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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

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HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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4.	**Hon'ble Shri Justice S. K. Kulshrestha**	Member
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7.	**Hon'ble Shri Justice R.S. Jha**	Member

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(ARTICLES & MISC.)

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(NOTES ON IMPORTANT JUDGMENTS)

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TELEPHONE NUMBERS OF OFFICERS OF JOTRI

S.No.	Name	Office	Residence
1.	Hon'ble Shri Justice R.S. Garg, Chairman, High Court Training Committee	2629492	2608180
2.	Director (JOTRI)	2626945	2624594
3.	Additional Director (JOTRI)	2629588	2330784
4.	Deputy Director (JOTRI)	2629788	2600780

FROM THE PEN OF THE EDITOR

J.P. Gupta
Director

Esteemed Readers

The Rule of Law is the backbone of a democratic civilized society. It requires an efficient, strong and enlightened judicial system. By our Constitution, Judiciary has been entrusted with a great task of ensuring actualization of rights guaranteed to the citizens coupled with a duty to see whether other organs of the State are functioning within the ambit of their powers or not so as to achieve the goal of social, economic and political justice. Indian Judiciary is functioning well in the above indicated direction; that is why people of this country have immense and explicit faith and trust in our judicial system.

The effectiveness of judicial system qualitatively and quantitatively depends on the competent and efficient judges. The judges should have requisite skills and enthuse attitude to deliver justice. Otherwise, they may commit errors causing gross injustice to the persons approaching the judicial system for redressal of their grievances. Hence, it is necessary that the judicial officers must be suitably trained in order to improve their skills, knowledge and attitude.

Besides this, the traditional functions assigned to judicial officers like an arbitrator to settle disputes between citizens *inter se* has radically changed. The conventional judicial functions have assumed new dimensions and the traditional litigation has been undershadowed by new kinds of emerging litigations and methods like Negotiable Instruments Act, Environmental Laws, Intellectual Property Rights, Cyber Laws, Protection of Women from Domestic Violence Act, Mediation, Plea Bargaining etc. The result is that the role of Judiciary in the changed scenario has become more complex and diverse and the Judiciary is under continuous pressure to discharge its role pro-actively under the existing legal system. The Judiciary is maintaining its responsibility, accountability and independentness, which will in every sense inseparable. In summary, it is imperative that justice delivery system should match and answer effectively and efficiently to the requirements of litigants and this can be achieved only through systematic and organized judicial education and training. The aim of judicial education and training is to assist and strengthen the quality of impartiality, competitiveness, efficiency and fearlessness of the judges.

Keeping the above object in view, Judicial Officers' Training & Research Institute in the third quarter of the Year 2007 has conducted various workshops for the judicial officers of District Judiciary on divergent subjects like Juvenile Justice (Care and Protection of Children) Act, 2000 for Judicial Magistrates as well as Members of the Juvenile Justice Boards, Foundation Training in Mediation Procedures for Additional District Judges and Advocates, Protection of Women from Domestic Violence Act for Judicial Magistrates and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for Special Judges working under the Act so that their judicial output can be improved. Shortly, the Institute is going to organize Induction Training for the newly recruited Civil Judges Class II in three batches in two phases.

Moreover, this Journal is also a part of training process to the judicial officers and its aim is to make them aware about the latest developments in the field of law and justice.

This issue of the Journal, as usual, contains all useful and relevant material. In Part I of the issue, we have the privilege to publish the address on the subject 'Protection of Human Rights and the Role of Courts' delivered by Hon'ble Shri Justice Deepak Verma in the symposium organized by Amnesty International India, National Committee for Advocates Pune, National Committee for Legal Aid Services India and Madhya Pradesh State Legal Services Authority for judicial officers on 01.09.2007 at Jabalpur. Apart from that, articles on 'Child witness – Competency and Administration of Oath', 'Assessment of Age – An overview' and 'Law relating to Bank Guarantee and Injunction' also find place in Part I. Part II contains notes on important judgments of Supreme Court and Madhya Pradesh High Court. Part III & IV consist of important Circulars, Notifications, Acts and Rules.

I, on behalf of the Institute, express my sincere gratitude to the authors, who have taken pains and for contributing articles on different subjects for the benefit of judicial Officers and other readers. I hope that the Journal continues to retain its worth and utility to fulfill the requirements in order to strengthen one's knowledge in the ever developing field of law.

Thank you.

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Hon'ble Shri Justice S.K. Chawla, Former Judge, High Court of M.P. addressing the participants in the two days' workshop on – 'Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 ' held at JOTRI on 17th & 18th September, 2007. On His Lordship's right is Director, JOTRI

Hon'ble Shri Justice R.S. Garg, Chairman, High Court Training Committee delivering inaugural address on the opening day (28.09.2007) of the two days' workshop on – 'Juvenile Justice (Care & Protection of Children) Act, 2000'. On His Lordship's right is Director, JOTRI

HON'BLE SHRI JUSTICE RAMESH SURAJMAL GARG ASSUMES CHARGE

Hon'ble Shri Justice Ramesh Surajmal Garg on His Lordship's transfer from Gujarat High Court to High Court of Madhya Pradesh was administered oath of office on dated 17th September, 2007 by Hon'ble the Chief Justice Shri Anang Kumar Patnaik in a brief swearing-in-ceremony held in the Conference Hall of South Block of High Court of Madhya Pradesh at Jabalpur.

Was born on 18th June, 1948 at Mhow. Having completed early education from Mhow, did graduation from Indore Christian College. Obtained Law Degree from the same college in 1971 and enrolled as an Advocate on 27th August, 1971. Practiced in Indore Bench of the M.P. High Court and District Courts in Civil, Criminal, Constitutional, Labour, Company Law and Service matters.

Was appointed as an Additional Judge of the M.P. High Court on 15th December, 1994 and permanent Judge on 19th July, 1995. Was transferred to and allocated as a Judge of the Chattisgarh High Court and was appointed as Acting Chief Justice on 1st November, 2000. His Lordship established and inaugurated the High Court of Chhatisgarh and remained there upto 31st October, 2001. His Lordship was transferred to the High Court of Patna as a Judge and worked there from 1st November, 2001 to 26th February, 2005. Thereafter was transferred to High Court of Gujarat on 28th February, 2005 and was transferred back to the High Court of Madhya Pradesh and took oath of office on 17th September, 2007.

HON'BLE SHRI JUSTICE S.S. JHA DEMITS OFFICE

Hon'ble Shri Justice S.S. Jha demitted office on 15th October, 2007 on His Lordship's attaining superannuation.

Born on 15th October, 1945. Passed Higher Secondary School Examination from Model High School, Jabalpur. Did B.Sc. from Government Science College, Jabalpur. Passed Law from University Teaching Department and was nominated as President of the University Law Society. Graduate Diploma in French. Practiced at Jabalpur in District Court, High Court and Tribunals mainly on Civil, Constitutional, Labour, Company and Service matters. Had been counsel for the Union of India and Railways and represented number of Co-operative Banks.

Was appointed as Additional Judge of the High Court of Madhya Pradesh on 24th January, 1996 and permanent Judge from 22nd January, 1999. Participated in the International Conference on Intellectual Property Rights and another Conference on "Copyright Enforcement a publishing industry perspective" organized by the Law Commission of India, British Council and European Union.

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

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PART - I

मानवाधिकार संरक्षण एवं न्यायालयों की भूमिका

[माननीय न्यायमूर्ति श्री दीपक वर्मा, म.प्र. उच्च न्यायालय द्वारा 'मानव अधिकारों के संरक्षण' विषय पर अधीनस्थ न्यायालय के न्यायाधीशों की दिनांक 1.9.07 को एमनेस्टी इन्टरनेशनल इण्डिया, नेशनल कमेटी फॉर एडवोकेट पुणे, नेशनल कमेटी फॉर लीगल एड सर्विसेस इंडिया एवं म.प्र. स्टेट लीगल सर्विसेस अथॉरिटी द्वारा आयोजित सिम्पोज़ियम में मुख्य अतिथि के रूप में दिया गया व्याख्यान।]

हमें गर्व है कि हम विश्व के सर्वाधिक सफल विराट लोकतांत्रिक गणराज्य के नागरिक हैं । लोकतंत्र का अर्थ है जन सामान्य का राज्य। लोकतंत्र में सामान्य जन उनके द्वारा चुने गये प्रतिनिधियों के माध्यम से शासन करते हैं। संवैधानिक लोकतंत्र का आधार मूलभूत माननीय स्वतंत्रता है । जन सामान्य का अर्थ मात्र शक्तिशाली और सम्पन्न का राज्य न होकर पीड़ित और निरीह जन का राज्य है इसलिये लोकतंत्र के विकास की अवधारणा जन सामान्य की मूलभूत स्वतंत्रता और सामाजिक न्याय के इर्द गिर्द ही घूमती है। इसी कारण से भारतीय संविधान की प्रस्तावना भी मानवीय प्रतिष्ठा एवं स्वतंत्रता को संरक्षण देने हेतु मूलभूत अधिकारों की उद्घोषणा करती है और यहीं से मानव अधिकारों की संरक्षा की अवधारण भी प्रतिध्वनित होती है।

''मानव अधिकार'' शब्द का सर्वप्रथम प्रयोग संयुक्त राष्ट्र के चार्टर में सामने आया जिसे द्वितीय विश्व युद्ध के बाद सेंनफ्रांसिसको में दिनांक 25 जून, 1945 को अंगीकृत किया गया। मानव अधिकारों के विधिक रूप में अंगीकृत करने का प्रथम दृष्टांत दिनांक 10 दिसम्बर 1948 को संयुक्त राष्ट्र महासभ – 1948 में ''मानव अधिकारों की सार्वत्रिक उद्घोषणा'' के रूप में समक्ष आता है, जिसे भारतीय संविधान के भाग 3 में 'मूलभूत अधिकारों' एवं भाग 4 में 'राज्य के नीति निर्देशक तत्व' के रूप में अंगीकृत किया गया है। कालान्तर में वर्ष 1976 में संविधान संशोधन द्वारा भाग4 (क) जोड़ा गया जो भारतीय नागरिकों के मूलभूत कर्तव्यों को उल्लेखित करता है, जिसमें सभी नागरिकों से राष्ट्रीय एवं अंर्तराष्ट्रीय मान्यता प्राप्त मानव अधिकारों के सम्मान और संरक्षण की अपेक्षा की गई है। इस प्रकार निर्विवाद रूप से कहा जा सकता है कि सभी महत्वपूर्ण मानव अधिकार जो कि मानव अधिकारों की सावत्रिक उद्घोषणा एवं अंतर्राष्ट्रीय प्रतिज्ञापत्रों में मान्य किये गये थे, भारतीय न्यायालयों द्वारा प्रवर्तनीय भी है।

धारा 2(1) (द) मानव अधिकारा संरक्षण अधिनियम में उल्लेखित परिभाषा के अनुसार – ''मानव अधिकार'' से संविधान द्वारा प्रत्याभूत किये गये या अंतर्राष्ट्रीय प्रतिज्ञा पत्रों में सम्मिलित और भारत में न्यायालयों द्वारा प्रवर्तनीय व्यक्ति के जीवन, स्वतंत्रता, समानता एवं प्रतिष्ठा से संबंधित अधिकार अभिप्रेत है।

अब प्रश्न यह उपस्थित होता है कि न्यायालयों द्वारा किस प्रकार इन मानव अधिकारों का संरक्षण किया जा सकता है?

सर्वोच्च न्यायालय एवं उच्च न्यायालयों द्वारा मूलभूत अधिकारों की अवधारणा को विस्तार दिया गया और मानव अधिकार के विभिन्न आयामों को मूलभूत अधिकारों के साथ जोड़कर नवीन ''मानव अधिकार न्यायशास्त्र'' (Human Rights Jurisprudence) की रचना की गई।

मानव अधिकारों के हनन के विरूद्ध सर्वोच्च न्यायालय की सकारात्मक सक्रियता और मानव अधिकारों के संरक्षण के प्रति न्यायपालिका की कटिबद्धता के अनेक उदाहरण हैं :–

1. **एकान्त कारावास के विरूद्ध मानवाधिकार संरक्षण** – सुनील बत्रा विरूद्ध देहली प्रशासन, ए.आई.आर. 1978 सु.को. 1675
2. **बच्चों के मानवाधिकारों का संरक्षण** – एम.सी. मेहता विरूद्ध तमिलनाडू राज्य, (1996) 6 एस.सी. सी. 756, बंधुआ मुक्ति मोर्चा विरूद्ध भारत संघ व अन्य, ए.आई.आर.1997 एस.सी.2218
3. **लिंग भेद के विरूद्ध मानवाधिकार संरक्षण** – एयर इंडिया विरूद्ध नर्गिस मिर्जा, ए.आई.आर. 1981 एस.सी. 1829, मेकिनन मेकेंजी एंड कं. विरूद्ध एन्ड्रू डी कोस्टा, ए.आई.आर. 1987 एस.सी. 1281
4. **कार्यस्थल पर महिलाओं के सम्मान एवं मानवाधिकारों का संरक्षण** – विशाखा विरूद्ध राजस्थान राज्य, ए.आई.आर.1997 एस.सी. 3011
5. **भोजन एवं निवास के मानवाधिकारों का संरक्षण** – जे.पी. रविदास एवं अन्य विरूद्ध नवयुवक हरिजन उत्थापन मल्टीयुनिट इंडस्ट्री को–ऑपरेटिव सोसायटी लि., ए.आई.आर. 1996 एस.सी. 2151, मधु किश्वर विरूद्ध बिहार राज्य, (1996) 5 एस.सी.सी. 125
6. **अनुसूचित जनजातियों के आर्थिक सशक्तिकरण संबंधी मानवाधिकार संरक्षण** – मुरलीधर दयानदेव केसेकर विरूद्ध विश्वनाथ पांडू बर्डे, 1995 सप्लीमेंट (2) एस सी सी 549
7. **आसरे एवं निवास संबंधी मानवाधिकार संरक्षण** – उत्तरप्रदेश आवास एवं विकास परिषद विरूद्ध फ्रेन्डस कोऑपरेटिव हाऊसिंग सोसायटी लि., ए.आई. 1996 एस.सी. 114
8. **स्वास्थ्य संबंधी मानवाधिकार संरक्षण** – पंजाब राज्य विरूद्ध मोहिन्दर सिंह चावला, ए.आई.आर. 1997 एस.सी. 1225
9. **समान कार्य समान वेतन संबंधी मानवाधिकार संरक्षण** – रणधीर सिंह विरूद्ध भारत संघ, ए.आई. आर. 1982 एस.सी. 879
10. **अनिवार्य एवं निःशुल्क प्राथमिक शिक्षा संबंधी मानवाधिकार संरक्षण** – जे.पी. उन्नीकृष्णन विरूद्ध आंध्रप्रदेश राज्य, ए.आई.आर. 1993 एस.सी. 2178
11. **विधिक सहायता संबंधी मानवाधिकार संरक्षण** – माधव विरूद्ध महाराष्ट्र राज्य, ए.आई.आर. 1978 एस.सी. 1584
12. **आजीविका संबंधी मानवाधिकार संरक्षण**– ओल्गा टेलिस विरूद्ध मुम्बई नगर निगम, (1985) 3 एस.सी.सी. 545
13. **निजता संबंधी मानवाधिकार संरक्षण** – गोविन्द विरूद्ध मध्यप्रदेश राज्य, ए.आई.आर. 1975 एस.सी. 1378
14. **अवैध गिरफ्तारी के विरूद्ध मानवाधिकार संरक्षण** – जोगेन्दर विरूद्ध उत्तरप्रदेश राज्य, (1994) 4 एस.सी.सी. 260

15. **स्वच्छ पर्यावरण संबंधी मानवाधिकार संरक्षण** – बेल्लोर सिटीजन वेलफेयर फोरम विरूद्ध भारत संघ, (1996) 5 एस.सी.सी. 647, आंध्रप्रदेश पाल्युशन कंट्रोल बोर्ड विरूद्ध प्रो. एम.व्ही. नायडू, (2001) 2 एस.सी.सी. 62

16. **शीघ्र विचारण संबंधी मानवाधिकार संरक्षण**– हुसैन आरा खातून विरूद्ध बिहार राज्य, ए.आई.आर. 1979 एस.सी. 1360

17. **हथकड़ी लगाने के विरूद्ध मानवाधिकार संरक्षण** – प्रेमशंकर विरूद्ध देहली प्रशासन, (1980) 3 एस.सी.सी. 526

18. **पुलिस प्रताड़ना के विरूद्ध मानवाधिकार संरक्षण** – फ्रांसिस कोराली विरूद्ध देहली प्रशासन, (1981) 1 एस.सी.सी. 608, डी.के. बासु विरूद्ध पश्चिम बंगाल राज्य, (1997) 1 एस.सी.सी 416

19. **लोक स्थान पर धूम्रपान के विरूद्ध मानवाधिकार संरक्षण** – मुरली एस.देवरा विरूद्ध भारत संघ, (2001) 8 एस.सी.सी. 765

20. **अभिरक्षाधीन हिंसा के विरूद्ध मानवाधिकार संरक्षण** – नीलबटी बेहरा विरूद्ध उड़ीसा राज्य, (1993) 2 एस.सी.सी. 746, सुबे सिंह विरूद्ध हरियाणा राज्य, (2006) 3 एस.सी.सी. 178

21. **जेलों में दुर्दशा के विरूद्ध मानवाधिकार संरक्षण** – रामामूर्ति विरूद्ध कर्नाटक राज्य, ए.आई.आर. 1997 एस.सी. 1739

22. **निर्दोषिता के उपधारणा संबंधी मानवाधिकार संरक्षण** – रणजीत सिंह विरूद्ध महाराष्ट्र राज्य, ए.आई.आर. 2005 एस.सी. 2277

23. **सार्वजनिक फांसी के विरूद्ध मानवाधिकार संरक्षण** – अर्टनी जनरल विरूद्ध लकमा देवी, ए.आई. आर. 1986 एस.सी. 467

यह सम्पूर्ण सूची न होकर उदाहरण मात्र है, अब अधीनस्थ न्यायापालिका से मानवाधिकार संरक्षण की अपेक्षा पर विचार करना समीचीन होगा। अधीनस्थ न्यायपालिका निम्नलिखित मामलों में प्रत्यक्ष भूमिका रखती है।

1. गिरफ्तारी
2. हथकड़ी लगाना
3. रिमांड कार्यवाही
4. अभिरक्षाधीन पूछताछ
5. अभिस्वीकृतियाँ
6. जमानत
7. निःशुल्क विधिक सहायता
8. शीघ्र विचारण

9: अभिरक्षाधीन अभियुक्तों की अवस्था

10. जेल अभिरक्षा की परिस्थितियाँ

11. न्यायालयीन कार्यवाहियों की नियमिता

12. न्यायालय की जानकारी में स्वप्रेरणा से अथवा अन्यथा लाये गये मानवाधिकार हनन।

मानव अधिकार संरक्षण अधिनियम मानव अधिकारों के संरक्षण हेतु राष्ट्रीय एवं प्रादेशिक स्तर पर आयोग के गठन का प्रावधान करता है। आयोग को मानव अधिकार हनन की शिकायतों का संज्ञान लेकर कार्यवाही करने की अधिकारिता दी गई है। ऐसी स्थिति में यह प्रश्न उद्‌भूत होना स्वाभाविक है कि आयोग के उपलब्ध होते हुए मानव अधिकार संरक्षण हेतु न्यायालयों की क्या भूमिका होगी? साथ ही यह विचार करना भी आवश्यक है कि अधीनस्थ न्यायालय मानवाधिकार संरक्षण में उनकी अपेक्षित भूमिका किस प्रकार निर्वाह कर सकते हैं?

धारा 30 – मानवाधिकार संरक्षण अधिनियम मानवाधिकार हनन संबंधी अपराधों के त्वरित निराकरण के उद्‌देश्य से मानवाधिकार न्यायालयों की स्थापना उपबंधित करती है, इसके अनुसार प्रत्येक राज्य में मुख्य न्यायाधिपति की सहमति से प्रत्येक जिले में एक सत्र न्यायालय को मानवाधिकार न्यायालय अधिसूचित किया जाना अपेक्षित है। मध्यप्रदेश राज्य शासन द्वारा राजपत्र में प्रकाशित अधिसूचना दिनांक 09.07.1996 के माध्यम से प्रत्येक सत्र न्यायाधीश को 'मानवाधिकार न्यायालय' के रूप में अधिसूचित किया गया है।

धारा 4(2) दंड प्रक्रिया संहिता उपबंधित करती है कि भारतीय दंड संहिता से भिन्न किसी अन्य अपराध से संबंधित अन्वेषण जांच एवं विचारण पर दंड प्रक्रिया संहिता के सामान्य प्रावधान लागू होंगे। इस प्रकार मानवाधिकार न्यायालयों को मानवाधिकार हनन संबंधी अपराधें के विचारण का समवर्ती क्षेत्राधिकार प्राप्त है। इस संबंध में ***तमिलनाडू पंज्ञानगुड़ी मक्कलसंगम विरूद्ध तमिलनाडू राज्य,*** दांडिक पुनरीक्षण क्रमांक 868/1995 में प्रतिपादित निर्णय दिनांक 23.06.1997 देखा जा सकता है। 'मानवाधिकार न्यायालय' किसी भी अपराध से संबंधित समंस, वारंट अथवा सत्र विचारण प्रक्रिया के अनुरूप विचारण कर सकता है। जहाँ अपराध विशेष सत्र न्यायालय (मानवाधिकार न्यायालय) द्वारा विचारणीय है वहाँ पर ***गांगुला अशोक विरूद्ध आंध्रप्रदेश राज्य, (2000) 5 एस.सी.सी. 504*** की अपेक्षा के अनुसार मजिस्ट्रेट द्वारा उक्त अपराध से संबंधित प्रकरण धारा 209 दं.प्र.सं. के अंतर्गत मानवाधिकार न्यायालय को उपार्पित किया जाना अपेक्षित है। यदि किसी विचारण के दौरान सत्र न्यायाधीश अथवा अन्य न्यायालय के समक्ष मानवाधिकार हनन संबंधी कोई मामला जानकारी में आता है तो उसे संबंधित क्षेत्राधिकारिता के मजिस्ट्रेट को धारा 190 (1) (ग) द.प्र.सं. के अन्तर्गत संज्ञान लेकर आवश्यक अन्वेषण एवं उपार्पण कार्यवाही के निर्देश सहित प्रेषित कर सकते हैं। सभी सत्र न्यायाधीश एवं न्यायिक मजिस्ट्रेट स्वप्रेरणा से अथवा अन्यथा उनकी जानकारी में लाये गये मानवाधिकार हनन संबंधी अपराधों का संज्ञान लेकर उन्हें विधिवत् प्रक्रिया अनुसार मानवाधिकार न्यायालय को अग्रेषित कर सकते हैं।

प्रत्येक न्यायालय मानवाधिकार हनन संबंधी सूचना को मानवाधिकार आयोग को अग्रेषित कर सकता है। जहाँ पर विचारण के दौरान किसी न्यायालय के समक्ष लोक प्राधिकारी के द्वारा मानवाधिकार हनन का तथ्य जानकारी में आता है वहाँ न्यायालय के पास 2 विकल्प उपलब्ध है। प्रथमतः, यदि कोई अपराध गठित हो रहा

हो तो न्यायालय दंड प्रक्रिया संहिता के प्रावधानुसार उसका संज्ञान लेकर कार्यवाही करने के लिए अधिकृत है। द्वितीयतः, उक्त मानव अधिकार हनन की सूचना मानवाधिकार आयोग को दी जा सकती है।

विगत दिनों एक न्यूज चैनल में भागलपुर में पुलिस बर्बरता की एक घटना ने सभी को उद्वेलित किया । एक महिला के गले से चैन खींचने वाले व्यक्ति को सार्वजनिक रूप से जनता एवं पुलिस द्वारा बुरी तरह पीटा गया और उसके पैरों को मोटर सायकिल से बांधकर घसीटा गया। निश्चित रूप से यह मानवाधिकार हनन की विद्रूपित घटना थी । मीडिया ने जब उक्त व्यक्ति से पूछा कि इस घटना के लिये वह किसे दोषी मानता है? उसने प्रशासन को दोषी ठहराया।

आज का युग जनचेतना का है । निरीह पीड़ित व्यक्ति भी अपनी स्वतंत्रता और अधिकारों के प्रति जागरूक है। उसकी पीड़ा का अहसास और बढ़ जाता है, जब वह अपने अधिकारों को जानते हुए भी असहाय महसूस करता है।

इन स्थितियों पर कवि दुष्यंत की पंक्तियाँ सटीक हैं –

''वो आदमी नहीं है मुकम्मल बयान है,
माथे पर उसके चोट का गहरा निशान है,
सामान कुछ नहीं है, फटेहाल है मगर,
झोले में उसके पास, कोई संविधान है।''

इस जनचेतना और सामाजिक न्यायसंघर्ष के प्रति न्यायापालिका की सहृदय, संवेदनशील एवं सकारात्मक पहल आज की आवश्यकता है इसलिये आपका दायित्व और गुरूत्तर हो जाता है।

अंत में गुरूदेव रविन्द्रनाथ टैगोर और महात्मा गांधी के संवाद को उद्धरित कर समापन करूंगा ।

गुरूदेव ने एक बार गांधी जी से पूछा – आप इतने अरसिक क्यों हैं? क्या भोर में सूर्योदय की लालिमा आप के हृदय को हर्ष विभोर नहीं करती? क्या पक्षियों के कलरव का दैवीय संगीत आपको रोमांचित नहीं करता? क्या खिलते गुलाब की पंखुड़ियों को देखना आपके हृदय को खुशी नहीं देता?

