reported in 2006 (4) MPHT 69

Held:

The First Appellate Court did not appreciate the oral and documentary evidence properly and reversed the judgent and decree of the Trial Court. The Hon'ble Supreme Court in *Madhukar and others Vs. Sangram and others,* reported in *2001 (4) SCC 756,* with regard to the duty of the First Appellate Court relying on its earlier judgment in the case of *Santosh Hazari Vs. Purshottam Tiwari,* reported in *2001 (3) M.P.H.T. 71 (SC) = (2001) 3 SCC 179,* held as under:–

> "However, expression of general agreement with the findings in the judgment under appeal should not be a device or camouflage adopted by the Appellate Court for shirking the duty cast on it. While writing a judgment of reversal, the Appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the Trial Court must weigh with the Appelllate Court, more so when the findings on oral evidence recorded by the same Presiding Judge who authors the judgment. This does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact, arrived at by the Trial Judge. As a matter of law, if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the Appellate Court is entitled to interfere with the findings of fact.
>
> Secondly, while reversing a finding of fact the Appellate Court must assign its own reasons for arriving at a different finding. An additional obligation has been cast on the First Appellate Court by the scheme of the present Section 100 substituted in the Code. The First Appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the First Appellate Court is also a final Court of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the First Appellate Court even on questions of law unless such question of law be a substantial one."

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328. LAND ACQUISITION ACT, 1894 – Section 28

Grant of interest on compensation – Whether interest be granted on the whole amount including solatium? Held, Yes – Law explained.
Kamal Kant Shrivastava and others v. State of M.P. and another
Reported in 2006 (3) MPHT 107 (DB)

Held:

At this juncture, we think it condign to state whether there should be grant of interest on the whole amount which includes solatium and interest. In this context, we may profitably refer to the decision rendered in the case of *Sunder Vs. Union of India, (2001) 7 SCC 211,* wherein it has been held as under :–

> "26. We think it useful to quote the reasoning advanced by the Chief Justice S.S. Sandhawalia of the Division Bench of the Punjab and Haryana High Court in *State of Haryana Vs. Kailashwati* :–
>
> "Once it is held as it inevitably must be that the solatium provided for under Section 23 (2) of the Act forms an integral and statutory part of the compensation awarded to a land owner, then from the plain terms of Section 28 of the Act, it would be evident that the interest is payable on the compensation awarded and not merely on the market value of the land. Indeed the language of Section 28 does not even remotely refer to market value alone and in terms talks of compensation or the sum equivalent thereto. The interest awardable under Section 28 therefore would include within its ambit both the market value and the statutory solatium. It would be thus evident that the provisions of Section 28 in terms warrant and authorise the grant of interest on solatium as well."
>
> 27. In our view the aforesaid statement of law is in accord with the sound principles of interpretation. Hence the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium."

In view of the aforesaid, the interest is payable on solatium as well as the interest as the same forms a part of the award.

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329. MOTOR VEHICLES ACT, 1988 – Sections 168 and 173

Motor accident – Deceased travelling on the roof top of the bus – Whether it amounts to contributory negligence on the part of driver/ conductor of the bus and the deceased? Held, Yes.
Manager, The Oriental Insurance Company Ltd. v. Mantola and others
Reported in 2006 (3) MPHT 115 (DB)

Held:

In view of the aforesaid pronouncement of law it is quite clear that two views have been stated, viz., (i) if a person is allowed to travel on the roof top

that would tantamount to rash and negligent act on the part of the owner and the driver and hence, the owner is vicariously liable and, therefore, the Insurance Company should indemnify the owner; (ii) that in view of the statutory provision a passenger is not supposed to sit on the roof top, but if he is allowed to sit on the roof top he also contributes to the occurrence of the accident. In our considered opinion, the second view that a person travels on the roof top contributes to the accident is correct and we are in respectful agreement with the same keeping in view the statutory provision engrafted under Section 123 of the Motor Vehicles Act...

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330. INDIAN PENAL CODE, 1860 – Section 376

Rape – Consent given by prosecutrix on a promise that accused would marry her on a later date – Whether promise can be said to be based on misconception of fact? Held, No

"Consent", meaning of – Law explained.

Abdul Salam v. State of M.P.

Reported in 2006 (3) MPHT 121

Held:

In *Uday Vs. State of Karnataka, AIR 2003 SC 1639,* it has been held :–

> "The consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a 'misconception of fact'. A false promise is not a fact within the meaning of the Code. There is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence. Absence of consent being one of them."

(ii) The Apex Court in *Deelip Singh alias Dilip Kumar vs. State of Bihar, AIR 2005 SC 203,* examining the case on "Consent" of the prosecutrix held as under :–

> "In the instant case, not at the first instance but afterwards the accused obtained consent of victim girl to sexual intercourse on the basis of promise to marry which was not acted upon. But at the first instance also, she was not subjected to rape against her will. The predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her about the prospect of

marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the First Information Report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a week moment. Nor does her evidence indicate that she was incapable of under-standing the nature and implications of the act which she consented to. Another statement of significance is that she tried to resist the talk of marriage by telling the accused that marriage was not possible because they belonged to different castes. However, she agreed to marry him after she was raped and under the impression that he would marry, she did not complain to anybody. These statements do indicate that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the *pros* and *cons* of the act. The prospect of the marriage proposal not materializing had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. Incidentally, the awareness of the prosecutrix that the marriage may not take place at all in view of the caste barrier was an important factor for holding that her participation in the sexual act was voluntary and deliberate. In the aforesaid circumstances, it cannot be said that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. No doubt the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. But there is no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise made was false to his knowledge. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, accused cannot be convicted."

On facts and in the circumstances it has been proved that the prosecutrix (P.W.2) aged about 18 years was a consenting party to the alleged act of sexual intercourse by the appellant. It cannot be said that her consent was obtained by putting in fear of death or of hurt. A consent given by the prosecutrix on a false promise of marriage is not a fact within the meaning of Penal Code for determining whether the consent given by the prosecutrix was voluntary or under a misconception of fact. Therefore, the Court below erred in recording conviction of appellant under Section 376 of the IPC.

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331. GUARDIANS AND WARDS ACT, 1890 – Section 25
Custody of minor – Relevant factors for deciding the issue of minor's custody.
Ram Kishore Singh v. Nirmala Devi Kushwahs and another
Reported in 2006 (3) MPHT 156 (DB)

Held:

It is well settled that in matters concerning custody of minor children, welfare of the minor and not the legal right of this or that particular party is paramount consideration. Regarding custody of minor the following genuine facts are to be kept in mind:–

(a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.

(b) His physical, emotional and educational needs.

(c) The likely effect on him on any change in the circumstances.

(d) His age, sex, ground and any characteristics, which the Court considered relevant and lastly.

(e) Any harm which he has suffered or is at risk of suffering.

Therefore, the Court should take into consideration duly weightage to the relevant considerations and facts which appears to be just in the custody of the child welfare.

On the same guidelines about welfare of the child in *Jayant Barar Vs. Deepak Barar, AIR 1994 NOC 269* MP, the Court has expressed their opinion.

In this case, in the statement before the Court, the minor expressed his desire to live with his grand father. During the course of proceedings in appeal, by order of the Court, he was kept in hostel and both the parties were kept away so that he should not be influenced by either side. He has appeard before this Court on the date of final hearing of this appeal and in the Court he has again expressed that he wants to reside with his grand father, who is the present appellant.

The Apex Court has laid down some guidelines in similar circumstances in the case of *Kirtikumar maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi, AIR 1992 SC 1447,* in which it is laid down that,–

"Pursuant to our order dated March 27, 1992 the children namely, Vishal and Rikta are present before us in these chamber proceedings. Their Maternal uncle Kirtikumar and their father Pradipkumar are also present. Vishal and Rikta both are intelligent children. They are more matured than their age. We talked to the children exclusively for about 20/25 minutes in the chamber. Both of them are bitter about their father and narrated various episodes showing ill-treatment of their

mother at the hands of their father. They categorically stated that they are not willing to live with their father. They further stated that they are very happy with their maternal uncle Kirtikumar who is looking after them very well. We tried to persuade the children to go and live with their father for some time but they refused to do so at present. After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage".

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332. SERVICE LAW :

Employment of temporary, contractual or daily wages basis – Such employment not being a regular appointment, the employee cannot claim to be absorbed in service – Law explained.

Principal, Mehar Chand Polytechnic and another v. Anu Lamba and others

Judgment dated 08.08.2006 by the Supreme Court in Civil Appeal No. 7051 of 2002, reported in (2006) 7 SCC 161

Held:

The Constitution Bench in *Secy., State of Kamataka v. Uma Devi (3), (2006) 4 SCC 1* in regard to the temporary employees clearly opined : (SCC p. 40, para 48)

> "There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatement with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

It was further observed: (SCC p. 40, para 49)

"The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."