महात्मा गांधी ने जवाब दिया – गुरूदेव, मैं संवेदनाहीन नहीं हूँ पर मैं क्या करूं? मेरी केवल एक ही इच्छा, अभिलाषा और उत्कंठा है कि मैं गुलाब की लालिमा मेरे देश के लाखों नंगे भूखे गरीबों के गालों पर कब देख पाऊंगा ? कब मैं उनकी आहों और कराहों की जगह पंछियों की मीठी चहचहाहट सुन पाऊंगा ? कब मैं सूर्य के प्रकाश से आम आदमी का हृदय आलोकित होता देख पाऊंगा ? कब मैं सूर्योदय की रक्ताभ लालिमा उनके चेहरों पर देख पाऊंगा ?

जनसामान्य के प्रति इसी भावना और संवेदना से आप सभी उनके मानवाधिकार संरक्षण के लिये कृतसंकल्प होंगे, यही मेरी कामना और शुभकामना है।

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CHILD WITNESS - COMPETENCY AND ADMINISTRATION OF OATH

J.P. Gupta
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The subject 'Child witness - Competency and Administration of Oath is governed by the provisions of Section 118 of Evidence Act, 1872 and Sections 4, 5 & 7 of the Oaths Act, 1969.

According to the provisions of Section 118 of the Evidence Act, all persons are competent to testify unless they are in the opinion of the Court (a) unable to understand the questions put to them, (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, (iv) in any other such cause.

Therefore, it is clear that the child is a competent witness, unless in the opinion of the Court he is unable to understand the questions put to him or to give rational answers to those questions. The law has not prescribed minimum or maximum age of the child for competency as a witness. Simultaneously, no provisions have been laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must depend upon the good sense and discretion of the Judge. Hon'ble the Apex Court in case of *Surya Narayan v. State of Karnataka, AIR 2001 SC 482* has made it clear that Indian Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 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, *inter alia.*

A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. In practice, usually Courts receive the evidence of children of eight or nine years of age when they appear to possess sufficient understanding. In other words, it can be said that irrespective of the age, the child is a competent witness if the Court is of the opinion that he or she understands the nature of an oath. However, even if a child does not understand this, his or her evidence may still be heard by the Court if it is of the opinion that (i) he understands that it is his duty to speak the truth and (ii) he has sufficient understanding to justify his evidence being heard.

The Privy Council in the case of *Md. Sugal Esa v. The King, 1946 PC 3* observed it is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a

witness. In *Rameshwar v. State of Rajasthan, AIR 1952 SC 54* Hon'ble the Apex Court accepting the above proposition of law has also further held that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth, and state why they think so. Otherwise the credibility of the witness may be seriously affected.

In view of the above discussion, it is obvious that the question of understanding is also to be decided in each case by making preliminary inquiry as to whether particular child who has appeared in the witness-box is intelligent enough to be able to understand as to what evidence he or she is giving and to be able to understand the question and to be able to give a rational answer. In other words, in the absence of oath, the evidence of a child witness can be considered, provided that such a witness is able to understand the questions and is able to give rational answers thereof.

Therefore, before recording the evidence of child witness, determination of its competency is a condition precedent. The Court is at liberty to test the capacity of a witness to depose by putting proper questions and know whether there was proper understanding and the person was able to give rational account of what he has seen. If a person of tender years can satisfy those requirements, he can be treated as a competent witness or disqualify to be a competent witness by reason of lack of understanding. The object of this inquiry is that the time of Court should not be wasted if it is found, as a result of preliminary inquiry that the child is neither intelligent nor he can give evidence, which may be acceptable. Ordinarily, in this inquiry questions and answers should be recorded and though recording of the questions is not necessary where the answers recorded clearly suggest the questions. Hon'ble the Supreme Court in the case of *Rameshwar v. State of Rajasthan* (supra) has held that merely because the trial judge did not put certain formal questions to the child witness or that he did not append a certificate that the child understood the duty of speaking the truth, the statement of child again does not become ineffective and its probative force will not suffer on that ground.

Having determined the question of competency and the child is found to be competent as a witness then the Court has to take decision as to whether the child witness is required to be administered oath under the Oaths Act, 1969. To indulge on the subject, reference of concerned provisions of the Oaths Act would be useful:

> **Section 4. Oaths or affirmations to be made by witnesses, interpreters and jurors.-** (1) Oath or affirmations shall be made by he following persons, namely:-

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by witnesses; and

(c) jurors:

Provided that, where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Section 5. Affirmation by persons desiring to affirm – A witness, interpreter or juror may, instead of making an oath, make an affirmation".

The aforesaid provision shows that every person of age of twelve years or above is required to be administered oath or affirmation by the Court before recording his evidence as a witness. If the child is below twelve years and the Court is of the opinion that the witness does not understand the nature of oath or affirmation, the provisions required for administering oath or affirmation shall not be applicable to such witness. But the evidence of such witnesses shall not render inadmissible in evidence given by him nor affect the obligation to state the truth.

Though u/s 4 of the Oaths Act, 1969 it is expected that the oath or affirmation to be made by all the witnesses except the person under twelve years of age, however, the provisions of Section 7 of the Oaths Act make it clear that omission or irregularity in observing the aforesaid provisions under Section 4 will have no adverse effect on the admissibility of the evidence of such witness or the obligation of a witness to state the truth. In this regard, it is pertinent to quote Section 7 of the Oaths Act, 1969, which runs as under:

Section 7. Proceedings and evidence not invalidated by omission of oath or irregularity.- No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

The Appellate and Revisional Courts are supposed to pay attention on the aforesaid provisions when the Courts come across the situation in which by mistake of trial Court or otherwise without administering the oath or affirmation, evidence has been recorded and question of admissibility of evidence is required to be decided. The aforesaid provision categorically expresses that the omission to take the oath or to take any affirmation or any reasonability about it shall have no effect about the admissibility of evidence or obligation of a witness to state the truth.

In the cases of *Ram Huzur Pandey v. State, AIR 1959 All 409, Varkey Joseph v. State of Kerala, AIR 1960 Ker 301* and *J.V. Wagh v. State of Maharashtra, 1996 Cr.L.J. 803 (Bom)* it has been laid down that when no oath is administered to a child, the evidence is required to be recorded in the form of questions and answers, as a child witness is apt to be swayed by influences. If it is done, not only the trial Court but the Appellate Court is also in a position to gather whether the answers are relevant and whether they are tutored replies. It is a safeguard given to the accused to check the veracity of the child witness. Though failure to record is not fatal, it is bound to result some prejudices to the accused.

In conclusion, it is the duty of the Court in case a child witness appears before him to decide firstly as the child is competent as a witness as per provisions of Section 118 Evidence Act, 1872 and then if the age of child is below twelve years, to decide whether oath is required to be administered as per the provisions of Section 4 of the Oaths Act, 1969.

ASSESSMENT OF AGE – AN OVERVIEW

Gopal Shrivastava
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Assessment of age is always an important factor for the Courts of Law. Criminal liability is directly connected with age. Any criminal act committed by a child below the age of 7 years is not an offence. Any criminal act done by a child between 7 to 12 years of age depends upon his ability to understand the nature and consequences of his act. Generally, criminal courts do not have jurisdiction regarding offences committed by a person below the age of 18 years. Assessment of age plays an important role in cases of kidnapping and abduction. Sometimes in cases of rape, criminal liability depends on the age of the prosecuterix. In cases involning consent if the age of prosecuterix is below 16 years, her consent is of no defence, otherwise it is a good defence. Even in civil cases like marriage, the assessment of age is a very important factor because marriage may be declared null and void and may be an offence if any one of the spouse is a minor. Competency to enter into a contract also depends upon the age as contract made by a minor is void. Age is also an important factor at the time of taking admission, recruitment, to contest election, filing of a civil suit as well as to defend a suit.

RELEVANT PROVISIONS REGARDING AGE

Age of any person is a question of fact. Whenever date of birth of a person is in question before the Courts, we always scrutinize it at the touchstone of the provisions of the Indian Evidence Act, 1872. Following are the relevant provisions –

1. Section 32 (5) makes a statement relevant by a person who is dead or cannot be found and the statement relates to the existence of any relationship by blood (which includes date of birth of the person concerned), and, the person making such statement must have special means of knowledge as to relationship and lastly, statement must have been made before the question in dispute was raised.
2. Section 35 makes relevant entries regarding age in any public or official book or register or record by a person in discharge of his official duty or in performance of his duties specially enjoined by the law.
3. Section 45 makes opinion of an expert relevant regarding the age of any person.
4. Oral evidence of a person, who has means of knowledge of date of birth in question.

HOW TO ASSESS

The moot cause of the problem is how to assess the correct age of the person. In this regard, oral evidence of parents, entries in Births and Deaths Register, entries made in the School Register, entries in Voters list, kotwar Book,

Register maintained by the police are produced before the Courts to prove the age of a person. Sometimes the evidence of aforesaid nature is contradictory. Therefore, Courts are in dilemma as to which piece of evidence should be accepted.

ORAL EVIDENCE

Oral evidence of parents about the age of a person is, no doubt, the best piece of evidence, because they are the persons, who know the exact date of birth. Normally, Courts hesitate to accept their testimony because they are more interested in the welfare of their child than justice. In the case of *Umesh Chandra v. State of Rajasthan, AIR 1982 SC 1057* the Apex Court held:

> 'In case like this, ordinarily the oral evidence can hardly be useful to determine the correct age. Oral evidence may have utility only if no documentary evidence is forthcoming.'

However in the case of *Vishnu @ Undrya v. State of Maharashtra, (2006) 1 SCC 283 = AIR 2006 SC 508,* Their Lordships held,

> 'In case of determination of the date of birth of the child, the best evidence is of the father and mother. PW1 and PW13 categorically stated that PW4 prosecuterix as referred to above in all material particulars. These are the statements of facts. If the statement of facts are pitted against the so called expert opinion of the doctor with regard to determination of age based on ossification test scientifically conducted, the evidence of the former will prevail over the expert opinion.....'

Therefore, if there is any contradiction between ossification and oral evidence, and oral evidence corroborated by the *ante litam motam* entries then oral evidence should be given preference.

SCHOOL REGISTER

Entries about the date of birth in Government school registers and reputed private school registers which are maintained as per Government instructions are admissible u/s 35 of the Evidence Act. (See: *Umesh Chanda* (supra) and *Mohd. Ikram v. State of U.P., AIR 1964 SC 1625*) However, the entries made in the registers which are not maintained according to the statutory requirements and not maintained in the ordinary course of business of the school, such entries are neither admissible nor carry any evidentiary value. [See: *Ram Dev Chouhan v. State of Assam, (2001) 5 SCC 714* and *Rajendra Singh Gorkhi v. State of Uttar Pradesh, (2006) 5 SCC 584*]

Though the entries of the school register are admissible but what value can be attached is a totally different matter. In actual life, it happens that person states false age of the child at the time of his admission to school so that in later stage he would have advantage of seeking a public service for which minimum age of eligibility is often prescribed. The Courts cannot ignore this fact while assessing the value of entries. (See: *Brij Mohan Singh v. Priya Brat Narain*

Singh, AIR 1965 SC 282) Not only this, people enhance the age of their children to get admission in school, to get service earlier or to contest election.

So it is always risky to base conclusion on these entries. Looking to these inherent weaknesses of this type of entries, Their Lordships in the case of *Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 1796* expounded the law in the following terms:

> 'The entries regarding dates of birth contained in the school's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in school record was examined. The entries contained in the admission form or in the school register must be shown to be made on the basis of the information given by the parents or a person having a special knowledge of the date of birth of the person concerned. If the entry made on the basis of information is given by someone else such an entry will have no evidentiary value.'

Recently in case of *State of Chhattisgarh v. Lekh Ram, (2006) 5 SCC 736,* the Apex Court held that though an entry in a school register is not conclusive evidence about the age but if it is corroborated by oral evidence as the same was recorded on the basis of a statement of parents, it may be a good piece of evidence.

CORRECTION OF ENTRIES

Often Courts come across such a document where the entries are corrected either at the time of entry or later stage. Sometimes, it is made to achieve a particular object, some times it is made to correct error which comes to their knowledge at later stage. If Courts come to the conclusion that it is created with a motive to escape from the clutches of law, then it should be rejected. [See: *Rajendra Singh Gorkhi* (supra) and *Ram Dev Chauhan* (supra)] If Court comes to a conclusion that it is bonafide, then it should not be rejected on the ground that it has been corrected. Correction of entries is also a part of discharging public duty [See: *Upadesh Kumar v. Prithvi Singh, (2001) 2 SCC 524*]

EARLIER ENTRIES VIS-A-VIS SUBSEQUENT ENTRIES

Normally preference should be given to the entries made in the original school records. In higher classes, date of birth is recorded on the basis of transfer certificate. In determining the age, what is the source of entry is the prime question and it is to be considered whetherr person mentoning the date of birth of person concerned has any means of knowledge. Answers to these queries would be a determinative factor. In *Ram Dev Chauhan* (supra) Their Lordships held:

> ..... but the age of the boy was entered into the register on the basis of transfer certificate at the time of his admission in that school. The source of the age recorded in the original school is not known to us in order to ascertain

whether information furnished at the time of admission in the school was correct or not and in this respect no evidence has been adduced.....'

If after due enquiry it is found that original school record entry is manipulated or is wrong, the date of birth shown in the higher classes on the basis of original school record entry becomes redundant because the basic document is found doubtful. [See: *Shashikant v. State of M.P., 2005 (1) MPHT 245*]

CERTIFICATE OF BIRTH REGISTER

Often times certificate of birth register is produced before the Court to prove the age of the person concerned. It is a public document maintained under the Registration of Births and Deaths Act, 1969. The Act casts a duty on the persons, institutions to inform the birth to the Registrar, imposes penalty on their failure, provides a complete procedure of recording the current and belated entries, correction of entries etc. Section 17(2) of the Act declares that certified copy of the entries of birth and death registers shall be a public document as provided under Section 76 of the Indian Evidence Act.

Entries in births & deaths registers are always considered as the best piece of evidence relating to age. In *Sidheshwar Ganguly v. State of West Bengal, AIR 1958 SC 143,* Hon'ble Supreme Court while pointing its importance said:

> 'The only conclusive piece of evidence of the girl's age, may be the birth certificate. But unfortunately in this country such document is not ordinarily available.'

Following the above proposition our High Court in case of *Mohandas v. State of M.P., 1999 Cr.L.J. 3451* has also expressed the view that entries made in certificate of birth register is a conclusive piece of evidence.

In *Harpal Singh v. State of Himachal Pradesh, AIR 1981 SC 361* Their Lordships held that, 'it is a public document. There is no need to call the authority who prepared it.' Because it is a public document, therefore, entries made thereunder are presumed to be correct unless the contrary is proved. (See: *Krishna Rajan v. Doraiswamy Chettiar, AIR 1966 Kerala 305*) In *Mohandas* (supra) it was held that certified copy of the birth register prevails over entry in the school register. In *Anita v. Atal Bihari, 1993 Cr.L.J 549 (MP)* it was held that entry made in the birth register is more reliable than the ossification test.

So it is settled that if there is certificate of birth register maintained by Registrar (Births and Deaths), the Court must follow the same.

KOTWAR BOOK

Kotwars are appointed u/s 230 MPLRC. Under Section 258 MPLRC, the State Government vide notification No. 211-6477-VII-N (Rules) dated, 6th January, 1960: as amended by Notification No. 4992-136-VII-N-I, dated the 11th September, 1964. Notification No. 2578-1463-N-I dated 15th June, 1966 and Notification No. F.2-20-VII-Sec.8-95, dated 17th March, 1997 framed the rules

relating to appointment, punishment and removal of Kotwars and their duties. Therefore, Kotwars are public servants. Amongst other duties, one important role which cast upon the Kotwars, is to maintain births and deaths register. Under Rule 427 of M.P. Police Regulation, the Kotwars have to present their registers periodically before the concerned Officer-in-Charge of the police station. Therefore, entry of Kotwar book is admissible u/s 35 of the Evidence Act if it is maintained regularly and properly and entries are made within reasonable period of time. No doubt, if is it so, it may be a good piece of evidence. (See: *Shrikrishan Bhikachand v. Jagoba Mahipat Kunbi, AIR 1937 Nagpur 264*)

Normally, Kotwars are not much educated. Sometimes entries are made by other persons. If entries are not made by a public servant in discharge of his duty, then such entries are not admissible u/s 35 of the Evidence Act. [See: *Brij Mohan Singh* (supra)].

COPY OF ENTRIES OF BIRTH REGISTER MAINTAINED BY THE POLICE

Rule 429 of the M.P. Police Regulation mandates that every police station has to maintain a birth and death register and a duty is cast upon him that when any birth takes place, it should be entered into that register. By Notification No. 5666-4758-four dated 13th October, 1950 register should be completed according to the procedure prescribed by Rule 429. Under Rule 428 of M.P. Police Regulation, every resident of municipal area is duty bound to give information of birth and death to the police. Therefore, entries of birth register maintained by the police are admissible under Section 35 of the Evidence Act. If it is properly and regularly maintained, entries made by a person in discharge of his duty are, no doubt, a good piece of evidence.

VOTERS' LIST

It is prepared by authorities under Representation of the Peoples Act, 1950. Therefore, it is a public document and admissible under Section 35 of the Evidence Act. In *Nazir Hussain v. State, 1998 Cr.L.J 1720* Calcutta High Court held that it has a greater value than school register.

HOROSCOPE

It is a very common document which is placed before the Court to prove the age. As it is not a public document, it is not admissible under Section 35 of the Evidence Act. But it is admissible under Section 32 (5) of the Evidence Act. Normally, Courts hesitate to accept such piece of evidence because it can be prepared at any time to suit the need of a particular situation. It is very difficult to say whether it is ante litam motam or post litam motam. In most of the cases the maker of it may not be available to prove that it was made immediately after the birth. It must be proved that it had been made by a person having special knowledge regarding authenticity of age, time etc. Therefore, horoscope is considered very weak piece of evidence. [See: *Umesh Chand* (supra)]. Recently in the case of *State of Punjab v. Mohinder Singh, (2005) 3 SCC 702* Their Lordships held that entry in the school records regarding date of birth is more authentic than horoscope.

SCHOOL NAME VS. NICK NAME

It would not be out of place to mention here that in our society when birth takes place, people call the child by nick name and when the child is admitted in the school, his name is changed. Normally a child has two names – one is called school name and the other is nick name. So entry of name in Birth Register or Kotwar Book may differ from the entries of the School Register. Therefore, mere filing of copy of entry in the birth register or Kotwar book or school register does not prove ipso facto birth of the person concerned. Evidence has to be produced to connect the entries with the person whose date of birth has to be established and the identity of the person has to be established by independent evidence. (See: *State of M.P. v. Kamruddin Imamuddin, AIR 1956 Nagpur 74*)

MEDICAL OPINION REGARDING AGE

Mostly doctors base their opinion on:–

(a) AGES OF ERUPTION OF PERMANENT TEETH

This is based on theory that particular teeth erupts in a particular age. There are some surveys which gives tables regarding the year of eruption of teeth. Exceptions are being encountered in the data of body development and anatomy as also with teeth. So opinion cannot be utilized by common standard to the age.

(b) SECONDARY SEXUAL CHARACTERISTICS

This theory is based on the fact that puberty occurs at the age of 12 to 13 years for females and 13 to 14 years in case of males, in tropical countries like ours growth of pubic hair with the development of breast. Hair in the armpit appears one year after the former sign. This alone is also not a sure test to determine the age. Variation depends not only of the country but special class to which the person belongs.

(c) OSSIFICATION TEST

It is the most reliable test in scientific field. Bones have generally two parts. One is called Diphysis which is made of boney matter and the other is called epiphysis which is made of cartilage (soft matter). Fusion of epiphysis with diphysis is called ossification. This theory depends that each bone has a particular age when centre of ossification appears, starts fusion and complete fusion process. It is also not a surer test. It merely indicates an average age and it is likely to vary in individuals even of the same province owing to variation in climate, diet, development, hereditary and factors affecting the people of different provinces even in the same province. There is no fixed standard for the determination of the age of union of epiphysis for the whole of India.

In *Jayamala v. Home Secretary, Government of J&K, AIR 1982 SC 1297,* the Apex Court held, 'margin of error in age ascertained by radiological examination is two years on either side.' Following Modi's Medical Jurisprudence, our High Court in *Akeel v. State of Madhya Pradesh, 1998 (2) MPLJ 199* held that margin

of error may be three years on either side. So it also does not reflect the true age of a person.

NATURE OF MEDICAL EVIDENCE

The medical officer is not a witness of fact and evidence given by him is of an advisory nature which is given on the basis of symptoms. [See: *Madan Gopal Kakkad v. Nawal Dube and another, (1992) 3 SCC 204.*] Though medical evidence has an advisory character but it is based on scientific examination. Its importance cannot be kept aside. In *Ram Dev Chouhan* (supra) Their Lordships held:

> '..... The doctor's estimates of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in realm where we grope in the dark to find out what would possibly have been the age..... In absence of all other acceptable materials if such opinion points to a reasonable possibility regarding his age, it is certainly to be considered.'

STANDARD OF PROOF OF AGE

Determination of date of birth of a person before a Court of law whether in civil proceedings or criminal proceedings has to be determined on the basis of material placed on record. Different standards cannot be applied in a civil or a criminal case [See: *Rajendra Singh Gorkhi* (supra)]. No doubt, if after due appreciation of evidence, two views are possible, benefit of doubt should be given to accused. [See: *Rajendra Chandra v. State of Chhattisgarh, (2002) 2 SCC 287, and Akeel* (supra)]. But to give such a benefit without any reason or appreciation, may cause injustice to the victim.