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333. CRIMINAL PROCEDURE CODE, 1973 – Section 482

Inherent powers of the High Court u/s 482, ambit and scope of – Exercise of inherent jurisdiction, mode of – Law explained.

Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS and another

Judgment dated 10.08.2006 by the Supreme Court in Criminal Appeal No. 36 of 2002, reported in 92006) 7 SCC 188

Held:

Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. The courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any

express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle *"quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest"* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* do to real and substantial justice for the administrtion of which alone the courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers the court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complant; the court may examine the question of fact. When a compalint is sought to be quashed, it is permissible to look into the materials to assess what the compalinant has alleged and whether any offence is made out even if the allegations are accepted in toto.

In *R.P. Kapur v. State of Punjab, (1960) 3 SCR 388* this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings: (SCR p. 393)

> (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
>
> (ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in *State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335.* A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp. 378-79, para 102)

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of a the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absured and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

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PART - III

CIRCULARS/NOTIFICATIONS

[72] **Notification No. C-35848-II-15-50-87 dated 29th August, 2006,** *[Published in M.P. Rajpatra (Asadharan) dated 30-8-2006 Pages 833-834 (9)]* .- In exercise of powers conferred by Section 122 read with Section 89 and sub-section (1) of Section 128 of the **Code of Civil Procedure, 1908 (No. 5 of 1908)**, the High Court of Madhya Pradesh with the previous approval of State Government under Section 126 of the Code, hereby makes the following rules for regulating the procedure for settlement of dispute outside the Court, the same have been previously published as required under Section 122 of the said Code, namely : -

Rules
PART-I

ALTERNATIVE DISPUTE RESOLUTION RULES, 2006

1. Short Title and Commencement : (1) These rules may be called the **Civil Procedure Alternative Dispute Resolution Rules, 2006**.

(2) They shall come into force from the date of their publication in the "Madhya Pradesh Gazette."

2. Definitions :– (1) In these rules, unless the context otherwise requires, –

"Code" means the Code of Civil Procedure, 1908 (No. 5 of 1908);

(2) Words and expressions used but not defined in these rules shall have the same meaning, as assigned to them in the Code.

3. Procedure for directing parties to opt for alternative modes of settlement: (a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under sub-section (1) of Section 89 of the Code and the parties shall submit to the Court their responses within thirty days of the first hearing.

(b) At the next hearing, which shall be not later than thirty days of the of the receipt of responses, the Court shall reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Rule 1 (a) of Order X, of the said Code in the manner stated hereunder :

Provided that the Court, in the exercise of such power, shall not refer any dispute to Arbitration or to Judicial settlement by a person or institution without the written consent of all the parities to the suit.

4. **Persons authorized to take decision for the Union of India, State Governments and others.** – (1) For the purpose of Rule 3, the Union of India or the Government of a State or a Union Territory, or Local Authorities, all Public Sector Undertakings, all statutory corporations and all Public Authorities shall nominate a person or person or group of persons, who is or are authorized to take a final decision as to the mode of Alternative Dispute Resolution in which it proposes to opt in the event of direction by the Court under Section 89 of the Code and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate Courts in this behalf as soon as such nomination is received from such Government or authorities.

(2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in sub-rule (1) shall, if it is a plaintiff, file along with the plaint or if it is a defendant file, along with or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorized to take a final decision as to the mode of alternative dispute resolution, which the party prefers to adopt in the event of the Code directing the party to opt for one or other mode of Alternative Dispute Resolution.

5. **Court to give guidance to parties while giving direction to opt.**– (a) Before directing the parties to exercise option under clause (b) of Rule 3, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely: -

(i) that, it will be to the advantage of the parties, so far as time and expense are concerned, to opt for any one of these modes of settlement referred to in Section 89 of the Code rather than seek a trial on the disputes arising in the suit;

(ii) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in clause (a) of sub-section (1) of Section 89 of the Code;

(iii) that, where there is a relationship between the parties which requires to be preserved, it will be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of Section 89 of the Code.

Explanation. - Dispute arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to Lok Adalat or to Judicial Settlement as envisaged in clause (c) of sub-section (1) of Section 89 of the Code.