CONCLUSION

Ultimately, question of age is a question of fact. Standard of proof of age is like any other fact. It depends on appreciation of evidence. Merely, any document produced as to the proof of age cannot be blindly accepted. Courts should bear in mind that often the aforesaid documents are created with particular purpose, so enquiries should be made – Whether the document is ante litam motam? Whether there is any manipulation? If it is so, whether there is any explanation? Whether it connects the identity of the person concerned? Whether it is made by a public servant in discharge of his duty? Whether it is made by a person in performance of his duty enjoined by the law? What are the criteria of entry? Who supplied the information of the age of the person concerned? and what is his means of knowledge? Not only this, Court may take into account physical features of the person whose age is in question with oral testimony, ossification test and may reach to its own conclusion. [See: *Sidheshwar Ganguly* (supra)].

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LAW RELATING TO BANK GUARANTEE AND INJUNCTION

(Conditional and Unconditional Bank Guarantee)

Sanjeev Kalgaonkar
O.S.D.III
High Court of M.P., Jabalpur

S.126 of the Contract Act provides - 'A contract of Guarantee is a contract to perform the promise of discharge the liability of a third person in case of his default.'

Therefore, a Bank Guarantee is a tripartite contract between the banker, the beneficiary and the person (customer) at whose instance, the bank issues the bank guarantee. In other words, it is a contract under which the bank as a guarantor issues the guratnee on behalf of its customer in favour of a third person, the beneficiary.

Thus, bank guarantee is a commitment undertaken by the bank on behalf of its customer to perform the promise or discharge the liability in case of his default.

Unconditional & Conditional Bank Guarantee :-

An unconditional or absolute guarantee is one by which the guarantor is bound immediately upon failure of the principal to perform his contract, without further steps being taken by anyone or without any further conditions to be performed.

Conditional Guarantee is not enforceable immediately upon the default of the principal debtor but the beneficiary is obliged to take some steps to fix the liability under the guratnee.

In *Hindustan Construction Co. Ltd. Vs. State of Bihar AIR 1999 SC 3710,* the Supreme Court has observed that –'the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute between the beneficiary under the bank guarantee and the person on whose behalf the guarantee was furnished.'

It was further observed that - 'the terms of bank guarantee are, therefore, extremely material. Since the bank guarantee is an independent contract between the bank and beneficiary, both the parties would be bound by the terms thereof. The invocation will have to be in accordance with the terms of the bank guarantee, or else the invocation itself would be bad. If the conditions provided in the terms are not fulfilled, injunction against invocation of bank guarantee may be issued.'

The guarantee being issued by Indian banks usually contain a clause to the effect that the guarantee would be honoured on first written demand without any demur and in some cases on being stated that the principal debtor has defaulted. Most of such providing clauses which stipulate that beneficiary shall be the sole judge to decide whether the principal debtor has committed defaults or not. All such guarantees are unconditional and absolute guaratnees.

The principal that emerges from catena of judgments of the Apex Court, can briefly be stated thus-

1. A Bank guarantee is an independent and distinct contract between the beneficiary and the bank. The right and liabilities therein are to be determined on its own term.
2. An unconditional bank guarantee which is payable on demand implies that the bank is liable to pay as and when the demand is made upon the bank by the beneficiary. The bank is not concerned with any inter se dispute between the beneficiary and the person at whose instance the bank had issued the guarantee.
3. Commitment of banks must be honoured free from interference of the court; otherwise trust in commercial transaction, internal as well as international, would be eroded. The autonomy of bank guarantee has to be protected and barring circumstances of exceptional nature, Court should not interfere.
4. Bank guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor. When a contract of guarantee is sought to be invoked, it was primarily for the bank to plead as case of fraud and not for a promisor to set up a case of breach of contract.
5. An irrevocable commitment in form of bank guarantee can not be interfered with except in case of **'established fraud of egregious nature'** vitiating underlying contract to its entirety or in case of **'special equities in form of preventing irretrievable injustice'** to the party approaching court to restrain operation of bank guarantee.
6. Breach of contract by reason of failure to perform may render a party responsible for damages for commission of breach of contract, but, breach of contract alone does not lead to the conclusion that a fraud had been committed thereby. Fraud, which vitiates the contract, must have a nexus with the acts of the parties prior to entering into the contract. Subsequent breach of contract on the part of a party would not vitiate the contract itself.

(Kindly refer - *UCO Bank Vs. Bank of India, AIR 1981 SC 1426; U.P. State Sugar Corp. Vs. Sumac International Ltd., AIR 1997 SC 1644; Deawoo Motors India Ltd. Vs. Union of India, (2003) 4 SCC 690, Hindustan Steel Works Construction Ltd. Vs. Tarapare & Co., AIR 1996 SC 2268; Hindustan Steel Works construction Ltd. Vs. G.S. Atwal & Co. Pvt. Ltd., AIR 1996 SC 131; Ansal engg. Projects Ltd. Vs. Tihri Hydro Dev. Corporation, (1996) 5 SCC 450* and *Reliance Salt Ltd. v. M/s. Cosmos Enterprises, 2006 AIR SCW 6262*)

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of April, 2007. The Institute has received articles from various districts. Articles regarding topic nos. 3 & 4 received from Balaghat and Shajapur are being included in this issue. An exhaustive article which covers topic no. 1 has already been published in JOTI JOURNAL June, 2007 while dealing with topic no.1 of December, 2006 (See page No.124). Therefore, no separate article is being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 2 and 5, they shall be sent in future to the other group of districts for discussion:

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

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

2. Whether jurisdiction u/s 24 CPC can be exercised by Additional District Judge on the application being made over to him for determination by the District Judge?

   क्या अतिरिक्त जिला न्यायाधीश धारा 24 व्य. प्र. सं. की अधिकारिता का उपयोग उस आवेदन के सम्बन्ध में कर सकता है जो उसे जिला न्यायाधीश द्वारा भेजा गया है?

3. Whether a woman, who has remarried after the death of her husband in a motor accident, can claim damages regarding death of deceased husband under Motor Vehicles Act despite her remarriage?

   क्या ऐसी महिला जिसने मोटर दुर्घटना में अपने पति की मृत्यु होने के बाद पुर्नविवाह कर लिया है मोटर दुर्घटना अधिनियम के अंतर्गत पुर्नविवाह के बावजूद मृत पति के बारे में प्रतिकर प्राप्त करने की अधिकारिता रखती है ?

4. What procedure a Special Court constituted under Electricity Act, 2003 is required to follow when it finds that it is undesirable to try such case summarily?

   विद्युत अधिनियम 2003 के अंतर्गत घटित अपराध का विचारण संक्षिप्त प्रक्रिया के अंतर्गत करना वांछनीय न पाने पर विशेष न्यायालय किस प्रक्रिया का अनुकरण कर सकती है ?

5. What are the main legal aspects relating to procedure and proof in trial of cases of cyber offences involving fraud or obscenity?

   कपट अथवा अश्लीलता से जुड़े सायबर अपराधों के मामलों के विचारण में प्रक्रिया तथा प्रमाण विषयक प्रमुख विधिक पहलू क्या हैं?

WHETHER A WOMAN, WHO HAS RE-MARRIED AFTER THE DEATH OF HER HUSBAND IN A MOTOR ACCIDENT, CAN CLAIM DAMAGES REGARDING DEATH OF DECEASED HUSBAND UNDER MOTOR VEHICLES ACT?

Judicial Officers
District Balaghat

Provisions for compensation under Motor Vehicles Act are made to safeguard the pecuniary interest of the dependants and legal representatives of the deceased who died in motor accident.

High Courts of many states are constantly of the view that a widow inspite of her re-marriage is entitled for compensation in claim petitions filed due to death of her husband in motor accident.

In the case of *Manjula Devi Bhuta v. Manju Shri Radha, 1967 MPLJ 972 = 1968 JLJ 189 = 1968 ACJ 1 (MP)* a Division Bench of High Court of Madhya Pradesh considered the question that the widow who re-married within a short time after the death of her husband would be entitled for compensation, the Court observed that her loss of dependency can be ascertained only during the period of her widowhood when she remained widow. Similar view has been taken by the High Court of Orissa in the case of *State of Orissa v. Archana Nayak, 1987 ACJ 772 (Ori)* and held that "a widow would be entitled to compensation from the date of death of her husband till her re-marriage as thereafter she ceases to be legal representative of the deceased husband."

But later on High Court of Madhya Pradesh and some other High Courts in some cases has taken broader approach. In the case of *Paramlal v. Urmila, 1982 MPLJ SN 27,* in a claim petition filed by a widow who subsequently remarried, it has been held by the High Court of Madhya Pradesh that:

> "...claim will be her personal claim and it cannot be divested because of remarriage."

Further in the case of *Hariram and others v. Commissioner for Workman's compensation, 1994 ACJ 1094* it has been held by the High Court of Madhya Pradesh that:

> "..inheritance is not kept in abeyance, it took place immediately after the death and since at the time of death Ramkanya was residing as wife of the deceased and, therefore, she would be deemed to be a widow. Now there is no principal of limited heir. She will inherit absolutely with full right and, therefore, even after remarriage she cannot be deprived of her right of getting compensation."

View expressed in *Hariram's case* (supra) by the High Court of Madhya Pradesh reflects in the case of Keral a High Court, *Veerappan v. Mutthuma,1995 ACJ 313 (DB).* In this case while dealing with the M.F.A. originated from an award under the Workman's Compensation Act, High Court of Kerala has held:

> "..there is no provision under the Workman's Compensation Act that after marriage widow is not entitled to compensation. At the time of accident first respondent's status as the wife of the deceased was not denied and so on his death she became one of his legal heirs. Contention of the appellants that on remarriage first respondent is debarred from claiming compensation as a dependant of the deceased husband is without any merit as there is no provision under the Act that after remarriage widow of the deceased would not be regarded as dependant. Under the Act a widow is a legal heir of her husband. Compensation due to her, as a legal heir under the Act cannot be deprived to her merely on the ground that she has entered into a marriage subsequently. Under section 21 of the Hindu Adoption and Maintenance Act, 1956 widow is dependant of the deceased husband so long as she is not remarried. No such restricted definition is found under the Workman's Compensation Act. As a widow is a dependant under the Act and as that status is not lost on account of her remarriage, first respondent cannot be denied of the compensation even if it is assumed that she has remarried subsequently."

Following the *Veerappan's case* (supra), High Court of Bombay in the case of *Maharashtra State Road Transport Corporation v. Darbakhan and others, 2006 ACJ 1410* while deciding a First Appeal arising from claim award, in para 7 has held that:

> "At the relevant time, admittedly, the respondent No. 4 was entitled for compensation being a widow of the deceased. Her entitlement cannot be curtailed or taken away only because she remarried later on. A widow cannot wait for the compensation to come and then decide for another marriage. The reality of life cannot be overlooked. A widow may or may not be in a position to marry again. There is no bar or anything pointed out under any provisions of law that such widow, after marriage, is disentitled for claim of the deceased husband."

But disagreeing with the view taken in the *Hariram's* and *Paramlal's cases* (supra) a Division Bench of the High Court of Madhya Pradesh in the case of *Anju Mukhi and another v. Satish Kumar Bhatia and another, 1998 (1) MPLJ 25* overruled both these judgments. Dealing with the above question in agreement with the *Manjula Devi's case* (supra), High Court has held:

"...that appellant No. 1, a Hindu widow, has remarried after the death of her husband. In a case where the dependency is to be determined, she would certainly cease to be the legal representative/dependent of her first husband after her remarriage as would be evident from Section 21 (iii) of the Hindu Adoption and Maintenance Act, 1956 as she did not remain a dependent and such widow loses her right to be maintained. To maintain an application to claim compensation for the death of her husband, she must not only be widow at the time of the death of her husband but she should also continue as such to be the legal representative of the deceased husband until the final decision. The appellant No. 1, the widow would be entitled to compensation only for the period from the date of accident that is 10.2.1985 till 18.8.1985, that is, for a period of about six months 8 days which can be easily calculated and estimated at Rs. 6,000/- taking into account the earnings of the deceased and the dependency of the widow. The contention that the second husband earned less and the marriage was performed for the purpose of safety and security, therefore, the dependency should be assessed accordingly, could not be accepted as the widow after her remarriage lost her entitlement to claim compensation as a dependent."

With a deflection from the cases of *Paramlal, Hariram and Veerappan* (supra) and in agreement with *Anju Mukhi's case* (supra) Division Bench of the High Court of Madhya Pradesh in the case of *Halkibai and another v. New India Assurance Co. Ltd and others, 1999 ACJ 187* in para 7 of the judgment has held:

"Admittedly, the appellant No.1 had not remarried for about 6 months after the death of her late husband, when the husband of a lady dies, it cannot be said that the lady does not suffer or that her suffering is wiped out by her future life. The widow would, therefore, be entitled to receive compensation even after her remarriage, but not in the larger share, out of the amount of compensation, as it may be granted to the other heirs of the deceased."

In agreement with the view expressed in the *Halkibai's case* (supra) in the case of *Chetram and others v. Mewal Das and Co. and others, 2004 (I) D.M.P. 41* (Madhya Pradesh) a Division Bench of the High Court of Madhya Pradesh has held, "a widow who remarried later on is entitled to receive some amount of consortium but amount should not be same as is given to a widow who does not remarry."

INSTITUTIONAL SUPPLEMENT:

But in the case of *Pramila and others v. Sarvar khan and others, 2003 ACJ 542,* Division Bench of the High Court of Madhya Pradesh has distinguished Anju Mukhi's case (supra) in the following manner:

> "Perusal of the judgment in *Anju Mukhi's case, 1998 ACJ 400 (MP),* demonstrates that the learned Judges accept the position that by virtue of section 14 of the Hindu Succession act, 1956, the property possessed by a female Hindu of her husband vested in her cannot be divested, meaning thereby once the widow acquires the absolute right over the property, she could not be divested from it on her remarriage, but creates exception in case where a Hindu widow marries after the death of her husband in a motor accident, she ceases to be the legal representative/ dependant of her first husband under section 21 (iii) of the Hindu Adoptions and Maintenance Act, 1956, therefore, loses right to be maintained; and under section 25 (3) of the Hindu Marriage Act, 1955, when a decree for divorce or judicial separation against her is passed, the order for payment of permanent alimony ceases by loss of her entitlement to maintenance.
>
> Right to equality is a fundamental right. Parliament has enacted Section 14 to remove the pre-existing disabilities fastened on the Hindu female limiting her right to the property without the full ownership thereof. The discrimination is sought to be remedied by section 14 (1) of Hindu Succession Act, 1956 by enlarging the scope of acquisition of property by a Hindu female by appending an explanation with it. Section 14 has to be construed harmoniously, consistent with the constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu females. This provision has the protection of clause (3) of Article 15 of the Constitution of India, being a special provision enacted for the benefit of Hindu women. Sub-section (2) thereof does not operate to take away the right duly conferred by sub-section (1) of section 14 of the Hindu Succession Act, 1956. It deals with the pre-existing order, decree, instrument, gift or will or award providing for restricted estate in such property. 'Property' includes both movable and immovable acquired by a female Hindu in any manner whatsoever.

Sections 19, 21 and 22 of the Hindu Adoptions and Maintenance Act, 1956, provide for maintenance of daughter-in-law by her father-in-law or heirs of deceased from out of the estate inherited by them from the deceased, provided she has no property of her own, is unable to obtain maintenance from the estate of her husband or her father/ mother or from her son or daughter, if any, or his or her estate so long as she does not remarry. Maintenance under the Hindu Marriage Act, 1955 also ceases on remarriage and in other circumstances provided therein, but these factors, in our considered opinion, have no application for grant of compensation to a widow on the death of her husband.

'Legal representative' ordinarily means a person who in law represents the estate of a deceased person or a person on whom the estate devolves on the death of an individual. Legal representative in a given case need not necessarily be a wife, husband, parents and child. However, it cannot be said that wife is not a legal representative of her deceased husband. She is qualified to represent his estate on his death, therefore, qualified to file application for compensation for the loss of her husband. Succession to the estate opens on the occurrence of death of husband. 'Estate' would include all kinds of properties, movable and immovable, left by the deceased husband. It would include claim for compensation which arises on the death of husband. Her entitlement to the estate/compensation is settled on the taking place of the accident resulting in the death of the husband. She cannot be divested of this right, being absolute and inalienable, even if she remarries. This conclusion flows by operation of Articles 15 (3) of the Constitution of India and Section 14(1) of the Hindu Succession Act, 1956. Provisions of Hindu Adoptions and Maintenance Act, 1956, have no application since their application is confined to limited field.

The term 'dependency' is not a principle of absolute application. It is a guide fro arriving at a figure which is called compensation. Compensation is payable for loss caused to the victim in accident by the tortfeasor(s) and it is claimable even by a person who is well placed in life earning handsomely and is not actually dependent on the deceased, object being to penalize, by award of compensation, the tortfeasor(s) against loss sustained by

the victim or his legal representatives, otherwise they would not suffer in any way committing breach of positive duty to operate vehicles on highway/public place in a careful manner.

Proceeding further, husband is entitled to claim compensation in the event of death of wife even if he is earning himself and dependency is calculated on the income of the deceased wife or contribution for the family. After the death of such a wife, the husband marries. Is his right to compensation forfeited? The answer to this question is in the negative. When this is so in case of husband, why different principle be made applicable in case of wife who marries after the death of husband? Compensation awarded by Motor Accidents Claims Tribunal under the Motor Vehicles Act, 1988, is not maintenance. It is a compensation for the loss sustained by the legal representative(s) for the death of their relation. The legal representatives become entitled to compensation on the occurrence of the accident and death of the relation. Widow has absolute right to compensation allowed by the Claims Tribunal which should not be influenced by the fact that the wife has married after the accident.

There is another reason for allowing the claim of the widow for full compensation, to which she has been held entitled by the Claims Tribunal, based on higher and broader perspective. National policy allows woman equal status with man, in all spheres of activities. Both are given equal rights. Government and non-governmental organizations emphasise remarriage of a widow. When a man can remarry, why cannot a woman? It is understandable that life of a widow, after the death of her husband, in the family cripples abnormally. Generally, she is subjected to all kinds of indignities, compelling her to leave and fall back on parents where she is taken to be an ey-sore by the families of her brothers, particularly when parents are not alive, and even if they are alive, they can hardly look after her due to old age. With this background, it is considered necessary that a widow marries as early as possible. Therefore, in case she has done so, her claim for compensation cannot be defeated by remarriage. It would be highly improper to compel her to lead a life of widow till she receives the compensation on the termination of court case or else forfeit the right. The compensation continues to maintain her

throughout her life since second marriage cannot be as good as the first marriage. It is by compulsion. She was not responsible for the death of her husband in the accident, therefore, she cannot be divested of the absolute right to claim compensation on remarriage. The Motor Vehicles Act, 1988 does not debar her. Since she becomes entitled to the compensation, she cannot be divested from it. These submissions were not advanced before the learned Judges in *Anju Mukhi's case, 1998 ACJ 400 (MP),* therefore, that case is clearly distinguishable and decisions in *Sobha Jain's case, 1983 ACJ 327 (Patna) and Kiran Lata's case, 1983 ACJ 130* (Rajasthan), are more pragmatic and give broader thrust to widow's right to compensation on death of her husband. It is important that 'dependant' and 'legal representative' are given practical, purposeful and pragmatic meaning to avoid damage to the entitlements of widow who remarries after the death of her husband in the accident...."

Recently in the case of *Smt Vimla v. Dinesh Kumar Sharma and Ors., AIR 2007 MP 47* the aforesaid cases have been referred and followed the case of Pramila and others (supra) and held that after remarriage the widow is not entitled to get compensation as she is not dependent on her husband. The case of *Anju Mukhi and another* (supra) is considered by the subsequent Division Bench in the case of Pramila and others (supra). Division Bench while deciding the case of *Anju Mukhi* (supra) has not at all considered the fact that the word 'dependant' does not find place in Section 110 of the old Motor Vehicles Act as well as in Section 163 of the Motor Vehicles Act, 1988. The principles of Fatal Accidents Act are now not available to the claim petition decided under the Motor Vehicles Act. This view has been taken by the Apex Court in the case of *G.S.R.T.C. Ahmedabad v. Ramanbahai, AIR 1987 SC 1690.* Under Section 166 of the Motor Vehicles Act, it is provided that any of the legal representatives can file the claim petition. Widow even after remarriage continues to be the legal representative of her husband as there is no provision under the Hindu Succession Act or any other law which lays down that after remarriage she dos not continue to be the legal representative. The right of succession accrues immediately on the death of husband and in the absence of any provision she cannot be divested from the property vested in her due to her remarriage.

In conclusion, in view of the aforesaid discussion, we are of the view that the right of a woman, who has remarried after the death of her husband in a motor accident, is not affected in a claim for damages regarding death of her deceased husband under Motor Vehicles Act.

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विद्युत अधिनियम–2003 के अंतर्गत गठित अपराध का विचारण संक्षिप्त विचारण प्रक्रिया के अंतर्गत करना वांछनीय न पाने पर विशेष न्यायालय द्वारा अपनाई जाने वाली प्रक्रिया

न्यायिक अधिकारीगण

शाजापुर

विद्युत अधिनियम, 2003 के भाग 14 में धारा 135 से लेकर धारा 139 में निर्दिष्ट अपराधों के शीघ्र विचारण के प्रयोजनार्थ विशेष न्यायालयों का गठन इसी अधिनियम के भाग 15 के अनुसार राज्य सरकार द्वारा शासकीय राजपत्र में अधिसूचना द्वारा किया जा सकता है। इस बाबत् अधिनियम की धारा 153 में स्पष्ट उपबंध हैं।

विद्युत अधिनियम, 2003 की धारा 154 में विशेष न्यायालय की प्रक्रिया एवं शक्ति संबंधी उपबंध है, जिसके अनुसार दं. प्र. सं., 1973 में कुछ भी समाहित होते हुए इस अधिनियम की धारा 135 से 139 के तहत दण्डनीय प्रत्येक अपराध का विचारण ऐसे विशेष न्यायालय द्वारा होगा, जिसकी अधिकारिता के भीतर ऐसा अपराध हुआ हो।

धारा 154 (3) विद्युत अधिनियम, 2003 के अनुसार विशेष न्यायालय दं. प्र. सं. 1973 की धारा 262 या धारा 260 की उपधारा (1) में कुछ भी समाहित होते हुए इस अधिनियम की धारा 135 से 139 में निर्दिष्ट अपराध का संहिता में विहित प्रक्रिया के अनुसार संक्षिप्त रूप से विचारण कर सकेगा एवं दं. प्र.सं., 1973 की धारा 263 से 265 के उपबंध ऐसे विचारण को लागू होंगे।

इसके साथ ही यह प्रथम परन्तुक भी धारा 154 (3) विद्युत अधिनियम, 2003 के साथ है कि जहां इस उपधारा के तहत किसी संक्षिप्त परीक्षण के अंतर्गत विशेष न्यायालय को ऐसा प्रतीत होता है कि प्रकरण की प्रकृति ऐसी है कि ऐसे प्रकरण को संक्षिप्त रूप में परीक्षण करना अवांछनीय है, तो विशेष न्यायालय किसी साक्षी को, जिसकी परीक्षा की जा चुकी है, पुनः बुलायेगा और ऐसे अपराधों के विचारण के लिये उक्त संहिता के उपबंधों के द्वारा उपबंधित प्रक्रिया में प्रकरण की पुनः सुनवाई करने के लिये अग्रसर हो सकेगा।

धारा 154 (3) विद्युत अधिनियम, 2003 के द्वितीय परन्तुक में और यह उपबंध भी है कि किसी धारा के अधीन किसी संक्षिप्त विचारण में दोष सिद्धी की दशा में पांच वर्ष से अधिक नहीं होने वाली अवधि के लिये कारावास का दण्डादेश पारित करना विशेष न्यायालय के लिये विधिपूर्ण होगा।

विद्युत अधिनियम, 2003 की धारा 153 के अंतर्गत विशेष न्यायालयों का गठन विद्युत अधिनियम की धारा 135 से 139 के अपराधों के शीघ्र विचारण के उद्धेश्य से किया गया है, जिनमें से धारा 135 से 138 विद्युत अधिनियम के अपराध तीन वर्ष एवं उससे अधिक के कारावास से दण्डनीय है तथा धारा 139 विद्युत अधिनियम का अपराध सिर्फ अर्थदण्ड, जो रूपये 10,000/– (दस हजार रूपये) तक हो सकेगा, से दण्डनीय है।

दण्ड प्रक्रिया संहिता की धारा 2 (भ) के अनुसार --

'' वारण्ट मामला '' से ऐसा मामला अभिप्रेत है, जो मृत्यु दण्ड, आजीवन कारावास या दो वर्ष से अधिक की अवधि के कारावास से दण्डनीय किसी अपराध से संबंधित है और संहिता की धारा 2 (ब) के अनुसार ''समन मामला'' से ऐसा मामला अभिप्रेत है, जो किसी अपराध से संबंधित हो, जो वारण्ट मामला नहीं है।

विद्युत अधिनियम की धारा 135 से 138 के अपराध के लिये तीन वर्ष/द्वितीय बार दोषसिद्धी पर पांच वर्ष तक कारावास का दण्ड प्रावधानित है, जो वारण्ट मामले की परिधि में आते है, और धारा 139 विद्युत अधिनियम का अपराध सिर्फ रूपये 10,000/- (दस हजार रूपये) तक के अर्थदण्ड से दण्डनीय है, जो समन मामले की परिधि में आता है ।

विद्युत अधिनियम की धारा 151 के अनुसार अपराधों का संज्ञान सक्षम प्राधिकारी के लिखित परिवाद पर किया जायेगा, ऐसी स्थिति में विशेष न्यायालय परिवाद पर अपराध का विचारण करेगा। दण्ड प्रक्रिया संहिता में पुलिस रिपोर्ट से भिन्न आधारों पर संस्थित मामलों के विचारण के लिये धारा 244 से लेकर 247 में विचारण की प्रक्रिया का प्रावधान किया गया है, ये प्रावधान न्यायिक मजिस्ट्रेट द्वारा अपनायी जाने वाली प्रक्रिया से संबंधित है।

दं.प्र.सं. के अध्याय 18 में सेशन न्यायालय के समक्ष विचारण की प्रक्रिया धारा 225 से 237 तक में उपबंधित की गयी है तथा इसमें एक ही तरह के प्रकरण के विचारण की प्रक्रिया प्रावधानित है। मात्र धारा 237 में यह प्रावधानित है कि धारा 199 की उपधारा (2) के अधीन अपराध का संज्ञान लेने वाला सेशन न्यायालय, मामले का विचारण, मजिस्ट्रेट द्वारा पुलिस रिपोर्ट से भिन्न आधार पर संस्थित किये गये वारण्ट मामलों के विचारण हेतु प्रावधानित प्रक्रिया के अनुसार करेगा। धारा 199 (2) दं.प्र.सं. के अनुसार भा.दं.सं. के अध्याय 21 के अंतर्गत आने वाले अपराधों के बारे में ऐसे व्यक्ति के विरूद्ध है, जो ऐसा अपराध किये जाने के समय भारत का राष्ट्रपति, उपराष्ट्रपति या किसी राज्य का राज्यपाल या किसी संघ राज्य क्षेत्र का प्रशासक या संघ या किसी राज्य का या किसी संघ राज्य क्षेत्र का मंत्री या संघ या किसी राज्य के कार्यकलापों के बारे में नियोजित अन्य लोकसेवक के लोककृत्यों के निर्वहन के आचरण के संबंध में मानहानि के लिये विचारण से संबंधित है, अर्थात् विशिष्ट व्यक्तियों के विरूद्ध अपराधों से संबंधित प्रकरणों के विचारण के समय वारण्ट मामलों की प्रक्रिया अपनाया जाना प्रावधानित है। अन्य सभी मामलों में सत्र विचारण की प्रक्रिया ही अपनायी जायेगी।

धारा 153 (3) विद्युत अधिनियम के अनुसार कोई व्यक्ति किसी विशेष न्यायालय के न्यायाधीश के रूप मे नियुक्ति के योग्य नहीं होगा, जब तक कि वह ऐसी नियुक्ति के तुरन्त पूर्व अतिरिक्त जिला एवं सत्र न्यायाधीश नहीं था।

धारा 155 के अनुसार इस अधिनियम में यथा अन्यथा उपबंधित है, उसे छोड़कर दण्ड प्रक्रिया संहिता के प्रावधान, जहां तक वे इस अधिनियम के उपबंधों के साथ असंगत नहीं होते है, विशेष न्यायालय के समक्ष कार्यवाहियों को लागू होंगे और उक्त अधिनियमितियों के उपबंधों के प्रयोजनार्थ, विशेष न्यायालयों को सत्र न्यायालय होना समझा जायेगा और वह सत्र न्यायालय की सभी शक्तियां रखेगा और विशेष न्यायालय के समक्ष अभियोजन की कार्यवाही करने वाले व्यक्ति को लोक अभियोजक समझा जायेगा।

चूंकि सत्र न्यायालय में अपनायी जाने वाली प्रक्रिया में समन ट्रायल एवं वारण्ट ट्रायल जैसी कोई पृथक प्रक्रिया नहीं है तथा धारा 153 विद्युत अधिनियम, विशेष न्यायालय को सत्र न्यायायल की शक्तियां प्रदान करती है, साथ ही अधिनियम की धारा 135 से 139 के अधीन आने वाले प्रकरणों का शीघ्र विचारण हो सकें, इस हेतु ही विशेष न्यायालयों का गठन किया गया है तथा संक्षिप्त विचारण प्रक्रिया अपनाते हुए भी पांच वर्ष तक की सजा दिये जाने हेतु विशेष न्यायालय को सक्षम बनाया गया है, ऐसी स्थिति में धारा 135 से 138 के वारण्ट मामले हो या धारा 139 का समन मामला, यदि विशेष न्यायालय यह पाता है कि अपराध का विचारण संक्षिप्त प्रक्रिया के अंतर्गत करना वाछंनीय नहीं है, तब वह सत्र न्यायालय में अपनायी जाने वाली प्रक्रिया के अनुसार ही प्रकरण का विचारण करेगा, क्योंकि यदि वारण्ट मामलों के विचारण की प्रक्रिया को अपनाया जाता है, तो विधान की मंशा असफल होती है, तथा अधिनियम में उपबंधित प्रावधानों से भी असंगत होगी।

इस प्रकार उल्लेखित विधिक प्रावधानों के आलोक में यह निष्कर्ष निकलता है कि :–

''विघुत अधिनियम, 2003 के अंतर्गत गठित अपराध का विचारण संक्षिप्त प्रक्रिया के अंतर्गत करना वांछनीय न पाने पर विशेष न्यायालय द्वारा सत्र प्रकरणों के विचारण में अपनायी जाने वाली प्रक्रिया का अनुसरण करना ही समीचीन होगा।''

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The fair and speedy delivery of justice is undoubtedly the noblest of human aspirations. It must remain our constant goal.

- Cooke, Lawrence H.

विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

मध्यप्रदेश न्याय शुल्क (संशोधन) अधिनियम, 2007 के प्रवृत्त होने के पश्चात प्रस्तुत परन्तु संशोधन के पूर्व संस्थित दावों से उत्पन्न अपीलों पर क्या न्याय शुल्क देय होगा?

ऐसी समस्याएं प्रायः जब अधिनियमों में संशोधन होते हैं तो न्यायालय के समक्ष उत्पन्न होती है। न्याय शुल्क अधिनियम, 1870 मे समय–समय पर राज्य शासन द्वारा संशोधन किए जाते रहे हैं। अनुसूची 1(क) एवं अनुसूची 2 में निर्धारित न्याय शुल्कों की दरें बढ़ाई जाती रही है। न्याय शुल्क अधिनियम मध्यप्रदेश में, मध्यप्रदेश कराधान विधि (संशोधन) अधिनियम, 1957 द्वारा अंगीकृत तथा विस्तारित किये जाने के वर्ष 1957 से ही लेकर अब तक इसमें दस संशोधन किए जा चुके हैं। नवीनतम संशोधन न्यायालय शुल्क (मध्यप्रदेश संशोधन) अधिनियम, 2006 (क्रमांक 2 सन् 2007) किया गया जो दिनांक 11.1.07 से प्रवृत्त हो चुका है।

प्रश्न यह है कि ऐसे दावों, जो संशोधन के पूर्व प्रस्तुत हुए और जिस पर तत्प्रचलित तिथि अनुसार न्याय शुल्क अदा की गई परंतु वे दावे न्याय फीस अधिनियम के संशोधन के पश्चात् निराकृत हुए, तो उनकी अपीलों में न्याय शुल्क किस विधि से देय होगा? क्या दावा संस्थित दिनांक की प्रचलित तिथि अनुसार अथवा अपील प्रस्तुत होने के समय प्रचलित तिथि अनुसार न्याय शुल्क देय होगा।

यदि समय–समय पर हुए इन संशोधनों को देखें तो स्पष्ट होगा कि न्याय शुल्क की दरें समय–समय पर बढ़ाई गई। विधायिका का आशय वादकारियों के हित में न होकर अतिरिक्त राजस्व एकत्रित करना था इसलिए ऐसे अधिनियमों का निर्वचन कठोरता से किया जाना चाहिए जो कि आम जनता के हित में न हो। विधि इस संबंध में सुस्थापित है कि अपील प्रक्रिया संबंधी अधिकार नहीं बल्कि एक सारवान अधिकार है। अपील का अधिकार दावा संस्थित दिनांक को ही निहित हो जाता है और यह अधिकार तब तक रहता है जब तक कि दावे का अंतिम रूप से निराकरण नहीं हो जाता। यद्यपि अपील के अधिकार का प्रयोग पक्षकार डिक्री के बाद करता हैं परंतु यह अधिकार दावे के समय ही उसमें निहित होता है। चूंकि दावे का अधिकार एक सारवान अधिकार है, इसलिए ऐसे संशोधन जो सारवान अधिकार को प्रभावी करते हैं, वे भूतलक्षी प्रभाव नहीं रखते हैं जब तक कि संशोधन अधिनियम में ऐसा कोई प्रावधान न किया गया हो।

चेयरमेन ग्रामीण विद्युत ग्रामीण सहकारी समिति, रीवा विरूद्ध राजेश कुशवाहा, 2002, एम.पी. एल.जे. 168 में माननीय उच्च न्यायालय ने न्याय शुल्क (म.प्र. संशोधन) अधिनियम, 1997 के विस्तार एवं प्रयोज्यता की विवेचना करते हुए यह मत दिया है कि उक्त संशोधन अधिनियम भूतलक्षी प्रभाव नहीं रखता इसलिए अपील पर वही न्याय शुल्क देय होगा जो दावा संस्थित दिनांक को प्रचलित तिथि पर था न कि अपील प्रस्तुत दिनांक को प्रचलित तिथि के अनुसार।

माननीय उच्च न्यायालय द्वारा उपरोक्त न्याय दृष्टान्त में जो सिद्धान्त प्रतिपादित किया गया है वह सिद्धान्त न्यायालय शुल्क (म.प्र.संशोधन) अधिनियम, 2006 (क्र. 2 सन् 2007) पर भी प्रभावी होता है चूंकि सन् 1957 के संशोधन अधिनियम में न्याय शुल्क बढ़ाई गई और इसमें भी बढ़ाई गई है इसलिए इसमें कोई भिन्न मत नहीं लिया जाना चाहिए।

निष्कर्षः– ऐसी अपीलें जो न्यायालय शुल्क (म.प्र. संशोधन) अधिनियम, 2006 (क्र. 2 सन् 2007) के पश्चात् प्रस्तुत हुई है परतु ऐसे दावों से उत्पन्न हुई है जो इस अधिनियम के पूर्व न्यायालय में संस्थित हो चुके थे उन पर वही न्याय शुल्क देय होगा जो दावा संस्थित दिनांक को प्रचलित था।

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क्या आवश्यक वस्तु अधिनियम,1955 अधीन अपराध जमानतीय है अथवा अजमानतीय ?

आवश्यक वस्तु अधिनियम 1955 में समय–समय पर संशोधन होते रहे, संशोधन अधि. (क्रं. 36/1967) 1967 के द्वारा 10A जोड़ी गयी और अधिनियम के अन्तर्गत सभी अपराध संज्ञेय और जमानतीय बनाये गये। संशोधन अधिनियम (क्र. 30/1974) द्वारा धारा 10A में संशोधन करते हुए '' और जमानती'' शब्द हटा दिया गया। आवश्यक वस्तु (विशेष उपबंध) अधि. 1981 द्वारा पुनः धारा 10A में संशोधन किया गया और अपराध अजमानती बनाया गया। वर्ष 1981 का संशोधन अधि. अस्थाई व्यवस्था थी जो पहले 5 वर्ष के लिये फिर समय–समय पर 5–5 वर्ष के लिये बढ़ाया जाता रहा। अन्ततः दिनांक 25.4.1998 को संशोधन अधि. 1981 समाप्त हो गया। इसका स्वाभाविक प्रभाव यह रहा कि जो भी संशोधन इस अधि. से किये गये थे वे सभी समाप्त हो गये। धारा 10A पुनः अपने मूल स्वरूप जो 1974 में था आ गया अर्थात् अपराध जमानतीय अथवा अजमानतीय है इस सम्बन्ध में कोई प्रावधान नहीं रह गया। ऐसी स्थिति में दण्ड प्रक्रिया संहिता की अनुसूची–2 के अनुसार अपराध जमानतीय है अथवा अजमानतीय है इस पर निर्भर करेगा कि अपराध के लिये क्या दण्ड प्रावधानित है । यदि अपराध 3 वर्ष और उससे अधिक के कारावास से दण्डनीय है तो अजमानतीय होगा अथवा जमानतीय होगा।

यदि हम अधि. की धारा 7 पर दृष्टिपात करें तो स्पष्ट है कि 7 (i) व (ii) एवं 7 (2) में वर्णित अपराध 7 वर्ष के कारावास से दण्डनीय है इसलिए दण्ड प्रक्रिया संहिता की अनुसूची 2 के अनुसार उपरोक्त अपराध अजमानती है, शेष अपराध जमानती होंगे और प्रथम श्रेणी मजिस्ट्रेट द्वारा विचारणीय होंगे।

दिनेश कुमार दुबे विरूद्ध म.प्र. राज्य, 2001 (1) एम.पी.एच.टी. 213 एवं ***नेमीचन्द अग्रवाल विरूद्ध म.प्र. राज्य M.Cr.C.NO. 6111/99 एवं M.Cr.C. No.7681/2000*** में माननीय उच्च न्यायालय की एकल पीठ ने यह मत प्रतिपादित किया है कि आवश्यक वस्तु संशोधन (विशेष उपबंध) अधि. 1981 के विलुप्त होने के पश्चात् अधि. के सभी अपराध जमानती हो गये।

बलवन्त सिंह विरूद्ध म.प्र. राज्य, 2001 (3) एम.पी.एल.जे 168 में माननीय उच्च न्यायालय की एकल पीठ ने आवश्यक वस्तु संशोधन (विशेष उपबंध) अधिनियम, 1981 के विलुप्त होने के प्रभाव की विवेचना करते हुये एवं उपरोक्त सभी न्याय दृष्टान्तों को विचार में लेते हुये यह निर्धारित किया है कि उपरोक्त न्याय दृष्टान्त में प्रतिपादित सिद्धान्त per incurium है और सही न्याय सिद्धान्त प्रतिपादित नहीं करते। न्यायालय ने यह भी निर्धारित किया है कि आवश्यक वस्तु संशोधन (विशेष उपबन्ध) अधिनियम, 1981 के विलुप्त हो जाने से सभी अपराध जमानती नहीं हो जावेंगे बल्कि इस पर निर्भर करेगा कि अपराध में दण्ड का प्रावधान क्या है और अपराध जमानतीय है अथवा अजमानतीय यह प्रश्न दण्ड प्रक्रिया संहिता की अनुसूची से नियंत्रित होगा।

प्रश्न यह उत्पन्न होता है कि यदि समान पीठ के दो न्याय दृष्टान्त जो एक दूसरे के विपरीत हो तो उनमें से कौन सा अनुकरनीय होगा ?

जबलपुर बस आपरेटर एसोसियेशन एवं अन्य विरूद्ध म.प्र. राज्य एवं अन्य, 2003 (1) एम. पी. जे. आर. 158 में पांच न्यायाधीशों की पीठ ने यह प्रतिपादित किया है कि यदि समान बल के दो न्याय दृष्टान्त यदि एक दूसरे के विरोधाभासी हैं तो पूर्व का न्याय दृष्टान्त अनुकरणीय होगा और यदि पश्चात्वर्ती न्याय दृष्टान्त पूर्व के न्याय दृष्टान्त को स्पष्ट करता है और विभेदित करता है तो पश्चात्वर्ती न्याय दृष्टान्त अनुकरणीय होगा। चूंकि बलवन्त सिंह (उपरोक्त) के मामले पूर्व के सभी न्याय दृष्टान्त विभेदित किये गये और स्पष्ट किये गये एवं per incurium निर्धारित किये गये, इसलिये बलवन्त सिंह (उपरोक्त) का न्याय दृष्टान्त अनुकरणीय होगा।

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

Equality of opportunity is an equal opportunity to prove unequal talents

- SAMUEL, Herbert.

PART - II

NOTES ON IMPORTANT JUDGMENTS

257. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (3), 13 (1) & 13 (2)

(i) Default in payment of rent for many times – Tenant not entitled protection u/s 12 (3) of the Act.

(ii) Provisions of S.13 (1) of the Act would not remain in operation before determination of provisional rent u/s 13 (2) of the Act.

Kanta Devi and others v. Shiv Parvati Mandir and another
Reported in 2007 (3) MPLJ 221

Held:

The provision of section 12 (3) of M.P. Accommodation Control Act, 1961 gives protection to the tenant with regard to default of payment of rent, if, it was deposited in accordance with section 13 of the M.P. Accommodation Control Act. However as per the proviso to the aforesaid section if a tenant having obtained such benefits once in spite of any accommodation and again makes a default in payment of rent for 3 consecutive months he would not be entitled for the benefits of the section. Section 12 (3) of M.P. Accommodation Control Act is as under :–

> "(3) No order for the eviction of a tenant shall be made on the ground specified in clause (a) of sub-section (1), if the tenant makes payment on deposit as required by section 13 :
>
> Provided that a tenant shall not be entitled to the benefit under this sub-section, if, having obtained such benefit once in respect of any accommodation, he again makes a default in the payment of rent of that accommodation for three consecutive months."

In such circumstances, in my opinion the plaintiff/appellant is not entitled for the benefit of section 12 (3) of the M.P. Accommodation Control Act,

The Hon'ble Supreme Court in Case of *E. Palanisamy vs. Palanisamy (Dead) by Lrs and ors., (2003) 1 SCC 123* with regard to liability of the tenant to pay the rent in receiving the protection under the Lease and Rent Control Act, 1960 has held as under :–

> "The rent legislation is normally intended for the benefit of the tenants. At the same time, the benefit conferred on the tenant through the relevant statutes can be enjoyed only on the basis of strict compliance with the statutory provisions. Equitable consideration has no place in such matters. The statute contains express provisions. It prescribes various steps which a tenant is required to take. In section 8 of the T.N. Buildings (Lease and Rent Control) Act, 1960 the procedure to be followed by the tenant is given step by step. An earlier step is a

procondition for the next step. The tenant has to observe the procedure as prescribed in the statute. Strict compliance with the procedure is necessary. The tenant cannot straight away jump to the last step i.e. to deposit rent in Court. The last step can come only after the earlier steps have been taken by the tenant."

Consequently, I hold that both the Courts below have not committed any error of law in granting the decree of eviction under section 12(1)(a) of the M.P. Accommodation Control Act, 1961. I answer the substantial question of law No. 2 accordingly.

With regard to second substantial question of law is concerned, the Division Bench of this Court in case of *Anandilal vs. Shivdayal Pandey, 1977 MPLJ 822 = 1977 JLJ 817* has held as under :–

> "Even when there is no dispute with regard to the rate of rent and the dispute is only with regard to the arrears of rent no such a dispute, till the Court passes an order under sub-section (2) of section 13 of the Act, the operation of the whole of sub-section (1) of section 13 of the Act, is arrested. To be more specific, the liability of the tenant to deposit monthly rent for the preceding month under the second part of seciton 13 (1) does not commence until an order under sub-section (2) of section 13 is made.
>
> The order contemplated under sub-section (2) of section 13 of the Act is the one with regard to that part of deposit under section 13(1), for which there is a dispute. (1972 MPLJ 785) = 1972 JLJ 763 relied on."

The Hon'ble Supreme Court also in case of *Jamnalal and ors. vs. Radheshyam, 2000 (2) MPLJ (SC) 385 = 2000 (2) JLJ 1* has held as under :–

> "A careful reading of the sub-section shows that the Court is enjoined to fix a reasonable provisional rent, in relation to the accommodation, to be deposited or paid in accordance with the provisions of sub-section (1) if there is a dispute as to the amount of rent payable by the tenant. The clause 'the Court shall' fix a reasonable provisional rent in relation to the accommodation clearly indicates that 'any dispute as to the amount of rent' is confined to a dispute which depends on the rate of rent the accommodation either because no rate of rent is fixed between the parties or because each of them pleads a different sum. Where the dispute as to the amount of rent payment by the tenant has no nexus with the rate of rent, the determination of such dispute in a summary inquiry is not contemplated under sub-section (2) of the section 13. Such a dispute has to be resolved after trial of the case. Consequently, it is only when the obligations imposed in section 13 (1) cannot be complied with without resolving the dispute under sub-section (2) of that section, that section 13(1) will become

inoperative till such time the dispute is resolved by the Court by fixing a reasonable provisional rent in relation to the accommodation. It follows that where the rate of rent and the quantum of arrears of rent are disputed the whole of section 13 (1) becomes inoperative till provisional fixation of monthly rent by the Court under sub-section (2) of section 13, which will govern compliance of section 13(1) of the Act. But where rate of rent is admitted and the quantum of the arrears of rent is disputed, (on the plea that the rent for the period in question or part thereof has been paid or otherwise adjusted). Sub-section (2) of section 13 is not attracted as determination of such a dispute is not postulated thereunder. Therefore, the obligation to pay/deposit the rent for the second and the third period subsequent to the notice of demand and for the period in which the suit/proceedings will be pending that is (future rent) does not become inoperative for the simple reason that section 13 (2) does not contemplate provisional determination of amount of rent payable by the tenant. As resolution of the category of dispute does not fall under section 13 (2) the tenant has to take, the consequence of non-payment/deposit of rents for the said periods. If he fails in his plea that no arrears are due and the Court finds that the arrears of rent for the period in question were not paid, it has to pass an order of eviction against the tenant as no provision of section 13 of the Act protects him."

Consequently, I answer substantial question of law No. 1 that the provisions of section 13 (1) of the M.P. Accommodation Control Act, would not remain in operation before the determination of provisional rent under section 13 (2) of the M.P. Accommodation Control Act.