(v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement as explained below:

Settlement by 'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passed an award by the application of the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996),** in so far as they referred to arbitration.

Settlement by 'Conciliation' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996)** in so far as they relate to conciliation, and in particular, in exercise of his powers under Sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or re-formulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2006 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions, which affect them.

'Settlement in Lok Adalat means settlement by Lok Adalat as **Contemplated by the Legal Services Authority Act, 1987 (39 of 1987).** 'Judicial settlement' means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the **Legal Services Authorities Act, 1987 (39 of 1987)** and whereafter such reference, the provisions of the said Act apply, as if the dispute was referred to a Lok Adalat under the provisions of that Act.

6. Procedure for references by the Court to the different modes of settlement: – (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (b) of Rule 3 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996)** which are applicable after the stage of making of the reference to arbitration under the Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to Lok Adalat, the procedure envisaged **under the Legal Services Authority Act, 1987 (39 of 1987)** and in particular by Section 20 of that Act, shall apply;

(c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within 30 days of the direction under clause (b) of Rule 3 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the **Legal Services Authority Act, 1987 (39 of 1987)** which are applicable after the stage of making of the reference to Lok Adalat under the Act, shall apply as if the proceedings were referred for settlement under the provision of that Act;

(d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or Lok Adalat, or to Judicial Settlement, within thirty days of the direction of the Court under clause (b) of Rule 3, they shall consider, if they could agree for reference to conciliation or mediation, within the same period.

(e) (i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 3, and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of **Arbitration and Conciliation Act, 1996 (26 of 1996)** which are applicable after the stage of making of the reference to conciliation under this Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act;

(ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 3 and the Court shall, within thirty days of the application, refer the matter to Mediation and then the **Mediation Rules, 2006,** shall apply;

(f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under clause (b) of Rule 3, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application; and

(i) in case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996)** which are applicable after the stage of making of the reference to conciliation under that Act, shall apply;

(ii) in case all the parties agree for mediation, the Court shall refer the matter to mediation in accordance with the Civil Procedure - Mediation Rules, 2006.

(iii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to conciliation, the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996)** which are applicable after the stage of making of the reference to conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure - Mediation Rules, 2006 shall apply;

(g) (i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under clause (b) of rule 3, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(ii) After hearing the parties or their representatives on the day so fixed, the court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to Conciliation, the provisions of the **Arbitration and Conciliation Act, 1996 (26 of 1996)** which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure - Mediation Rules, 2006 shall apply.

(h) (i) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings of the Court, opt for any one of the modes of alternative dispute resolution not shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian.

(ii) Where an application is made to Court for leave to enter into a settlement initiated into in the alternative dispute resolution proceedings on behalf of a minor or other person under disability and such minor or other person under disability is represented by Counsel of pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement.

7. Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or Judicial Settlement or Mediation: – (1) Where a suit has been referred for settlement for conciliation, mediation of judicial settlement and has not been settled or where it is felt that it would not be proper in the interest of justice to proceed further with the matter,

the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

(2) Upon the reference of the matter back to the Court or under sub-rule (1) or under sub-section (5) of Section 20 of **the Legal Services Authorities Act, 1987 (39 of 1987)** the Court shall proceed with the suit in accordance with law.

8. Training in alternative methods of resolution of disputes, and preparation of manual. – (a) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts or Courts of equal status are located, by requesting bodies recognized by the High Court or the Universities imparting legal education or retired Faculty Members or other persons who, according to the High Court are well-versed in the techniques of alternative methods of resolution of dispute, to conduct training courses for lawyers and judicial officers.

(b) (i)The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, other members of the Bar specially qualified in the techniques of alternative dispute resolution for the purpose referred to in clause (a) above and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, or authority or person in the case of judicial settlement or conciliators and mediators;

(ii) The said manual shall describe the various methods of alternative dispute resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

(c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers;

(d) Persons who have experience in the matter of alternative dispute resolution procedure, and in particular in regard to conciliation and mediation, shall be given preference in the matter of empanelment for purposes of conciliation or mediation.

9. Applicability to other Proceedings. –The provisions of these Rules shall apply to proceedings before the Courts, including Family Courts constituted under the Family Courts Act, 1984 (66 of 1984), while dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act, 1984 (66 of 1984).