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258. ARBITRATION AND CONCILIATION ACT, 1996 – Section 7

Arbitration agreement – Requirement of – Mere use of the word 'arbitration' or 'arbitrator' in clause not make it an arbitration agreement – If the clause uses the words 'shall be referred for arbitration if the parties so determine' is not arbitration agreement – It means parties will decide in future whether dispute should be referred to arbitrator or not – If the clause uses the words 'shall be referred to arbitration', it would be arbitration agreement – Further consent of the parties to refer disputes to arbitration is a necessity.

Jagdish Chander v. Ramesh Chander and others

Judgment dated 26.04.2007 passed by the Supreme Court in Civil Appeal No. 4467 of 2002, reported in (2007) 5 SCC 719

Held:

Para 16 of the partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If

the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been in arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an arbitrator does not arise.

Sub-section (1) of Section 7 of the Act defines "arbitration agreement" as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) requires an arbitration agreement to be in writing. Sub-section (4) provides that an arbitration agreement is in writing, if it is contained in – (a) document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi v. K.N. Modi, (1998) 3 SCC 573, Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd., (1999) 2 SCC 166* and *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418.* In *State of Orissa v. Damodar Das, (1996) 2 SCC 216* this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

> (i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is

no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrased from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate

that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

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259. ARBITRATION & CONCILIATION ACT, 1996 – Sections 8 & 11
CIVIL PROCEDURE CODE, 1908 – Order XXXIX Rule 1 (2) & Section 151

(i) Whether judicial authority should refer the parties to arbitration where the entire contract containing the arbitration agreement is null and void by reason of fraud ? Held, No.

(ii) Doctrine of comity and amity – A Court should not pass an order which would be in conflict with the order passed by a competent court of law.

India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.

Judgment dated 08.03.2007 passed by the Supreme Court in Arbitration Petition No. 18 of 2005, reported in (2007) 5 SCC 510

Held :

It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law.

Even if it applies, the jurisdiction of the arbitrator to determine his own jurisdiction is on the basis of that arbitration clause which may be treated as an agreement independent of the other terms of the contract and his decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. But, the question would be different where the entire contract containing the arbitration agreement stands vitiated by reason of fraud of this magnitude.

A judicial authority, therefore, may entertain anapplication at the instance of a party which alleges that there exists an arbitration agreement whereupon judicial authority may refer the parties to arbitration, save and except in a case

where it finds that the said agreement is null and void, inoperative and incapable of being performed. Section 8 of the 1996 Act, however, is differently worded.

Thus, as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question.

The said prayers fall outside the arbitration agreement since LG long belongs to LG Corporation which is the owner of the trade mark. It is not a party to the arbitration agreement. It allegedly has filed a separate suit. In a case of this nature, a Division Bench of this Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531* held : (SCC p. 535, para 13)

> "13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators."
>
> "16. The next question which requires consideration is – even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.
>
> 17. Secondly, such bifurcation of suit in two parts, one to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

We are, however, not oblivious of the fact that *Sukanya Holdings* (supra) has been distinguished in *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 SCC 275.* The present case, however, is covered by *Sukanya Holdings* (supra)

The doctrine of comity or amity requires a court not to pass an order which would be in conflict with another order passed by a competent court of law. The courts have jurisdiction to pass an order of injunction not only under Order 39 Rule 2 of the Code of Civil Procedure but also under Section 151 thereof.

This aspect of the matter has been considered in *A Treatise on the Law Governing Injunctions* by Spelling and Lewis wherein it is stated :

> *"Section 8. Conflict and loss of jurisdiction.* – Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or Jurisdiction, yet the granting of the injunction by a second Judge may lead to complications and retaliatory action ...."

See also *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540 and Morgan Securities and Credit (P) Ltd. v. Modi Rubber Ltd., (2006) 12 SCC 642.*

A Court while exercising its judicial function would ordinarily not pass an order which would make on of the parties to the lis violate a lawful order passed by another court.

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260. ARBITRATION & CONCILIATION ACT, 1996 – Sections 16, 34 & 37 Object of the Act – Expeditious resolution – Challenge to jurisdiction of Arbitral Tribunal – Should be raised right at the beginning not later than filing of defence – If plea of jurisdiction is not taken before arbitrator as provided u/s 16 of the Act – Such plea cannot be permitted to be raised in proceeding u/s 34 of the Act unless good reason is shown.

Gas Authority of India Ltd. and another v. Keti Construction (I) Ltd. and others

Judgment dated 11.05.2007 passed by the Supreme Court in Civil Appeal No. 2440 of 2007, reported in (2007) 5 SCC 38

Held :

So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India, shows that where a party asserts that the Arbitral Tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the Arbitral Tribunal right at the beginning and normally not later than in the statement of defence.

The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before

the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

Where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(a)(v) of the Act on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.

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261. ARBITRATION ACT, 1940 – Section 30

Misconduct and jurisdictional error by Arbitrator – A deliberate departure from contract amounts to misconduct and is jurisdictional error.

Food Corporation of India v. Chandu Construction and others
Reported in 2007 (3) MPLJ 268 (SC)

Held:

It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to opearte within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error [see *Associated Eng. Co. vs. Govt. of A.P., (1991) 4 SCC 93 and Rajasthan State Mines and Minerals Ltd. vs. Eastern Engg. Enterprises, (1999) 9 SCC 283*].

Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliverate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action [also *see Associated Engg. Co. vs. Govt. of A.P.* (supra)]

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262. CIVIL PROCEDURE CODE, 1908 – Section 47

Power of executing Court – Under the decree, plaintiff is entitled to get regularization and receive salary – Decree did not specify salary of plaintiff – The executing Court has no jurisdiction to go beyond the decree and calculate the salary as per Government scale – Decree does not provide so the Court cannot travel beyond its bounds – Unless provision of S. 47 of the Act is not invoked.

Vedic Girls Senior Secondary School, Arya Samaj Mandir, Jhajjar v. Rajwanti (Smt) and others

Judgment dated 08.03.2007 passed by the Supreme Court in Civil Appeal No. 1220 of 2007, reported in (2007) 5 SCC 97

Held :

When there were conflicting claims regarding the salary payable to Respondent I, the said respondent ought to have taken steps to amend the prayers in the plaint so that proper relief could be provided to her. The same not having been done, the executing court had no jurisdiction to go beyond the decree as passed, despite the fact that the trial Judge had noticed the dispute and had even decided the same.

The executing court was required to execute the decree as made and it had no jurisdiction to widen its scope or to add to it unless a specific question was raised relating to discharge or satisfaction of the decree as envisaged in Section 47 CPC.

The executing courts appears to have been misled by the application filed on behalf of the decree-holder Respondent 1 indicating that her suit had been decreed by the Court with the direction upon the school authorities to make payment to her by cheque of her dues *as per government scale.*

The words "as per government scale" do not find place in the decree as passed by the trial court and this has resulted in the anomaly in these proceedings. The executing court was required to act within the bounds of the decree and not travel beyond it or to widen its scope without invocation of the provisions of Section 47 CPC.

(State of Punjab v. Krishan Dayal Sharma, AIR 1990 SC 2177; State of Punjab v. Buta Singh, 1995 Supp (3) SCC 684, relied on)

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263. CIVIL PROCEDURE CODE, 1908 – Order I Rule 10
TRANSFER OF PROPERTY ACT, 1882 – Section 52
Doctrine of lis *pendens* – Impleadment of party – Property alienated by defendant to transferee during the pendency of suit for specific performance of agreement without leave of Court – Transferee cannot claim impleadment in view of doctrine of *lis pendens*.

Sanjay Verma v. Manik Roy & Ors.

Reported in AIR 2007 SC 1332

Held:

The principles specified in Section 52 of the T.P. Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of

lis pendens embodies in Section 52 of the T.P. Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The Section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

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264. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17

Amendment of plaint regarding time barred claim – Normally Court as a rule declined to allow such amendment – But it does not affect the power of the Court – Bonafides on the part of plaintiff and reasonable explanation of delay are to be shown – Amendment may be allowed.

Shiv Gopal Sah alias Shiv Gopal Sahu v. Sita Ram Saraugi & Ors.

Reported in AIR 2007 SC 1478

Held:

It is quite true that this Court in a number of decisions, has allowed by way of an amendment even the claims which were barred by time. However, for that there had to be a valid basis made out in the application and first of all there had to be bona fides on the part of the plaintiffs and a reasonable explanation for the delay. It is also true that the amendments can be introduced at any stage of the suit, however, when by that amendment an apparently time barred claim is being introduced for the first time, there would have to be some explanation and secondly, the plaintiff would have to show his bona fides, particularly because such claims by way of an amendments would have the effect of defeating the rights created in the defendant by lapse of time. When we see the present facts, it is clear that no such attempt is made by the plaintiffs anywhere more particularly in the amendment application.

In *T.N. Alloy Foundry Co. Ltd. vs. T. N. Electricity Board & Others, [(2004) 3 SCC 392]* a three Judge Bench of this Court relying on *L.J. Leach & Co. Ltd. vs. Jardine Skinner and Co. [AIR 1957 SC 357]* reiterated as under:

> "The law as regards permitting amendments to the plaint is well settled. In *L.J. Leach & Co. Ltd. vs. Jardine Skinner and Co.* it was held that the Court would as a rule decline to allow amendments, if a fresh suit on the amendment claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the Court to order it."

The situation is no different in this appeal and as such a suit as described above would be clearly barred by limitation.

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265. CIVIL PROCEDURE CODE, 1908 – Order VI Rule 17

Amendments of plaint and written statement – Different principle is applicable – Addition of a new ground of defence or substituting or altering of defence or taking inconsistent pleas in written statement is permissible – But altering or substituting a new cause of action in the plaint may be objectionable – Withdrawal of admission in written statement, scope of – A party cannot withdraw admission by seeking amendment – However, the admission can be explained or add rider or proviso to the admission keeping the admission intact – Law explained.

Usha Balashaheb Swami and others v. Kiran Appaso Swami and others

Judgment dated 18.04.2007 passed by the Supreme Court in Civil Appeal No. 2019 of 2007, reported in (2007) 5 SCC 602

Held :

It is equally well-settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case (See: *B.K. Narayana Pillai v. Parameswaran Pillai, (2000) 1 SCC 712* and *Baldev Singh v. Manohar Singh, (2006) 6 SCC 498.* Even the decision relied on by the plaintiff in *Modi Spg. & Wvg. Mills Co. Ltd., (1976) 4 SCC 320* clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in *Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary, 1995 Supp (3) SCC 179.* In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in *Basavan Jaggu Dhobi case* (supra) as follows : (SCC p. 180, para 3)

> "3. As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a

contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands, thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."

Coming back to the facts of the present case regarding amendment of the written statement, we find that the appellants had stated in para 8 of their original written statement "that the plaintiff and Defendants 1 to 7 have got 1/2 share and defendants 8 to 14 have got 1/2 share in all the family properties" and that the maternal aunts have also got share. By seeking incorporation of paras 8-A and 8-B and substitution of para 8 in the written statement, the appellants have maintained the admissions made by them in para 8 of the written statement but added a proviso or condition to the admission. Therefore, it was not a case of withdrawal of the admission by the appellants by making the application for the amendment of the written statement but in fact such admission was kept intact and only a proviso has been added. This, in our view, is permissible in law and the question of withdrawing the admission made in para 8 in its entirety in the facts as noted hereinabove, therefore, cannot arise at all.

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266. CIVIL PROCEDURE CODE, 1908 – Order VII Rule 7 & Order XXII Rules 3, 4, 9 & 10

(i) Identification of immovable property – Suit for recovery of possession of immovable property – Property in suit must be identifiable.

(ii) Abatement of appeal – Appeal abate automatically if legal representative of deceased plaintiffs or defendants are not brought on record within specified period – Prayer for bringing legal representative on record may be construed as a prayer for setting aside the abatement – Prayer by one plaintiff may be construed prayer for setting aside the abatement of the suit in its entirety – Approach of the Court be liberal and justice-oriented while dealing with such applications.

P. Chandrasekharan and others v. S. Kanakarajan and others

Judgment dated 27.04.2007 passed by the Supreme Court in Civil Appeal No. 2206 of 2007, reported in (2007) 5 SCC 669

Held :

The plaintiff, before his suit is decreed, must establish the cause of action in respect of the property in question wherefor the relief for recovery of possession has been claimed. In case the suit is decreed, the executing court must be able to deliver possession thereof and thus there cannot be any doubt whatsoever that the property in suit must be adequately identifiable. When such a relief is claimed the plaintiff must show what he had purchased and how the court, in the event a dispute arises, would determine the identity of the property.

Indisputably, an appeal would abate automatically unless the heirs and legal representatives of the deceased plaintiffs or defendants are brought on record within the period specified in the Code of Civil Procedure, Abatement of the appeal, however, can be set aside if an appropriate application is filed therefor. The question, however, as to whether a suit or an appeal has abated or not would depend upon the facts of each case. Had such a question been raised, the respondents could have shown that their cross-objection did not abate as the estate of the deceased cross-objector was substantially represented.

In *Mithailal Dalsangar Singh v. Annabai Devram Kini, (2003) 10 SCC 691* whereupon Mr. Balakrishnan himself relied, this Court held : (SCC p. 696, paras 8-9)

> "8 Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a list determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

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267. CIVIL PROCEDURE CODE, 1908 – Order VII Rule 11(d)
TRANSFER OF PROPERTY ACT, 1872 – Section 105
SPECIFIC RELIEF ACT, 1963 – Sections 38 & 34

(i) Rejection of plaint – Plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law – Word 'Law' within the meaning of O.7 Rule 11(d) includes the Law of Limitation also – Test to be applied – Averments made in the plaint if taken to be correct in their entirety, whether decree can be passed – Law explained.

(ii) Difference between renewal of lease and extension of lease – In case of extension, fresh deed of lease is not required – However option of renewal of lease if exercised, a fresh deed of lease shall have to be executed between the parties.

(iii) Invocation of renewal clause lease deed by party having the right to do so – Denial of renewal by other party – Enforcement of contractual obligation – Simplicitor suit for injunction not maintainable unless lease is properly renewed or declaration obtained in respect thereof from a Court of law.

Hardesh Ores (P) Ltd. v. Hede and Company

Judgment dated 15.05.2007 passed by the Supreme Court in Civil Appeal No. 2517 of 2007, reported in (2007) 5 SCC 614

Held :

The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 rule 11 must include that law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in *Liverpool & London S.P. & Assn. Ltd. v. M.V. Sea Success, (2004) 9 SCC 512* and *Popat and Kotecha Property v. State Bank of India Staff Assn., (2005) 7 SCC 510.*

It was contended on behalf of the respondent-defendant that there is no question of automatic renewal of an agreement or lease by mere exercise of the option which the appellant-plaintiff may claim under the agreement. The

respondent contends that renewal of an agreement of lease requires execution of another document evidencing such renewal and, in its absence, it cannot be argued that the agreement or lease stood automatically renewed. It was also urged relying upon the decision of this Court in *Ambica Quarry Works v. State of Gujarat, (1987) 1 SCC 213* that the grant of renewal is a fresh grant and must be consistent with law. The respondents relied on the decision of this Court in *Provash Chandra Dalui v. Biswanath Banerjee, 1989 Supp (1) SCC 487* wherein this Court considered the difference between "extension" and "renewal" of a lease. This Court observed thus: (SCC p. 496, para 14)

> "14. It is pertinent to note that the word used is 'extension' and not 'renewal'. To extend means to enlarge, expand, lengthen, prolong, to carry out further than its original limit. Extension, according to Black's Law Dictionary, means enlargement of the main body; addition to something smaller than that to which it is attached; to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The distinction between 'extension' and 'renewal' is chiefly that in the case of renewal, a new lease is required, while in the case of extension the same lease continues in force during additional period by the performance of the stipulated act."

The same view was reiterated by this Court in *State of U.P. v. Lalji Tandon, (2004) 1 SCC 1* wherein it was observed as under : (SCC pp. 8-9, para 13)

> "There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed as the extension of lease for the term agree upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year by year or month by month, as the case may be."
>
> (emphasis in original)

Having regard to these decisions we must hold that in order to give effect to the renewal of a lease, a document has to be executed evidencing the renewal of the agreement or lease, as the case may be, and there is no concept of automatic renewal of lease by mere exercise of option by the lessee. It is, therefore, not possible to accept the submission urged on behalf of the appellant-plaintiffs that by mere exercise of option claiming renewal, the lease stood renewed automatically and there was no need for executing a document evidencing renewal of the lease.

We are of the view that the respondents are right in contending that enforcement of the negative covenants presupposes the existence of a subsisting agreement. As noticed earlier, the law is well settled that the renewal of an agreement or lease requires execution of a document in accordance with law evidencing the renewal. The grant of renewal is also a fresh grant. In the instant case, the appellant-plaintiff did exercise their option and claimed renewal. The respondents denied their right to claim renewal in express terms and also unequivocally stated that the agreement did not stand renewed as contended by the appellants. Having regard to these facts it must be held that a cause of action accrued to the appellant-plaintiff when their right of renewal was denied by the respondents. This happened in December 2001 and, therefore, within three years from that date they ought to have taken appropriate proceedings to get their right of renewal declared and enforced by a court of law and/or get a declaration that the agreement stood renewed for a further period of 5 years upon the appellants, exercising their option to claim renewal under the original agreement. The appellant-plaintiffs have failed to do so. However, the plaint proceeds on the assumption that the original agreement stood renewed including the negative covenants contained in clauses 15 and 20 of the original agreement which authorised only the appellants to extract ore from the mine with an obligation cast on the respondent-defendants not to interfere with the enjoyment of their rights under the agreement. In the facts of this case, in the suit prayer for injunction based on negative covenants could not be asked for unless it was first established that the agreement continued to subsist. The use of the words "during the subsistence of this agreement" in clause 15, and "during the pendency of this indenture" in clause 20 of the agreement is significant. In the absence of a document renewing the original agreement for a further the absence of a document renewing the original agreement for a further period of 5 years and in the absence of any declaration from a court of law that the original agreement stood renewed automatically upon the appellants exercising their option for grant of renewal, as is the case of the appellants, they cannot be granted relief of injunction, as prayed for in the suit, for the simple reason that there is no subsisting agreement evidenced by a written document or declared by a court. If there is no such agreement, there is no question of enforcing clauses 15 and 20 thereof. The appellants ought to have prayed for a declaration that their agreement stood renewed automatically on exercise of option for renewal and only on that basis could they have sought an injunction restraining the respondents from interfering with their possession and operation. Having not done so, they cannot be permitted to camouflage the real issue and claim an order of injunction without establishing the subsistence of a valid agreement. In the instant suit as well they could have sought a declaration that the agreement stood renewed automatically but such a claim would have been barred by limitation since more than 3 years had elapsed after a categoric denial of their right claiming renewal or automatic renewal by the respondent-defendants.

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268. CIVIL PROCEDURE CODE, 1908 – Order VII Rule 11(d) & Order I Rules 1 & 2

Whether plaint may be rejected on the ground of defect of misjoinder of parties and causes of action ? Held, No.

Prem Lala Nahata & Anr. v. Chandi Prasad Sikaria

Reported in AIR 2007 SC 1247

Held :

An objection of misjoinder of plaintiffs or misjoinder of causes of action, is a procedural objection and it is not a bar to the entertaining of the suit or the trial and final disposal of the suit. The Court has the liberty even to treat the plaint in such a case as relating to two suits and try and dispose them off on that basis. On the scheme of the Code, there is no such prohibition or a prevention at the entry of a suit defective for misjoinder of parties or of causes of action. The Court is still competent to try and decide the suit, though the Court may also be competent to tell the plaintiffs either to elect to proceed at the instance of one of the plaintiffs or to proceed with one of the causes of action. On the scheme of the Code of Civil Procedure, it cannot therefore be held that a suit barred for misjoinder of parties or of causes of action is barred by a law. It is open to the Court to proceed with the suit notwithstanding the defect of misjoinder of parties or misjoinder of causes of action and if the suit results in a decision, the same could not be set aside in appeal, merely on that ground, in view of S. 99 of the Code, unless the conditions of S. 99 are satisfied. Therefore, by no stretch of imagination, can a suit bad for misjoinder of parties or misjoinder of causes of action be held to be barred by any law within the meaning of 0.7, R. 11 (d).

When one considers 0.7, R. 11 with particular reference to Cl. (d), it is difficult to say that a suit which is bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by any law. A procedural objection to the impleading of parties or to the joinder of causes of action or the frame of the suit, could be successfully urged only as a procedural objection which may enable the Court either to permit the continuance of the suit as it is or to direct the plaintiff or plaintiffs to elect to proceed with a part of the suit or even to try the causes of action joined in the suit as separate suits.

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269. CIVIL PROCEDURE CODE, 1908 – Order VIII Rule 1

Written statement – Delay in filing – May be accepted only in exceptional cases and for reasons to be recorded in writing – Acceptance of written statement without reasons recorded in writing – Order is bad in law – Law explained.

M/s. Aditya Hotels (P) Ltd. v. Bombay Swadeshi Stores Ltd. & Ors.

Reported in AIR 2007 SC 1574

Held:

The parameters for extending the time granted by Order VIII, Rule 1 of the Code have been delineated by this Court in several cases. In *Kailash v. Nanhku and Ors. [2005 (4) SCC 480]* it was noted as follows :

42. Ordinarily, the time schedule prescribed by Order 8. Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8, Rule 1 of the Code was being allowed to be made because the circumstance were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned in the time was not extended.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him."

Since neither the trial Court nor the High Court have indicated any reason to justify the acceptance of the written statement after the expiry of the time fixed, we set aside the orders of the trial Court and that of the High Court. The matter is remitted to the trial Court to consider the matter afresh in the light of what has been stated in *Kailash's case* (supra).

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270. CIVIL PROCEDURE CODE, 1908 – Order IX Rule 13

Ex parte decree of divorce – Obtained without due service of summons – While setting aside ex parte decree the court held in matrimonial cases duty is cast on Courts to make an endeavour to reconcile and at the same time to ensure that service is duly effected.

Namita Rathore v. Mukesh Rathore

Reported in 2007(3) MPLJ 345

Held :

It is clear that trial Court has shown undue haste in the matter. Order-sheets of main case indicates that suit was registered on 17.7.1997. Process fee was ordered to be paid by ordinary mode and RAD, it was not paid by registered post acknowledgment due. In ordinary mode the summon was issued,

that was not served by process server, On 29.8.1997 again process fee was required to be paid as before, still the PF was not paid by registered post, it was paid by ordinary mode only. When there was an order passed by the Court of issuance of summon by both the modes ordinary and registered post acknowledgment due, for the reasons best known to the plaintiff, he did not make the payment of PF by registered post acknowledgment due. It appears to be a design not to pay the PF by registered post acknowledgment due, as if plaintiff knew that on the next very date process server was going to oblige him for service by refusal, that has exactly happened in the case, when there was an order of the Court to make the payment of PF by registered post, in the case of refusal endorsement made by process server, Court ought to have insisted the service by registered post acknowledgment due as ordered but the trial Court has failed in the duty to act in the fair manner and to ensure that service was properly effected that too in a matrimonial case, when paternity of child was also in question, whether the child was born out of wedlock or not, the trial Court ought to have acted with due circumspection in ensuring that an endorsement made by process server was not to oblige the plaintiff, however, trial Court did not do so. In three dates entire proceedings of suit were over, for two of the dates the plaintiff was responsible for not making due payment of PF by registered post acknowledgment due. In the matrimonial cases it is the duty cast on the Court to make an endeavour to reconcile at the same time to ensure that service is duly effected.

Whatever (an ex parte decree was obtained without due service of summon. The Court has acted perfunctorily while passing ex parte judgment and decree of divorce without any consideration of relevant provision of law and without ensuring that case of adultery was made out. Thus, I have no hesitation in setting aside the order passed by the Court below and ex parte judgment and decree) dated 4.11.1997. The trial Court is directed to give due opportunity to the appellant to substantiate the case, the written statement to be filed within 6 weeks from today as assured by Shri Sanjay Agrawal, learned counsel for appellant. Parties shall keep themselves present without any further summon before the Court below as the date is given in presence of parties and their counsel. Let the parties appear before the Court below on 28th March, 2007.

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271. CIVIL PROCEDURE CODE, 1908 – Order XX Rule 18 & Order XXI
Whether property in partition suit can be put on auction sale without initiating final decree proceeding? Held, No – Property can be put to sale only in execution of a decree – Further held, an order passed by a Court lacking inherent jurisdiction would be a nullity.

Hasham Abbas Sayyad v. Usman Abbas Sayyad and others
Reported in 2007 (2) MPLJ 294 (SC)

Held:

The short question which, inter alia, arises for consideration is as to whether the property in suit could be put on auction sale without initiating a formal final decree proceeding.

Preliminary decree declares the rights and liabilities of the parties. However, in a given case a decree may be both preliminary and final.

There can be more than one final decrees. A decree may be partly preliminary and partly final, [See *Rachakonda Venkat Rao and others vs. R. Satya Bai (Dead) by L.Rs. and another, (2003) 7 SCC 452*].

A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree unless and until final decree is a part of the preliminary decree.

The question came up for consideration before this Court in *Shankar Balwant Lokhande (Dead) v. Chandrakant Shankar Lokhande and another, (1995) 3 SCC 413,* where in it was opined :

> "Both the decrees are in the same suit. Final decree may be said to become final in two ways (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court; (ii) when, as regards the Court passing the decree the same stands completely disposed of. It is in the latter sense the word "decree" is used in Section 2 (2) of CPC. The appealability of the decree will therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

Taking note of the fact that a final decree proceeding is required to be drawn upon a stamped paper it was observed:

> The crucial question for consideration is as to when the limitation begins to run for filing are application to pass final decree on stamped papers. There is no direct decision of this Court on this point. Therefore after hearing counsel at length, we reserve the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question.

We are not oblivious of the fact that a somewhat different view as regards period of limitation provided under Article 136 of the Limitation Act, 1963 was taken in *W.B. Essential Commodities Supply Corpn. vs. Swadesh Agro Farming and Storage Pvt. Ltd. and another, (1999) 8 SCC 315,* wherein, inter alia, it was held that the aforementioned observations do not apply to a money decree.

In *Hameed Joharan (Dead) and others vs. Abdul Salam (Dead) by LRs. and others, (2001) 7 SCC 573, Shankar Balwant Lokhande* (supra) was distinguished inter alia, stating :

> "23. Significantly, the contextual facts itself in *Lokhande's* case (supra) has prompted this Court to pass the order as it has (noticed above) and as would appear from the recording in the order to wit : Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18 (2).

24. In that view of the matter, reliance on the decision of *Lokhande* case (supra) by Mr. Mani appearing for the appellants herein cannot thus but be said to be totally misplaced more so by reason of the fact that the issue pertaining to furnishing of stamp paper and subsequent engrossment of the final decree thereon did not fall for consideration neither the observations contained in the judgment could be said to be germane to the issue involved therein. The factual score as noticed in paragraph 10 of the Report makes the situation clear enough to indicate that the Court was not called upon to adjudicate the issue as raised presently. The observations thus cannot, with due deference to the learned Judge, but be termed to be an obiter dictum."

Yet again in *Mool Chand and others vs. Dy Director, Consolidation and others, (1995) 5 SCC 631* a distinction was drawn between a case where an appeal against a preliminary decree was filed and a case where a preliminary decree had not been appeled against.

Recently in *Dr. Chiranji Lal (D) by LRs. vs. Hari Das (D) by LRs., (2005) 10 SCC 746,* it was held that the period of limitation for execution of a partition decree would not be made contingent upon the engrossment of the decree on the stamp paper.

We have referred to the aforementioned decisions to clear the air in relation to one aspect of the matter, namely, although final decree may be required to be duly stamped, or the same may not have anything to do for the purpose of computing the period of limitation, the preliminary decree as such cannot be put to execution.

Although in regard to the period of limitation in execution of the final decree proceeding there are somewhat different views, but all decisions of this Court clearly state that it is the final decree proceeding which would be executable in nature. Without drawing a final decree proceeding, the Court could not have put the property on auction sale.

It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution.

The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a Court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to. (See *Chief Justice of Andhra Pradesh and another vs. L.V. A. Dikshitulu and others, AIR 1979 SC 193* and *MD, Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd., (2004) 8 SCC 619*].

This aspect of the matter has recently been considered by this Court in *Harshad Chiman Lal Modi vs. DLF Universal Ltd. and another, (2005) 7 SCC 791*, in the following terms:

> "We are unable to uphold the contention. The jurisdiction of a Court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity."

[See also *Zila Sahakari Kendrya Bank Maryadit vs. Shahjadi Begum and ors., 2006 (9) SCALE 675 and Shahbad Co-op. Sugar Mills Ltd. vs. Special Secretary to Govt. of Haryana and ors., 2006 (11) SCALE 674 para 29*]

We may, however hasten to add that a distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure; and a decree passed by a Court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with.

We are also not oblivious of some decisions of this Court where a property that had been put to auction and despite setting aside of the decree, the Court had not interfered with. [See *Bombay Dyeing and Mfg. Co. Ltd. vs. Bombay Environmental Action Group and others, (2006) 3 SCC 459 para 329*].

But in this case possession of the property has not been delivered to the auction purchaser.

The suit property is a residential house. The auction sale was wholly illegal. The auction purchaser can otherwise be compensated on monetary terms.

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272. CIVIL PROCEDURE CODE, 1908 – Order XXI Rule 2
Word 'adjustment' is not synonymous to the word 'satisfaction' in terms of decree – Adjustment is method of settling decree which is not provided for in the decree itself.
Ramji Bhai Patel v. Durga Bai and others
Reported in 2007 (2) MPLJ 361

Held :

The word 'adjustment' within the meaning of this provision is not synonymous to the word 'satisfaction' in terms of decree. The Supreme Court of India in the case of *Padma Ben Banushali and anr. vs.Yogendra Rathore and ors., AIR 2006 SC 2167* has held :–

> "It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of the Rule."

This Court in the case of *Gyasiram Kanairma Vaish vs. Brij Bhushandas and another, 1973 MPLJ 201=AIR 1973 MP 148,* has held that a decree within the meaning of Order 21, Rule 2 of the Code of Civil Procedure can be adjusted by a lawful agreement as long as it definitely extinguishes the decretal liability either in full or in part. Order 21, Rule 2 deals with the procedure to be followed in a limited class of cases relating to discharge or satisfaction of decree where there has been payment of money or adjustment or satisfaction of the decree by conscious arrangement. Thus, adjustment is clearly not the same thing as satisfaction. It is a method of settling the decree which is not provided for in the decree itself. I may successfully refer to the statement of Wallace J. in the case of *Thutta Venkataswami vs. Vissamesetti Kotilingam and another, AIR 1926 Madras 184.* Thus, Order 21, Rule 2 of the Code of Civil Procedure contemplates an adjustment to the satisfaction of the decree holder and adjustment within the meaning of this provision to be binding must be one between the decree holder and the judgment debtor and by their consent and further the same must be certified in a manner provided thereunder. To understand the scope of the term adjustment occurring in Order 21, Rule 2 of the Code of Civil Procedure, full Bench decision of Allahabad High Court in the case of *Maharaj Kumar vs. Hasan Khan, AIR 1961 Allahabad 1* needs to be referred, wherein it has been held that if the agreement between the parties has the effect of enhancing the liability of the judgment debtor it cannot be treated as bringing about any 'adjustment' of the decree within the meaning of Order 21, Rule 2 of the Code of Civil Procedure.

Order 21, Rule 2 of the Code of Civil Procedure may be invoked where adjustment of the decree in a manner not provided in the decree itself has been arrived at with the consent of the decree holder and it extinguishes the rights of the decree holder. It cannot apply to a case in which the adjustment was not accepted by the decree holder. It is not open to the judgment debtor to decide for himself and act on the supposition that the decree has been wholly adjusted though the decree holder is unwilling to accept that position.

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273. CIVIL PROCEDURE CODE, 1908 – Order XXI Rule 43

In execution of eviction and recovery of rent decree the belongings of tenant were attached and given to supurdgidar on supurdaginama – With the passage of one and half years, supurdagidar submitted before the executing Court that goods have been damaged – Held, faith of thousands of litigants cannot be allowed to be shattered by permitting supurdagidar to play tricky and foul game – Directions issued to executing Court to initiate proceedings of criminal breach of trust against supurdagidar and to proceed to recover differential amount between estimated cost and amount fetched by auction in case of finding any variation in items handed over to supurdagidar.

Mithu Lal Soni v. Ram Lal Soni and another

Reported in 2007 (2) MPLJ 254

Held :

Undisputedly, the decree for Rs. 11,568.90 paise has been passed in favour of the petitioner against the respondent No. 1 and various goods of the respondent No. 1 were attached, as detailed in Annexure P/2. They were, admittedly, handed over to the respondent No. 2 and its total cost was estimated at Rs. 12,000/- which was acknowledged by the respondent No. 2 vide supurdaginama contained in Annexure P/3. It is a matter of common knowledge that a full size T.V. of E.C. Company, an Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler, and ceiling fan (except wooden counter) must not be of perishable nature and if kept inside a room will not get converted in scrap merely within a period of one and half years i.e. from the date of Supurdaginama of 21.6.2001 to 17.12.2002 (being the date of application under section 151 of Civil Procedure Code). The items might have been in working condition or not but, definitely, the description of manufacturing company would remain the same and the inner components of these items would remain the same. Learned Executing judge was under an obligation to tally the items handed over by the respondent No. 2 for auction with the details mentioned in the memo of attachment and Supurdaginama contained in Annexures P/2 and P/3. If the particulars of the manufacturing company are different, the respondent No. 2 would be guilty of criminal breach of trust and would be liable to be prosecuted for the same. In such a situation, apart from the aforesaid, the estimated cost of Rs. 12,000/- would also be liable to be recovered from him. The items were kept in a room as per the statement of respondent No. 2 and it is inconceivable that a full size T.V. of EC. Company, an Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler, and ceiling fan kept in a room will get converted into scrap within a period of about 18 months. These are the items having inner valuable components. They must have contained the particulars like body number, frame number, machine number etc. embossed by the respective manufacturing company. HMT wrist watch cycle, full size cooler and ceiling fan must have been made of iron and were not of perishable nature. It was the bounden duty of the executing judge to ensure that the Nazir or person entrusted with the work of execution ought to have tallied the goods with the attachment list and Supurdaginama while taking possession and before putting them for auction. In

case, if this has not been done, the concerning Nazir, or the person entrusted with the work of execution will also be directed against them in accordance with law. If the specification/particulars were not noted down at the time of attachment and handing over them to the respondent No. 2, the erring employee may be also made liable in proportionate manner, to make good to the decree-holder after due enquiry. The executing Court cannot be permitted to act in such a casual and non-serious manner when the respondent No. 2, either singly or in connivance with he employee of execution section, is trying to give eye wash to the executing Court by saying that the good with the aforesaid descriptions have been damaged merely with the passage of one and half years. One must understand that when the important pillar of judiciary out of the three pillars of our Constitution reposes trust in a person by entrusting the goods to him as a Supurdagidar, the faith of thousands of litigants cannot be allowed to be shattered by permitting such Supurdagidar to play tricky and foul game. The learned executing judge does not appear to have applied his mind at all to the nature of items which were handed over to the respondent No. 2 on Supurdaginama. It is un-understandable that how the executing Court could believe that the items especially like a full size T.V. of E.C. Company, Atlas cycle, H.M.T. Sona wrist watch wall clock, full cooler (which obviously must have contained an exhaust fan and water pump) and ceiling fan could get damaged merely by keeping them in a room for one and half years and got converted in scrap fetching merely Rs. 600/-. The executing Court must understand that it is not merely a decree for money which would serve purpose of the plaintiff/decree holder but it would be the successful execution and satisfaction of the decree which would make the existence of the Court meaningful and any tricky obstruction in the execution in this manner must be thwarted in a stern manner in accordance with law.

In view of the aforesaid discussion, this petition is allowed. The learned executing judge is directed to re-decide the application dated 10.2.2004 contained in Annexure P/4 after holding an enquiry in due manner that whether the respondent No. 2 had re-delivered items to the Court for auction which were handed over to him under the Supurdaginama, marked as Annexure P/3. If there is a single variation in the particulars of any of the items handed over to him under the Supurdaginama vide Annexure P/3 and the items returned by him to the Court for putting them in auction, learned trial judge shall initiate the proceedings of criminal breach of trust against the respondent No. 2 Apart from this, the executing judge in case of finding any variation shall proceed to recover differential amount between the estimated cost and amount fetched by the auction, from respondent No. 2 in accordance with law. Role of Nazir and other person/employer entrusted with execution may also be scrutinized and action may also be taken, if found guilty. The petitioner is also awarded cost of Rs. 1000/- which would be payable by the respondents jointly or severally. The impugned order is set aside to the extent of dismissal of the application dated 10.2.2004 of the petitioner under Order 21, Rule 43 of the Civil Procedure Code which has been directed to be re-decided in the aforesaid manner in accordance with law within a period of three months.

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274. CIVIL PROCEDURE CODE, 1908 – Order XXI Rule 97

Auction held in execution of money decree against dissolved firm – Obstructionist purchaser from heirs of deceased partner and in possession raised obstruction – Auction purchaser filed an application under R. 97 for removal of obstruction – Right of auction purchaser against dissolved firm cannot be decided in execution proceedings – Partners in firm who were co-owners of definite share have merely applied their property to run business in partnership – Their rights in property would revive on dissolution – Held, application was rightly rejected.

M.V. Karunakaran v. Krishan

Reported in AIR 2007 SC 1501

Held:

It has been found as of fact by all the three courts that after purchasing the property from the heirs and legal representatives of Madhavan, the respondent herein had been put in possession and they had been residing therein when the auction sale was effected. He had caused some improvements and a new building had also been constructed by him. As a suit was filed after the deed of sale was executed and registered, the respondent was a necessary party. He was not arrayed as a party in the suit. He having been found to be in possession of the property as on the date when the delivery of possession of the property was sought to be effected; a fortiori he has a right to obstruct thereto. Once the title in respect of the property in question is found to one existing in the obstructionist, an application for removal of the obstruction as envisaged under Order 21, Rule 97 of the Code of Civil Procedure has rightly been determined in favour of the appellant.

Herein we have to consider the case from altogether a different angle. It is not a case where the partners of the firm were not the owner of the property. It is also not a case where the property was owned by the partnership firm. The partners as pre-existing co-owners had a definite share of the property. They merely applied their own property for running a business in partnership. On dissolution of the partnership, their right in the property revived. Using of a premises for business purpose would not automatically lead to the conclusion that the premises belonged to the partnership firm.

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275. CIVIL PROCEDURE CODE, 1908 – Order XXIII Rule 1 (4) & Section 2 (2)

Withdrawal of suit – Effect – Order allowing withdrawal of suit without liberty to file fresh suit – Does not constitute decree – Defendant can raise such defence in subsequent round of litigation.

Kandapazha Nadar & Ors. v. Chitraganiammal & Ors.

Reported in AIR 2007 SC 1575

Held:

In view of the above judgment, the position in law is clear that when the Court allowed the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it cannot debar the petitioners herein from taking the defence in the second round of litigation as held in the impugned judgment. The above judgments indicate that if the plaintiff withdraws the suit, the order of the Court allowing such withdrawal does not constitute a decree under Section 2(2) of the Code. That in any event, it will not preclude the petitioners herein (defendants in second round) from raising the plea that the sale deed executed by Chelliah Nadar on 26-2-73 in favour of Thangaraj Nadar was not true and valid.

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276. CIVIL PROCEDURE CODE, 1908 – Order XLVII Rule 1 Explanation Review, scope of – Law explained.

A decision or order erroneous in law or on merits cannot be corrected in exercise of powers of review under O.47 Rule 1 of the Code – Law explained.

Sushila and another v. Rajbeer Singh and another

Reported in 2007 (3) MPLJ 361

Held :

It is settled position under the law that even a decision or order erroneous in law or on merits it cannot be accepted that it is an error apparent on the face of the record and the aforesaid mistakes cannot be corrected exercising powers of review under Order 47, Rule 1. Even if erroneous view taken by the Division Bench in M.A. No. 169/99 decided on 21.9.1999, the same cannot be corrected and naturally the present case will not fall strictly within the scope of review and it cannot be held that there is mistake apparent on the face of record. Thus, considering the totality of the facts and circumstances of the case, we do not find any merit in this review petition.

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277. CONSTITUTION OF INDIA – Articles 342 & 311

Person secures appointment on the basis of false caste certificate – Cannot be allowed to retain benefit of the wrong committed by him – His services are liable to be terminated.

Additional General Manager, Human Resource, BHEL Ltd. v. Suresh Ramkrishna Burde

Reported in 2007 (3) MPLJ 1 (SC)

Held:

The principle, which seems to have been followed by this Court is, that, where a person secures an appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and

his services are liable to be terminated. However, where a person has got admission in a professional course like Engineering or MBBS and has successfully completed the course after studying for the prescribed period and has passed the examination, his case may, on special facts, be considered on a different footing. Normally, huge amount of public money is spent in imparting education in a professional college and the student also acquires the necessary skill in the subjects which he has studied. The skill acquired by him can be gainfully utilized by the society. In such cases the professional degree obtained by the student may be protected though he may have got admission by producing a false caste certificate. Here again no hard and fast rule can be laid down. If the falsehood of the caste certificate submitted by the student is detected within a short period of his getting admission in the professional course, his admission would be liable to be cancelled. However, where he has completed the course and has passed all the examinations and acquired the degree, his case may be treated on a different footing. In such cases only a limited relief of protection of his professional degree may be granted.

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278. CONTEMPT OF COURTS ACT, 1971 – Section 2 (c)

Contemner deliberately abused the Court and hurled sandals towards the Judge sitting on dais – Held, the act of contemner amounts to serious kind of criminal contempt of Court – In such cases severe punishment should be awarded so that it may be a lesson to the others and such kind of incident may not be repeated in future.

In the matter of Reference of Contempt against Jagmohan Parashar

Reported in 2007 (3) MPLJ 238 (DB)

Held :

In the cases where the person interferes or tends to interfere with or obstruct or tends to obstruct, the administration of justice in any other manner will be guilty of criminal contempt as defined in clause (c) of section 2 of the Contempt of Courts Act, 1971, From the conduct of the contemner it appears that it is a case of wilful contempt and comes within the purview of criminal contempt. The entire conduct of the contemner shows that neither he was mentally under shock nor it cannot be held that he committed the offence unknowingly without any intention. The purpose of the law of Contempt of Courts is for keeping the administration of justice pure and undefiled. The dignity of the Court is to be maintained at all costs. No doubt the contempt jurisdiction, which is of a special nature, should be used sparingly. But, abusing the Judge and thereafter throwing sandals towards the Judge aiming to hit him is clearly a serious kind of criminal contempt and the contemner cannot be simply acquitted from the allegations on tendering an apology. According to us, the unconditional apology which has been tendered by the contemner is also not acceptable, as he has first furnished explanation of his family conditions which has no bearing

on the misconduct committed by him and thereafter tendered apology in the High Court and not before the Judge concerned. Therefore, in such circumstances neither the apology can be accepted nor he can be pardoned. He has deliberately committed the criminal contempt of Court by abusing the Court and by hurling the sandals towards the Judge.

It is the duty of every citizen to maintain dignity and respect of the Courts as well as discipline in the Courts as without which public confidence in administration of justice cannot be maintained. In these days, the public may not treat the Courts as Temple of Justice but certainly the Courts command respect and are being treated as exalted place of justice where majesty of law is upheld and justice is administered. We realised, those old days have gone when Courts were treated as temple and Judges as priest, now we are in open democratic society and exposed to fair criticism but certainly there is no dispute in this established fact that even as on today if the people of this country is having any faith in any institution, that is first in the judiciary, Courts and administration of justice. Therefore, it is expected that there cannot be anything of greater consequences than to keep the stream of justice clear and pure.

The course of justice must not be deflected or interfered with. Those, who strike at it strikes at the very foundation of our society. It is expected that every person coming to the Court either as party or witness or employee working in the Court or the lawyers appearing in the Courts those who are also treated as Officer of the Court, are bound to maintain discipline, prestige and dignity of the Courts and it is expected of them to also extend and observe normal courtesy due to the courts and Judges. It is the need of the day that prestige and dignity of the courts of law have to be preserved at all costs.

After considering the entire episode, facts and circumstances of the case, we do not see any justification of the aforesaid conduct of the respondent, which was totally unwarranted, unscrupulous and cannot be ignored merely on the ground of tendering the apology. In our considered view, in such cases severe kind of punishment should be awarded to the contemner so that it may be a lesson to the others and such kind of incident may not be repeated in future. If such kind of persons are allowed to do such act and to hurl sandals, chappals or any other kind of material or to misbehave in such a rude manner and if such persons are not punished for their such kind of notorious act or acquitted simply on the ground of tendering apology, there will be no fear or respect in future in the mind of litigants towards the Courts or Judges. We are also of the view that where reputation, respect and dignity of the Courts is at stake, such an act cannot be termed to be a normal kind of act on the part of the accused. Such acts have to be dealt with severally and with heavy hand.

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279. CONTRACT ACT, 1872 – Sections 55 & 72

Damages for breach of contract – If time is essence of contract – Failure to perform a mutual obligation by employer – Gives right to other party to avoid the contract and asked for damages – Instead of avoiding the contract – Contractor accept belated performance of reciprocal obligation on the part of the employer – Contractor cannot claim damages – Unless he gives notice to the employer of his intention to do so.

State of Kerala & Anr. v. M.A. Mathai

Reported in AIR 2007 SC 1537

Held :

In *General Manager, Northern Railway and another vs. Servesh Chopra [2002 (4) SCC 45]* it was inter alia observed as follows:

> "In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states:
>
> > "a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. contractor cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the

contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

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280. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)

The period of police custody for investigation in particular case cannot be treated as police or judicial custody/detention in another case if another case relates to a different occurrence.

State of West Bengal v. Dinesh Dalmia

Reported in 2007 CrLJ 2757 (SC)

Held:

The whole purpose of S. 167 is that the accused should not be detained for more than 24 hours and subject to 15 days police remand and it can further be extended up to 90/60 as the case may be. But the custody of police for investigation purpose cannot be treated judicial custody/detention in another case. The police custody means the police custody in a particular case for investigation and not judicial custody in another case. Thus, where two F.I.Rs were lodged against accused at Calcutta and Chennai and the accused who was arrested and was in C.B.I. custody in the case pending before Court at Chennai, on receiving information that he was also required in case at Calcutta voluntarily surrendered before the Magistrate at Chennai in case relating to F.I.R. in Calcutta, such notional surrender cannot be treated as police custody so as to count 90 days from that notional surrender as regards case pending at Calcutta. A notorious criminal may have number of cases pending in various police stations in city or outside city, a notional surrender in pending case for another FIR outside city or of another police-station in same city. If the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to sub-section (1) and can be released on bail. This kind of device cannot be permitted under Section 167 of the Cr.P.C. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days' police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the Police custody in the case pending in Calcutta.