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005

(Continued from August 2006 Issue)

8. Vacation of office by Chairperson or Member.– (1) If the Chairperson or, as the case may be, a member,-

(a) becomes subject to any of the disqualifications mentioned in section 7; or

(b) tenders his resignation under sub-section (2) of section 5, his seat shall thereupon become vacant.a

(2) If a casual vacancy occurs in the office of the Chairperson or a Member, whether by reason of his death, resignation or otherwise, such vacancy shall be filed within a period of ninety days by making afresh appointment in accordance with the provisions of section 4 and the person so appointed shall hold office for the remainder of the term of office for which the Chairperson, or a Member, as the case may be, in whose place he is so appointed would have held that office.

9. Vacancies etc., not to invalidate proceedings of Commission.– No act or proceeding of the Commission shall be invalid merely by reason of-

(a) any vacancy in, or any defect in the constitution of, the Commission; or

(b) any defect in the appointment of a person as the Chairperson or Member, or

(c) any irregularity in the procedure of the Commission not affecting the merits of the case.

10. Procedure for transaction of business.– (1) The Commission shall meet regularly and its office at such time as the Chairperson thinks fit, but three months shall not intervene between its last and the next meeting.

(2) All decisions at a meeting shall be taken by majority:

Provided that in the case of equality of votes, the Chairperson, or in his absence the person presiding, shall have and exercise a second or casting vote.

(3) If for any reason, the Chairperson, is unable to attend the meeting of the Commission, any Member chosen by the Members present from amongst themselves at the meeting, shall preside.

(4) The Commission shall observe such rules of procedure in the transaction of its business at a meeting, including the quorum at such meeting, as may be prescribed by the Central Government.

(5) All orders and decisions of the Commission shall be authenticated by the Member-Secretary or any other officer of the Commission duly authorized by member-secretary in this behalf.

11. Member-Secretary, officers and other employees of Commission.– (1) The Central Government shall, by notification, appoint an officer not below the rank of the Joint Secretary or the Additional Secretary to the Government of India as a Member-Secretary of the Commission and shall make available to the Commission such other officers and employees as may be necessary for the efficient performance of its functions.

(2) The Member-Secretary shall be responsible for the proper administration of the affairs of the Commission and its day-to-day management and shall exercise and discharge such other powers and perform such other duties as may be prescribed by the Central Government.

(3) The salary and allowances payable to, and the other terms and conditions of service of the Member-Secretary, other officers and employees, appointed for the purpose of the Commission shall be such as may be prescribed by the Central Government.

12. Salaries and allowance to be paid out of grants.– The salaries and allowances payable to the Chairperson and Members and the administrative expenses, including salaries, allowances and pensions payable to the Member-secretary, other officers and employees referred to in section 11, shall be paid out of the grants referred to in sub-section (1) of section 27.

CHAPTER III

FUNCTIONS AND POWERS OF THE COMMISSION

13. Functions of Commission.– (1) The Commission shall perform all or any of the following functions, namely:-

(a) examine the review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;

(b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;

(c) inquire into violation of child rights and recommend initiation of proceedings in such cases;

(d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/ AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measure;

(e) look into the matters relating to Children in need of special care and protection including children in distress, marginalized and disadvantages children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;

(f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;

(g) undertake and promote research in the field of child rights;

(h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publication, the media, seminars and other available means;

(i) inspect or cause to be inspected any juvenile custodial home, or any other place or residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organization; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;

(j) inquire into complaints and take suo motu notice of matters relating to,-

(i) deprivation and violation of child rights;

(ii) non-implementation of law providing for protection and development of children;

(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children,

or take up the issues arising out of such matters with appropriate authorities; and

(k) such other functions as it may consider necessary for the promotion of child rights and any other manner incidental to the above functions.

(2) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

14. Powers relating to inquiries. – (1) The Commission shall, while inquiring into any matter referred to in clause (j) of sub-section (1) of section 13 have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 (5 of 1908) and, in particular, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office; and

(e) issuing commissions for the examination of witnesses or documents.

(2) The Commission shall have the power to forward any case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

15. Steps after inquiry. – The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:-

(i) where the inquiry discloses, the Commission of violation of child rights of a serious nature or contravention provisions of any law for the time being in

force, it may recommended to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(ii) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(iii) recommend to the concerned Government or authority for the grant of such interim relief to the victim or the members of his family as the Commission may consider necessary.

16. Annual and special reports of Commission.- (1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

2. The Central Government and the State Government concerned, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any, within a period of one year from the date of receipt of such report.

(3) The annual report shall be prepared in such form, manner and contain such details as may be prescribed by the Central Government.

CHAPTER IV

STATE COMMISSION FOR PROTECTION OF CHILD RIGHT

17. Constitution of State Commission for Protection of Child Rights.– (1) A State Government may constitute a body to be known as the ..... (name of the State) Commission for Protection of Child Rights to exercise the powers conferred upon, and to perform the function assigned to, a State Commission under this Chapter.

(2) The State Commission shall consist of the following Members, namely:-

(a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and

(b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the State Government from amongst person of eminence, ability, integrity, standing and experience in,-

(i) education;

(ii) child health, care, welfare or child development;

(iii) juvenile justice or care of neglected or marginalized children or children with disabilities;

(iv) elimination of child labour or children in distress;

(v) child psychology or sociology, and

(vi) laws relating to children.

(3) The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.

18. Appointment of Chairperson and other Members.– The State Government shall, by notification, appoint the Chairperson and other Members.

Provided that the Chairperson shall be appointed on the recommendation of a three Member Selection Committee constituted by the State Government under the Chairmanship of the Minister in-charge of the Department dealing with children.

19. Term of office and conditions of service of Chairperson and Members. – (1) The Chairperson and every Member shall hold office as such for a term of three years from the date on which he assumes office.

Provided that no chairperson or a member shall hold the office for more than two terms;

Provided that office as such after he has attained-

(a) in the case of Chairperson, the age of sixty-five years; and

(b) in the case of a Member, the age of sixty years.

(2) The Chairperson or a Member may, by writing under this hand addressed to the State Government, resign his office at any time.

20. Salary and allowances of Chairperson and Members.– The salaries and allowances payable to, and other terms and conditions of service of, the Chairperson and Members shall be such as may be prescribed by the State Government:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member, as the case may be, shall be varied to his disadvantage after his appointment.

21. Secretary, officers and other employees of the State Commission.– (1) The State Government shall, by notification, appoint an officer not below the rank of the Secretary to the State Commission as the Secretary of the State Commission and shall make available to the State Commission such other officers and employees as may be necessary for the efficient performance of its functions.

(2) The Secretary shall be responsible for the proper administration of the affairs of the State Commission and its day-to-day management and shall exercise and discharge such other powers and perform such other duties as may be prescribed by the State Government.

(3) The salary and allowances payable to, and the other terms and conditions of service of the Secretary, other officers and employees, appointed for the purpose of the State Commission shall be such as may be prescribed by the State Government.

22. Salaries and allowance to be paid out of grants.– The salaries and allowances payable to the Chairperson and Members and the administrative expenses, including salaries, allowances and pensions payable to the Secretary, other officers and employees referred to in section 21, shall be paid out of the grants referred to in sub-section (1) of section 28.

23. Annual and special reports of State Commission.– (1) The State Commission shall submit an annual report to the State Government and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that is should not be deferred till submission of the annual report.

(2) The State Government shall cause all the reports referred to in sub-section (1) to be laid before each House of State Legislature, where it consists of two House, or where such Legislature consist of one House, before that House along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(3) The annual report shall be prepared in such form, manner and contain such details as may be prescribed by the State Government.

24. Applications of certain provisions relating to National Commission for protection of Child Rights to State Commission.– The provisions of sections 7, 8, 9, 10, sub-section (1) of section 13 and section 14 and 15 shall apply to a State Commission and shall have effect, subject to the following modifications, namely:-

(a) references to "Commission" shall be construed as references to "State Commission";

(b) reference to "Central Government" shall be construed as references to "State Government"; and

(c) reference to "Member-Secretary" shall be construed as reference to "Secretary".

CHAPTER V

CHILDREN'S COURTS

25. Children's Courts.– For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a court of session to be a Children's Court to try the said offences:

Provided that nothing in this section shall apply if-

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted,

for such offences under any other law for the time being in force.

26. Special Public Prosecutor. – For every Children's Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

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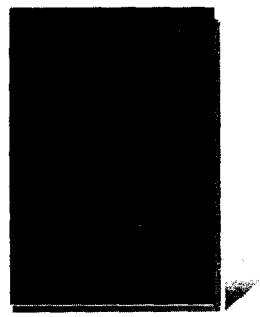

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Gold Medallist
Chief Editor: Supreme Court Cases

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