Note : Please go through the whole case. Previous laws also discussed

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281. CRIMINAL PROCEDURE CODE, 1973 – Sections 178, 181 (4) & 156 (3)

Territorial jurisdiction of a Magistrate – Determination of – Offences of cheating and criminal misappropriation – A person accused of cheating could be prosecuted at the place where fraudulent representation was made – For criminal misappropriation – Within

whose jurisdiction the property had been entrusted or was to be accounted for – Commission of even a part of offence within the jurisdiction of the Court is sufficient for exercising jurisdiction to direct concerned police officer to investigate the matter as per law.

Asit Bhattacharjee v. Hanuman Prasad Ojha and others

Judgment dated 15.05.2007 passed by the Supreme Court in Criminal Appeal No. 738 of 2007, reported in (2007) 5 SCC 786

Held :

Sub-section (1) of Section 156 empowers the officer in charge of a police station to investigate any cognizable offence which a court having jurisdiction over the local area within its limits or to try under the provisions of Chapter XIII; the power of the Magistrate to order such an investigation is vested in him who can take cognizane of the offence under Section 190 of the Code of Criminal Procedure.

Chapter XIII provides for jurisdiction of the criminal courts in inquiries and trials. Section 177 provides that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. Section 178 provides for place of inquiry or trial. It provides;

"178. *Place of inquiry or trial.* – (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas."

Section 181 provides for place of trial in case of certain offences. Sub-section (4) of Section 181 was introduced in the Code of Criminal Procedure in 1973 as there existed conflict in the decisions of various High Courts as regards commission of offence of criminal misappropriation and criminal breach of trust and with that end in view, it was provided that such an offence may be inquired into or tried by the court within whose jurisdiction the accused was bound by law or by contract to render accounts or return the entrusted property, but failed to discharge that obligation.

The provisions referred to hereinbefore clearly suggest that even if a part of cause of action has arisen, the police station concerned situate within the jurisdiction of the Magistrate empowered to take cognizance under Section 190(1) of the Code of Criminal Procedure will have the jurisdiction to make investigation.

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282. CRIMINAL PROCEDURE CODE, 1973 – Section 228

Framing of charge – Relevant consideration – Material showing on record that the accused might have committed offence – Material brought on record has to be accepted true at the stage of framing of charge – Probative value of the record has to be seen at that stage where fraud alleged to have been committed by Government servant by processing and verifying fake bills – All officers who dealt with the relevant files at one point of time or other could not be considered to have taken part in conspiracy – In such case individual acts of criminal misconduct of an accused should be seen.

Soma Chakravarty v. State through CBI

Judgment dated 10.05.2007 passed by the Supreme Court in Criminal Appeal No. 710 of 2007, reported in (2007) 5 SCC 403

Held:

It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the court could form an opinion that the accused *might* have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.

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The courts although may take a strict view of an offence where fraud is alleged against a public servant, but only because it is found to have been committed, the same by itself may not be sufficient to arrive at a conclusion that all officers who have dealt with the files at one point of time or the other would be taking part in conspiracy thereof or would otherwise be guilty for aiding and abetting the offence. It is necessary to deal with the individual acts of criminal misconduct for finding out a case therefore.

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283. CRIMINAL PROCEDURE CODE, 1973 – Section 311

Recalling of witness – Determinative factor – Just decision of the case – Court is not empowered to ask any party to examine any particular witness – But if Court comes to the conclusion that evidence of any person is essential to the just decision of the case – Second part of the Section imposes obligation upon Court to examine the person – Second part of the Section is mandatory in nature – Witness already examined – Recall application is based on ground

that parties compromised the offence outside the Court – Offence is not compoundable – Held, application was rightly rejected.

Rama Paswan & Ors. v. State of Jharkhand

Reported in 2007 CrLJ 2750 (SC)

Held :

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary enabling provision, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witnesses at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon

and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

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284. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Whether cognizance u/s 319 of the Act may be taken on the basis of uncrossed testimoney of a witness? Held, Yes – Further held, powers u/s 319 of the Act are to be used sparingly when the Court is hopeful that there is a reasonable prospect of the case, as against the newly brought accused, ending in conviction.

Ramavatar and another v. State of M.P.

Reported in 2007 (2) MPLJ 280

Held:

The impugned order has been assailed mainly on the ground that the uncrossed testimony of Madhav Singh cannot be considered as evidence as provided under section 319 (1) of Criminal Procedure Code. Section 319 of Criminal Procedure Code, which goes as under :–

> 319. *Power to proceed against other persons appearing to be guilty of offence* (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused the Court may proceed against such person for the offence which he appears to have committed.
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> (emphasis supplied)

... One judgment rendered by the Apex Court in *Rakesh an another v. State of Haryana, 2001 (5) Supreme Court Today 300* completely answered this contention, which is based on identical facts. In this case also the cognizance under section 319 of Criminal Procedure Code was taken only on the basis of uncrossed testimony of the prosecutrix which was assailed on the same ground. The Apex Court has observed in para 13 –

"13 Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' as used in section 319 Criminal Procedure Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not."

It appears that the power under section 319 of Criminal Procedure Code are discretionary and are to be used sparingly when the Court is hopeful that there is a reasonable prospect of the case, as against the newly brought accused ending in conviction and the approach of the Court should be based on the evidence recorded during trial. The other material of the charge-sheet papers is not required to be considered. *Keeping these principles in mind, if the impugned order is to be considered.* The uncrossed testimony of Madhav Singh can be considered as an evidence in the case, in view of the observation of the Apex Court in the case of *Rakesh* (supra), he has stated against the petitioners about their specific involvement in the incident. About petitioner Ramavatar, he states that he was carrying 12 bore gun and exhorted in the words, "देखते क्या हो गोली से उड़ा दो" along with his exhortation, he himself fired his gun hitting at the hand of injured Bunti. The bullets fired by the petitioner Rajendra and Brijendra, hit the deceased Bhagirath. The bullet fired by Dharmendra, hit the deceased Shambu. The bullets fired by petitioner Arvind, hit the deceased Shyam and the bullets fired by Udaiveer, hit the deceased Shambu. He immediately lodged the report Ex. P-18 at the Police Station. Admittedly, this FIR corroborates this statement and also it is corroborated by the medical evidence. This fact has been argued on behalf of the respondents and not controverted on behalf of the petitioners during the arguments. The facts which have been stated by this witness about his filing applications and affidavits before the authorities during investigation can also be considered because that is now part of the statement of this witness during trial and documents have been exhibited in the statement. The statements of Madhav Singh is one of the three eye witness. Rest two Bunti and Padam Singh are yet to be examined. Considering this legal evidence, the satisfaction of the Court as required by the observation of the aforementioned judgments of the Apex Court, appears in existence. Considering all the facts and circumstances, this evidence on the record, appears sufficient to sustain the impugned order.

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285. CRIMINAL PROCEDURE CODE, 1973 – Sections 357, 357 (1), (2) & (3) & 374

(i) Appeal against conviction – Statutory right can never be subjected to any condition.
When appellant accused is directed to pay compensation – Appellate Court can put terms – But direction to pay amount of compensation; must be for a reasonable sum.

(ii) Fine and compensation, distinction between.

Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.

Reported in 2007 CrLJ 2417 (SC)

Held:

An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of Appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a Fundamental Right. Right of Appeal, thus, can neither be interfered with or impaired, nor it can be subjected to any condition.

Although it has been contended that direction to impose a fine of Rs. 5 lacs had been issued as a condition precedent for admitting the appeal; from the order of the Appellate Court, the same does not appear, to be correct. In its order dated 23.4.2006, the learned Appellate Court directed:-

"Appeal admitted."

Substantive sentence @ compensation payable in default is suspended till the disposal of the appeal, on payment of Rs. 5 lacs within four weeks.

Call R & P.

Appellant be released on same bail.

Appellant to furnish fresh bail bond."

Unfortunately, the legislature has not made any express provision in this behalf. In absence of any express provision, the question must be considered having regard to the overall object of a statute. We have noticed hereinbefore that Article 21 of the Constitution of India read with Section 374 of Crl. P.C. confers a right of appeal. Such a right is in absolute one. In a case where a judgment of conviction has been awarded, the Court can release a person on bail having regard to the nature of offence but as also the other relevant factors including its effect on society. A person upon arrest may have to remain in jail as an under-trial prisoner. So would a person upon conviction. A person may also have to remain in Jail, in the event he defaults in payment of fine, if he is so directed. But when a direction is issued for payment of compensation, having regard to sub-section (2) of Section 357 of the Code, the application thereof should ordinarily be directed to be stayed. It will therefore, be for the Court to stay the operation of that part of the judgment whereby and whereunder

compensation has been directed to be paid, which would necessarily mean that some conditions therefor may also be imposed. A fortiori a part of the amount of compensation may be directed to be deposited, but the same must be a reasonable amount.

The distinction between sub-sections (1) and (3) of Section 357 is apparent. Sub-section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part: whereas sub-section (3) calls for a situation where a Court imposes a sentence of which fine does not form a part of the sentence.

If, therefore, under sub-section (2) of Section 357, realization of fine, at least in respect of the factor(s) enumerated in clause (1) of sub-section to be stayed automatically, we see no reason as to why the legislative intent cannot be held to apply in relation to amount of compensation directed to be paid in terms of sub-section (3).

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286. CRIMINAL PROCEDURE CODE, 1973 – Sections 384 & 386

Appeal against conviction – Appellate Court directed the appellant to deposit the amount of fine – Appellant failed to deposit the amount of fine – Appellate Court dismiss the appeal – Held – Appeal cannot be dismissed on the premise that appellant failed to deposit the fine amount – Appeal must be decided on merits – Trial Court may take all coercive steps for realization of fine.

Vijay D. Salvi v. State of Maharashtra and others

Judgment dated 16.05.2007 passed by the Supreme Court in Criminal Appeal No. 745 of 2007, reported in (2007) 5 SCC 741

Held:

It appears that two complaint cases were filed against the appellant. In both the cases, he was convicted under Section 138 of the Negotiable Instruments Act, 1881, and sentenced to undergo one month's simple imprisonment in each of the cases. In one case, the appellant was directed to pay fine of Rs. 1,40,000 and in another Rs. 1,45,000, in default, he was directed to undergo further imprisonment for a period of three months. Against the said orders, appeal were preferred before the Sessions Court which directed the appellant to deposit the amount of fine. But he failed to deposit the same, the appeals were dismissed. When the said order was challenged before the High Court in revision, similar order was passed on non-deposit of payment of fine and the revision applications have been dismissed. Hence, this appeal by special leave.

In our view, neither the appellate court nor was the Revisional Court right in dismissing the appeals or revisions in the event of non-deposit of fine, but they should have disposed of the case on merits.

Accordingly, the criminal appeal is allowed, impugned orders are set aside and the matter is remitted to the appellate court to dispose of the appeals on

merits in accordance with law after giving opportunity of hearing to the parties. It is directed that the trial court shall take all coercive steps for realisation of fine awarded by the trial court against the appellant.

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287. CRIMINAL PROCEDURE CODE, 1973 – Section 438 (1)

(i) Maintainability of application for anticipatory bail – Registration of crime is not a condition precedent.

(ii) Defence of accused as to innocence – Cannot be a ground for rejection of bail application.

Durga Shankar Gupta and others v. State of M.P.

Reported in 2007 (2) MPLJ 233

Held:

The Apex Court has dealt with all possible aspects and circumstances in which the application under section 438 of Criminal Procedure Code would be and would not be maintainable. It has been laid down that the provisions of section 438 (1) of the Code cannot be invoked on the basis of vague and general allegations and there must be some reasonable apprehension of arrest. Mere fear cannot take place of belief. It is further held that the Court must apply its own mind and decide whether a case is made out for grant of such relief, allegations and there must be some reasonable apprehension of arrest. Mere fear cannot take place of belief. It is further held that the Court must apply its own mind and decide whether a case is made out for grant of such relief.

This Court has also held in case of *Hariom Lokhande vs. M.P. State Electricity Board, 2006 (1) MPLJ 156* as follows :–

> "It is very much clear from the above provisions that the person, who has filed the application for anticipatory bail, must have reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. Therefore, two prerequisite conditions are necessary for filing of an application for anticipatory bail – (1) There should be reasonable belief that the person may be arrested and; (2) The arrest shall be in connection with the non-bailable offence. If these two conditions are fulfilled, certainly, the application under section 438 of the Code would lie in the Court of Session or in the High Court."

On a perusal of order impugned, I found that the learned Additional Sessions Judge has failed to call for the record of 'Merg' No 35/06 which was registered on 1-6-2006 at Police Station Kotwali, Khandwa. It is not a condition procedent for the maintainability of anticipatory bail application that the crime should have been registered. Registration of a crime is a procedural aspect and it has no concern with the apprehension of arrest of the accused. If a crime or even 'Merg' is not registered on the basis of an information or report submitted to the Police and the facts of the information or report are sufficient to raise an

apprehension in the mind of the accused that he may be arrested for a non bailable offence, in such a situation, the application of anticipatory bail would be maintainable and the person concerned would be entitled to invoke the provisions of section 438 (1) of the Code.

It is a matter of suprise that on the basis of arguments advanced by the learned counsel for the accused, the learned Additional Sessions Judge came to this conclusion that the accused have only fear in their minds and there is no likelihood that they may be arrested for a non-bailable offence. It was argued by the defence counsel in the Court of A.S.J. that the accused are innocent and they have not committed any offence and on the basis of this argument, the Court reached at a conclusion and that too against the accused. Defence of the accused that he has not committed the offence, cannot be a ground for rejection of bail application. Whether a person is entitled for bail or not, it can be decided only on the basis of facts of the case. In these circumstances, it is very much clear that the Court below committed an error while coming to the conclusion that the bail application cannot be allowed because of arguments advanced on behalf of defence. If the accused came before the Court with this defence that they have not committed any offence, it does not mean that they do not have a reason to believe that they may be arrested for a non-bailable offence. It is for the Court to consider the grounds on which the belief of the applicant is based while deciding the application for anticipatory bail. The Court below has totally failed to apply its mind in this matter.

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288. CRIMINAL PROCEDURE CODE, 1973 – Section 482

Matter is called for hearing – Advocate is absent – High Court may adjourn or dismiss for deault – High Court may dismiss petition in limine without recording any reasons – Advocate may apply for restoration either oral or by written application – While restoring the petition, Court may insist the advocate to argue the matter on merits – Court is not bound to adjourn the hearing in future.

Madhumilan Syntex Ltd. & Ors. v. Union of India & Anr.

Reported in AIR 2007 SC 1481

Held:

In several cases in High Courts as well as in Supreme Court a case is dismissed for default to secure the presence of the counsel. Normally, when the matter is called out and the advocate is absent, a Court may adjourn the matter to next date of hearing. But it may also dismiss the matter for default so as to secure appearance of the advocate. He may apply for restoration of the case either by written application or by oral prayer and the Court may restore it asking him to argue the case so that an appropriate order may be passed on merits. Appearance of a party or his advocate and prayer for recalling an order of dismissal for default may be a good ground for restoring the matter but it cannot be said to be a good ground for restoration of the matter for hearing in future. In

other words, a matter may be restored for hearing and not for adjournment. Therefore, it cannot be said that the High Court could not have insisted on the advocate to argue the matter after the order of dismissal of petition for default was recalled and restoration was ordered.

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289. CRIMINAL TRIAL :

EVIDENCE ACT, 1872 – Section 9

Test identification parade – Is not substantive evidence – Judgment can be based without test identification parade – Purpose – Testing the veracity of the witness to his capability of identifying persons who were unknown to him – FIR lodged against unknown person – Photographs of the accused were taken at the police station – I.O. allowed them to publish – Their names were shown as accused in said crime – Identification parade was held after ten days of arrest – Held, no value can be attached – Conviction cannot be held on vague identification.

Ravi @ Ravichandran v. State Rep. by Inspector of Police

Reported in 2007 CrLJ 2740 (SC)

Held:

Certain facts are not in dispute. The test identification parade was held after ten days. It is also not in dispute that the photographs of the accused were taken at the police station. The investigation Officer allowed them to be published. Photographs of the appellant and the said Udayakumar were not only published, according to the prosecution witnesses, they were shown to be the accused in the aforementioned crime. Some of them admittedly were aware of the said publication. The purported test identification parade which was held ten days thereafter, in our opinion, loses all significance, in the aforementioned fact situation.

It is no doubt true that the substantive evidence of identification of an accused is the one made in the court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being

identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification.

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290. ELECTRIC SUPPLY ACT, 1948 – Rules 26, 29, 44 and 45
CIVIL PROCEDURE CODE, 1908 – Section 9
Negligence – Principles of strict liability and absolute liability, applicability of – Law explained – A lady came in contact with live electric wire outside her house and died due to electric shock – Held, Trial Court grossly erred in holding that liability to prove negligence was on claimants – Further held, MPEB is liable to pay compensation not only on the ground of negligence in discharging statutory obligation but also on the principle of strict liability.

Jagdish and others v. Naresh Soni and others
Reported in 2007 (3) MPHT 234 (DB)

Held :

The question as posed in the beginning is whether the Trial Court while ignoring the aspect of theory of strict compliance was correct in non-suiting the appellants/plaintiffs on the ground that they have failed to discharge their burden in proving the negligence of respondents/defendants and more particularly the MPEB.

Before we dwell upon to answer the aforesaid issue it is necessary to note various judgments of the Apex Court on the issue of strict liability.

In the case of *Charan Lal Sahu v. Union of India, AIR 1990 SC 1480,* the Apex Court was examining the Constitutional validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The said Act dealt with the claims arising out or connected with the disaster for compensation of damages for loss of life or any personal injury, or damage to the property etc. The Apex Court while relying upon the case of *M.C. Mehta Vs. Union of India, (1987) 1 SCC 395,* held in Para 91:–

> "The question of liability was highlighted by this Court in *M.C. Mehta's case* (supra), where a Constitution Bench of this Court had to deal with the rule of strict liability. This Court held that the rule in *Rylands vs. Fetcher* (supra), laid down a principle that if a person who brings on his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and does not apply to things naturally on the land or where the escape is due to an act of God and an act of stranger or the default of the person injured or where the things which escape are present by the consent of the person injured or in certain cases where there is a statutory authority. There, this Court observed that the rule in *Rylands Vs. Fletcher* (supra), evolved in the 19th

Century at a time when all the developments of science and technology had not taken place, and the same cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry which poses potential threat to the health and safety of the person working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardles of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability under the rule in *Rylands vs. Flectcher* (supra)."

In Paragraph 134 of *Charan Lal Sahu* (supra), Singh, J., while concurring with the majority view opined that :–

"As the law stands to-day, affected persons have to approach Civil Courts for obtaining compensation and damages. In Civil Courts, the determination of amount of compensation or damages as well the liability of the enterprise has been bound by the shackles of conservative principles laid down by the House of Lords in *Rylands vs. Fletcher, (1868) 3 HL 330.* The principles laid therein made it difficult to obtain adequate damages from the enterprise and that too only after the negligence of the enterprise was proved. This continued to be the position of law till a Constitution Bench of this Court in *M.C. Mehta vs. Union of India, (1987) 1 SCC 395 :* (AIR 1987 SC 1086), commonly known as Sriram Oleum Gas Leak case evolved principles and laid down new norms to delay adequately with the new problems arising in a highly industrialized economy. This Court made judicial innovation in laying down principles with regard to liability of enterprises carrying hazardous or inherently dangerous activities departing from the rule laid down in *Rylands vs. Fletcher.*

The law so laid down made a landmark departure from the conservative principles with regard to the liability of an enterprise carrying on hazardous or inherently dangerous activities."

In the case of *M.P. Electricity Board v. Shail Kumari and others, (2002), 2 SCC 162,* the Apex Court in furtherance to the aforesaid principle laid down in *M.C. Mehta's* (supra), case held:–

> "8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way, i.e., the concept of taking reasonable precautions. If the defendants did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

The conspectus of judgments referred to above thus leaves no iota of doubt that the MPEB, not only on the ground of negligence but on the principle of strict liability is liable to pay compensation to the appellants.

In the instant case we find from the statement of P.W. 2, P.W. 5, P.W. 6 and the statement of Doctors P.W. 3 and P.W. 4 that the said Basanti Devi died of electric shock which she received from the loose electric wires lying on the ground. The respondent/defendant No. 1 in his statement recorded on 26.9.2000 in paragraph categorically stated that prior to the aforesaid incident he has lodged several complaints about unauthorised/illegal siphoning of the electricity but no action was taken by the MPEB to stop the aforesaid unauthorized act. Though the statement was given in defence but the same reflected the state of affair which existed regarding spurious siphoning of the electricity and the inaction on the part of the MPEB and though an Assistant Engineer was examined by the MPEB in its defence, however, there was no whisper even as to the maintenance and regular checking to stop such illegal and unauthorised activities.

The provisions contained under Rules 26, 29, 44 and 45 of the Rules framed under the Electricity Supply Act, 1948, which obligates the MPEB to conduct periodical inspection of the lines maintained by them and to take all such safety measures to prevent such accident and maintain the lines in such a manner that the life and property of the general public is not put to peril. In the instant case we find that the MPEB has utterly failed to discharge its statutory obligation cannot claim exoneration from paying damages in case of a death arising out of the accident due to electric shock from loose live electricity wire.

For the aforesaid reasons in our considered opinion the Trial Court has grossly erred in holding that the liability to prove negligence was on the appellants/ defendants, we accordingly set aside the judgment.

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291. ESSENTIAL COMMODITIES ACT, 1955 – Sections 6-A (1) and 3

Confiscation of an essential commodity or a vehicle – Valid seizure is *sine qua non* for passing an order of confiscation – Confiscation of goods and vehicles amounts to deprivation of property – The order of confiscation should not be passed only because it would be lawful to do so – Authorities concerned must arrive at a clear finding in regard to violation of an order made u/s 3 – Power to confiscation is discretionary and not obligatory – Authority also required to give an option to the owner of such vehicle to pay in lieu of confiscation a fine not exceeding market price.

Kailash Prasad Yadav and another v. State of Jharkhand and another

Judgment dated 02.05.2007 passed by the Supreme Court in Criminal Appeal No. 659 of 2007, reported in (2007) 5 SCC 769

Held:

We have to consider the matter from another angle. The order of confiscation is not passed only because it would be lawful to do so. The authorities must arrive at a clear finding in regard to the violation made under Section 3 of the Act. The issues which have been raised before us have not been considered either by the Deputy Commissioner or by the learned Sessions Judge as also by the High Court. The matter is pending before the criminal court. We, therefore, do not intend to delve further into the matter. Keeping in view the facts and circumstances of this case, we are of the opinion that it was not a fit case where an order of confiscation could have been passed.

Reliance placed by Mr. Singh on *Shambhu Dayal Agarwala v. State of W.B., (1990) 3 SCC 549* itself stated the law, thus: (SCC p. 555, para 6)

> "6. Section 6-A empowers confiscation of the seized essential commodity, the package, covering and receptacle in which the essential commodity was found and the animal, vehicle or other conveyance in which such essential commodity was carried. The words 'may order confiscation' convey that the power is discretionary and not obligatory."

Yet again, in *Dy. Commr. v. Rudolph Fernandes, (1980) 2 SCC 559* whereupon again Mr. Singh has relied upon, it was held : (SCC p. 310, para 6)

> "6. In the light of the aforesaid provisions, the second proviso to Section 6-A [sic 6-A(1)] is required to be considered. First it is to be stated that the proviso limits the power of the competent authority to recover

fine up to the market price for releasing the animal, vehicle, vessel or other conveyance sought to be confiscated. So maximum fine that can be levied in lieu of confiscation should not exceed the market price. For our purpose, the relevant part of the proviso would be 'in the case of... vehicle... the owner of such... vehicle... shall be given an option to pay, in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such.... vehicle'. Question is – whether fine should not exceed the market price of the seized essential commodity or whether it should not exceed the market price of the vehicle. For this purpose, it appears that there is some ambiguity in the section. If it is not specifically provided that in lieu of confiscation of the vehicle a fine not exceeding the market price of the vehicle or of the seized essential commodity is to be taken as a measure. Still however, it is difficult to say that the measure of fine is related to the market price of the essential commodity at the date of its seizure. It nowhere provides that fine should not exceed the market price of the essential commodity at the date of seizure of the vehicle. The proviso requires the competent authority to give an option to the owner of such vehicle to pay in lieu of confiscation a fine not exceeding the market price. What is to be confiscated is the vehicle and, therefore, the measure of fine would be relatable to the market price of the vehicle at the date of seizure of the essential commodity sought to be carried by such vehicle."

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292. EVIDENCE :

Evidence adduced by the prosecution and the defence in a case cannot be considered in its counter case – Each case is to be decided on the basis of evidence available on record of the very case.

Lakhan Singh and others v. State of M.P.

Reported in 2007 (3) MPLJ 194

Held:

It is trite law that the evidence, oral or documentary, adduced by the prosecution and the defence in counter case cannot be considered and looked into in another counter case. Each case is to be decided on the basis of the evidence available on record of the said case. (See : *Nathulal and others vs. State of U.P., 1990 (supp) SCC 145, State of M.P. vs. Mishrilal (dead) and others, (2003) 9 SCC 426, paras 6,7 and 8 and Sudhir* and *others vs. State, (2001) 2 SCC 688*).

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293. EVIDENCE ACT, 1872 – Section 3

Interested witness – Evidentiary value – Neither relationship alone is determinative of interestedness nor relationship affect the credibility of witness – If plea of false implication is made, foundation has to be laid – Law explained.

Mano v. State of Tamil Nadu

Reported in 2007 CrLJ 2736 (SC)

Held:

In regard to the interestedness of the witnesses for furthering the prosecution version, relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if a plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

In *Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364)* it has been laid down as under :– "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culpart 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 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."

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294. EVIDENCE ACT, 1872 – Section 27

Approach of Court while appreciating evidence – Law stated. Evidence – Recovery of arms from the house of accused on the basis of disclosure statement of co-accused – Failure of prosecution to prove ownership of house is not fatal.

State of Maharashtra v. Siraj Ahmed Nisar Ahmed and others

Judgment dated 07.05.2007 passed by the Supreme Court in Criminal Appeal No. 166 of 1999, reported in (2007) 5 SCC 161

Held:

While appreciating the evidence, the court must keep in mind that the power of observation differs from person to person. What one may notice, other may not. An object or thing happened might reflect in the image of a person's mind, whereas it may go unnoticed on the part of another. It has not come out in the

evidence or in the cross examination that PW 55 was also a party to the search of the flat along with PW 50 after the arms were produced by the accused who had made a categorical statement that he had made a search of Block No. 402 before the completion of the panchnama. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence, as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of matter in issue, hypertechnical approach by taking sentence out of context here or there from the evidence, attaching importance to some techinical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole.

It is not necessary at all for the prosecution to prove the ownership of Block No. 402, Girnar Building from where the firearm and the live cartridges were recovered. It is sufficient for the prosecution to prove that the accused Gurnamsingh and his close relations were occupants of Block No. 402 so as to exclude the possibility of other persons concealing and keeping firearms in the premises of the flat. According to us, the prosecution has proved the seizure of the revolver and the live cartridge from the accused Gurnamsingh.

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295. EVIDENCE ACT, 1872 – Sections 32, 63 & 65

Photostat copy of dying declaration is exhibited – Prosecution has not given any explanation of original – No question was put to the doctor about the original document – Prosecution has not issued any notice u/s 66 of the Act – No evidence was produced that original was not available – Presiding Judge has also failed to perform his duty as per S. 165 of the Act – Held, in such circumstance photostat copy of dying declaration cannot be used as secondary evidence.

Smt. Rajantabai S. Parihar v. State of Madhya Pradesh

Reported in 2007 CrLJ 2495 (M.P.)

Held:

In the instant case, neither the original dying declaration was filed before the Court nor evidence was placed for taking the secondary evidence. No question was put to the doctor about the original document. It appears from the statement of Dr. Tripathi that Ex. P/4 was proved and exhibited as original dying declaration. Whereas it is the photostat copy. In this case, it would be apposite to discuss the statement of P.W. 5 F.M. Qureshi SI, who has deposed that he asked the doctor by submitting the requisition Ex. P/5-A for medical examination of the deceased who was alive at that time and was referred to M.Y. Hospital, Indore.

The further say of this witness is that during the course of talk, the doctor informed him that he recorded the statement of the deceased and also referred the deceased of M.Y. Hospital, Indore upon which, this witness F.M. Qureshi demanded a copy of the dying declaration on which the doctor replied that on the next day, he would send its photostat copy and he received the photostat copy Ex. P/4. In para 3, this witness has further stated that he issued the requisition Ex. P/6 to the medical officer of the Hospital at Dewas for sending of the original copy of the dying declaration Ex. P/4, but this witness has not stated any thing as to what reply was sent in pursuance of letter Ex. P/6. Overleaf the document Ex. P/6, this is mentioned by Dr. Tripathi on 11.10.1997 at 4.15 p.m. that he is sending the photostat copy of the document through Constable Satish Kumar No. 116 of P.S. Industrial Area, but these mentioning on overleaf of the document Ex. P/6 were not proved and exhibited in the Court. In this view of the matter, we are of the considered view that Ex. P.4 photostat copy of the dying declaration cannot be used as substantive piece of evidence against the appellant.

So far as the evidence of oral dying declaration is concerned, given by P.W. 3 Shakuntalabai, we do not find the same worthy for placing reliance, because the deceased was shifted in M.Y. Hospital, Indore and no evidence has been led by the prosecution whether in the Indore Hospital after sustaining 90% burn injury and lapse of two days, the deceased was in a fit state of mind to speak or talk relevantly.

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296. EVIDENCE ACT, 1872 – Section 65

Secondary evidence – For adducing secondary evidence it is necessary for the party to prove existence and execution of the original document – Requirement of S.65 must be fulfilled before secondary evidence can be admitted.

J. Yashoda v. K. Shobha Rani

Judgment dated 19.04.2007 passed by the Supreme Court in civil Appeal No. 2060 of 2007, reported in (2007) 5 SCC 730

Held:

The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced, decides the objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before

secondary evidence can be admitted. Secondary evidence of the contents of a document canot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section. In *Ashok Dulichand v. Madahavlal Dube, (1975) 4 SCC 664* it was inter alia held as follows : (SCC pp. 666-67, para 7)

> "7. After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of section 65, the appellant filed applications on 4-7-1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what where the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

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297. HINDU LAW :

Joint family property – Alienation by Karta and his sons – Legal necessity.

Subodhkumar & Ors. v. Bhagwant Namdeorao Mehetre & Ors.
Reported in AIR 2007 SC 1324

Held:

A karta has power to alienate for value the joint family property either for necessity or for benefit of the estate. He can alienate with the consent of all the coparceners of the family. When he alienates for legal necessity he alienates an interest which is larges than his undivided interest. When the Karta, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcenar. Cases Referred : *AIR 1988 SC 576, AIR 1964 SC 1385, AIR 1953 SC 487, AIR 1939 Pat 370, (1856) 6 Moo Ind App 393 (PC)*

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298. HINDU LAW :

Religious and charitable endowments – Whether temple is private or public, considerable factor – Discussed.

Gedela Satchidananda Murthy (Dead) by LRs. v. Dy Commr., Endowments Deptt., A.P. and others

Judgment dated 15.05.2007 passed by the Supreme Court in Civil Appeal No. 7210 of 2000, reported in (2007) 5 SCC 677

Held :

In *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638* Gajendragadkar, J. speaking for a Constitution Bench, in a matter relating to the famous Nathdwara Temple where the denomination in question did not recognise the existence of "sadhus" or "swamis" other than the descendants of "Vallabha", and no other ritualistic practices were adopted and where the cult did not believe in celibacy as well as did not regard that giving up worldly pleasures and the ordinary mode of a householder's life were essential for spiritual progress, opined : (AIR p. 1648, para 23)

> "23. The question as to whether a Hindu temple is private or public has often been considered by judicial decisions. A temple belonging to a family which is a private temple is not unknown to Hindu law. In the case of a private temple it is also not unlikely that the religious reputation of the founder may be of such a high order that the private temple founded by him may attract devotees in large numbers and the mere fact that a large number of devotees are allowed to worship in the temple would not necessarily make the private temple a public temple. On the other hand, a public temple can be built by subscriptions raised by the public and a public temple can be built by subscriptions raised by the public and a deity installed to enable all

the members of the public to offer worship. In such a case, the temple would clearly be a public temple. Where evidence in regard to the foundation of the temple is not clearly available, sometimes, judicial decisions rely on certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may prima facie appear to be a public temple ? The appearance of the temple of course cannot be a decisive factor; at best it may be a relevant factor. Are the members of the public entitled to an entry in the temple ? Are they entitled to take part in offering service and taking Darshan in the temple ? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple ? Are their offerings accepted as a matter of right ? The participation of the members of the public in the Darshan in the temple and in the daily acts of worship or in the celebrations of festival occasions may be a very important factor to consider in determining the character of the temple. In the present proceedings, no such evidence has been led and it is, therefore, not shown that admission to the temple is controlled or regulated or that there are other factors present which indicate clearly that the temple is a private temple. Therefore, the case for the Tilkayat cannot rest on any such considerations which, if proved, may have helped to establish either that the temple is private or is public."

In *Dhaneshwarbuwa Guru Purshottambuwa v. Charity Commr., (1976) 2 SCC 417* this Court opined that while each case of endowment as to the character of temple would depend on the history, tradition and facts, the presence of the features enumerated therein may be held to be sufficient to hold that the same satisfies the tests which were required to be fulfilled in arriving at a decision that the temple in question was a public trust.

We are not, however, oblivious of the fact that only because members of the public are freely admitted to the temple, that by itself would not be sufficient to come to the conclusion that the temple was a public institution.

The question, however, which remains is as to whether the idol having been installed in the residential premises should be held to be a part of the charitable and religious institution. Each case, as is well known, will depend upon the factual matrix obtaining therein. We may in this behalf notice some decisions which are operating in the field.

In *Deoki Nandan v. Murlidhar, AIR 1957 SC 133* this Court opined : (AIR p. 142, para 16)

> "Firstly, there is the fact that the idol was installed not within the precincts of residential quarters but in a separate building constructed for that very purpose on a vacant site. And as pointed out in *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan, (1875) 15 Ber LR 167* it is a factor to be taken into account in deciding whether an endowment is private or public, whether the place of worship is located

inside a private house or a public building. Secondly, it is admitted that some of the idols are permanently installed on a pedestal within the temple precincts. That is more consistent with the endowment being public rather than private. Thirdly, the puja in the temple is performed by an archaka appointed from time to time."

(See also *Bihar State Board of Religious Trusts v. Bhubneshwar Prasad Choudhary, (1974) 2 SCC 288.*)

In *State of Bihar v. Charusila Dasi, AIR 1959 SC 1002* while referring to *Deoki Nandan* (supra) it was observed; (AIR p. 1008, para 11)

"11. In *Deoki Nandan v. Murlidhar,* (supra) this Court considered the principles of law applicable to a determination of the question whether an endowment is public or private, and observed: (AIR p. 137, para 7)

> "The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."

One of the facts which was held in that case to indicate that the endowment was public was that the idol was installed not within the precincts of residential quarters but in a separate building constructed for that very purpose on a vacant site. We do not suggest that such a fact is by itself decisive of the question. The fact that the temple is outside the dwelling house is only a circumstance in favour of it being regarded a public temple, particularly in Madras (except Malabar); there are, however, private temples in Bengal which are built outside the residential houses of donors (See the *Hindu Law of Religious and Charitable Trusts, Tagore Law Lectures* by the late Dr. B.K. Mukherjea, 1952 Edn., p. 188). In the case before us, the two temples were constructed outside the residential quarters, but that is only one of the relevant circumstances. We must construe the deed of trust with reference to all its clauses and so construed, we have no doubt that the trusts imposed constitute a public endowment. There is one other point to be noticed in this connection. The deed of trust in the present case is in the English form and the settler has transferred the properties to trustees who are to hold them for certain specific purposes of religion and charity; that in our opinion is not decisive but is nevertheless a significant departure from the mode a private religious endowment is commonly made."

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299. HINDU LAW :

Reunion after partition in joint Hindu family – Requires an intention of parties to reunite in estate and interest – He, who asserts reunion must strictly prove it in the same manner in which any other disputed fact is required to be proved – Mere joint residing or providing food and taking care of lands in the old age of father cannot be treated as reunion of family.

Ratan Singh and others v. Brindawan and others
Reported in 2007 (2) MPLJ 346

Held :

The condition and ingredients of reunion has been considered by the Apex Court in *Bhagwan Dayal v. Mst. Reoti Dubey, AIR 1962 SC 287* wherein the Apex Court held thus :–

> 22. For the correct approach to this question, it would be convenient to quote at the outset the observations of the Judicial Committee in *Palani Ammal vs. Muthuvenkatachala Moniagar, 52 Ind App 83 at p. 86: (AIR 1925 PC 49 at p. 51)*
>
> "It is also quit clear that if a Hindu family separates, the family or members of it may agree to reunite as a Hindu family, but such a reuniting is obvious reasons, which would apply in cases under the law of the Mitakshara, very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram vs. Rukhmabai, 30 Ind App 130 (PC)*."

It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate & interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status of members of a joint Hindu family. Such an agreement need not be express, but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. The legal position has been neatly summarized in Mayne's Hindu Law, 11th Edn. Thus at p. 569 :

> "As the presumption is in favour of union until a partition is made out, so after a partition the presumption would be against a reunion. To establish it, is necessary to show, not only that the parties already divided, lived or traded together, but that they did so with the intention of thereby altering their status and of forming a joint estate with all its usual incidents. It requires very cogent evidence to satisfy the burden of establishing that by agreement between them, the divided members of a joint Hindu family have succeeded in so altering their status as to

bring themselves within all the rights and obligations that follow from the fresh formation of a joint undivided Hindu family."

As we give our full assent to these observations, we need not pursue the matter with further citations except to consider two decisions strongly relied upon by the learned Attorney-General. *Venkataramayya vs. Tatayya, AIR 1943 Mad 538* is a decision of a Division Bench of the Madras High Court. It was pointed out there that "mere jointness in residence, food or worship or a mere trading together cannot bring about the conversion of the divided status into a joint one with all the usual incidents of jointness in estate and interest unless an intention to become reunited in the sense of the Hindu Law is clearly established. The said proposition is unexceptionable, and indeed that is the well settled law. But on the facts of that case, the learned Judges came to the conclusion that there wasa reunion. The partition there was effected between a father and his sons by the first wife. One o the sons was a minor. The question was whether there was a reunion between the brothers soon after the alleged partition. The learned Judges held that as between the sons there was never any reason for separation inter se, and that the evidence disclosed that on their conduct no explanation other than reunion was possible. They also pointed out that though at the time of partition one of the brothers was a minor, after he attained majority, he accepted the position of reunion. The observations relied upon by the learned Attorney-General read thus :

"In our view, it was not necessary that there should be a formal and express agreement to reunite. Such an agreement can be established by clear evidence of conduct incapable of explanation on any other footing."

This principle also is unexceptionable. But the facts of that case are entirely different from those in the present case, and the conclusion arrived at by the learned Judges cannot help us in arriving at a finding in the instant case.

24. Before we consider the evidence, we would like to make some general observations. In the plaint, the case of reunion is mentioned as an alternative case; further the plaint does not give the date of the alleged agreement to reunite or even the necessary and relevant particulars. The plea is stated in the following words :

"That even if it were assumed against facts strictly without prejudice to any plea herein taken, that there was separation between Pandit Lachhman Prasad's issues after his death, still in view of the conduct of Pandit Kashi Ram and Raghubar Dayal during their lifetime, and the fact that the plaintiff, Pandit Raghubar Dayal and Pandit Kashi Ram (and after the latter's death the first two) worked jointly and lived and messed together and acquired, owned and possessed the entire properties jointly

by their joint labour, which amounted to reunion the plaintiff would still be the sole owner of the entire property in any view of the case."

The plaintiffs case is that there was no partition of the larger family at all; and on that case no question of reunion arises. Further, he does not say that a reunion has taken place by agreement; but he asks the Court to hold that there was a reunion on the ground that the conduct of the parties, amounted to a reunion. The plea, to say the least, indicates that the plaintiff himself is not clear of his case.

It is settled, that if a joint Hindu Family separates, the family and other members of It may agree to reunite as a Joint Hindu Family, but such a reuniting is for obvious reasons which would apply in many cases under the law of Mitakshara of very rare occurrence and when it happens it must be strictly proved as any other disputed fact is proved. It is well settled that to constitute a re-union there must be an intention of the parties to re-unite in estate and interest. It is implicit in the aspect of a re-union that there shall be an agreement between the parties to re-unite any estate with an intention to revert to their family status of members of joint Hindu Family. The aforesaid agreement need not be expressed but may be gathered from the conduct of the parties alleged to have reunited. The conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. The burden is heavy on a party asserting reunion, and ambiguous pieces of conduct equally consistent with at reunion or ordinary joint enjoyment cannot sustain a plea of reunion.

In these circumstances, if father had chosen to reside with his elder son who was taking care of him for food and his agriculture, then it cannot be said that there was reunion of the family. It was only a pious duty and obligation of the elder son or any other son to take care of his or their old father. When the father started residing with Brindavan, the land which tell into the share of Udayjeet was taken care of by Brindwawan, as Udayjeet was residing with him. This by itself cannot be treated as an incidence of reunion. There must be some agreement specific or implied between the parties which may be gathered from the circumstances. The plaintiff in his statement has not said anything in this regard. Fact that separated coparceners were living together or plaintiff was taking care of agricultural lands of Udayjeet will not amount reunion as held in *Bhagwati Prasad vs. Rameshwari, AIR 1951 SC 72.* The judgment of the Apex Court in Bhagwan Dayal (supra) is very specific which requires heavy burden on a person who claims reunion of a partitioned family. The plaintiffs in this case have failed to prove any agreement, conduct or circumstances showing reunion of Brindavam with his father Udayjeet. The father Udayjeet was having landed property, the share got by him in the partition of the joint Hindu Family property and the property purchased by him along with the plaintiffs by sale deed dated 27.6.1956. Mere joint residing, or providing food and taking care of lands in the old age of father cannot be treated as reunion of family to deprive other brothers to succeed property of the father. The consequence on his death will be that all the sons will get equal share. If one of his sons, Brindawan wanted to succeed

his entire property on the basis of alleged reunion, then heavy burden was on the plaintiff to prove the aforesaid reunion as held by the Apex Court in Bhagwan Dayal (supra). In this case the plaintiff has utterly failed to prove reunion with Udayjeet and in the absence of this, the trial Court had rightly dismissed the suit. The Appellate Court without considering aforesaid findings reversed the judgment, which is not sustainable in law.

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300. HINDU LAW :

Joint family property – Proof and presumption – Burden of proof lies on the party who asserted it.

Makhan Singh (D) by LRs. v. Kulwant Singh

Reported in AIR 2007 SC 1808

Held :

There was no presumption that the property owned by the members of the Joint Hindu Family could a fortiori be deemed to be of the same character and to prove such a status it has to be established by the propounder that a nucleus of Joint Hindu Family income was available and that the said property had been purchased from the said nucleus and that the burden to prove such a situation lay on the party, who so asserted it where the suit property had been purchased by the father from his income as an employee of the Railways and it was therefore his self-acquired property such a property falling to his sons by succession could not be said to be the property of the Joint Hindu Family.

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301. HINDU LAW :

Sources of Hindu Law – Custom is one of the three sources of Hindu Law – Hindu Law recognizes local custom, class custom and family custom – Proof – Where custom is repeatedly brought to notice of the Courts, Court may hold that custom introduced into the law without the necessity of proof in individual case – Court can also take judicial notice of such custom in terms of S. 57 of Evidence Act – Primacy of custom vis-a-vis statute – If statutory law does not exclude applicability of customary law, customary law would prevail over the statutory law – In absence of any proof of custom, Hindu law would apply.

Ass Kaur (Smt.) (Deceased) by LRs. v. Kartar Singh (Dead) by LRs. and others

Judgment dated 18.05.2007 passed by the Supreme Court in Civil Appal No. 12395 of 1996, reported in (2007) 5 SCC 561

Held :

Custom is one of the three sources of Hindu law. Custom may override a statute subject, of course, to a clear proof of usage.

Hindu law recognises three types of customs : local custom, class custom and family custom.

As statutory law did not exclude the applicability of the customary law, customary law would prevail over the statutory law. It was so found by the courts below.

In absence of any proof of custom, indisputably the Hindu law would apply. A fortiori the Hindu Law of Inheritance (Amendment) Act, 1929 in terms where of a sister becomes an heir in preference to the collaterals would be applicable in regard to devolution of property.

In *R.B.S.S. Munnalal v. S.S. Rajkumar, AIR 1962 SC 1493* this Court was considering the question as to whether a Jain widow could adopt a son to her husband without his express authority, being governed by the custom which had by long acceptance become part of the law applicable to them. Therein, it was observed: (AIR p. 1498, para 11)

> "It is well settled that where a custom is repeatedly brought to the notice of the courts of a country, the courts may hold that custom introduced into the law without the necessity of proof in each individual case."

The court can also take judicial notice of such customs in terms of Section 57 of the Evidence Act, 1872. As and when a custom has repeatedly been recognised by the courts, the same need not be proved. Reference in regard to the Punjab "general custom" may be made to *Ujagar Singh, v. Jeo, AIR 1959 SC 1041 and Bawa Singh v. Taro, AIR 1951 Punj 239.*

●

302. HINDU MARRIAGE ACT, 1955 – Section 12

Petition of nullity of marriage – On grounds of pre-marital pregnancy – Husband after becoming aware of the fact – Performed marital intercourse – Medical evidence does not show that wife was pregnant at the time of marriage – Rejection of petition is proper.

Devendra Sharma v. Sandhya

Reported in AIR 2007 MP 103

Held:

In view of the evidence discussed above it cannot be said that at the time of marriage the respondent was pregnant by some other person than the appellant. There is evidence that the aborted pregnancy could have been caused by the appellant. Even after becoming aware of the pregnancy the appellant performed marital intercourse with the respondent and this conduct makes him disentitle from decree of nullity. The satisfactory beyond all reasonable doubt. In such cases it shall be just to seek more cogent and convincing reason than one which may only be sufficient to create doubt. The appellant can be allowed to succeed only after he proves beyond reasonable doubt that the respondent was pregnant by some one else at the time of marriage. The onus is on the appellant to prove about the pre marital pregnancy. Appellant has failed to prove that

immediately after the marriage he had no access to the wife. From the evidence of respondent it is established that marital intercourse took place immediately after the marriage. The trial Court believed the evidence of respondent. I do not find any reason to take a contrary view. The appellant has failed to prove that immediately after the marriage he had no access to the respondent and did not live with the wife. The medical evidence given by the appellant also does not establish that respondent at the time of marriage was pregnant.

●

303. INDIAN PENAL CODE, 1860 – Sections 153-A & 505 (2)

Offences u/ss 153-A & 505 (2), ingredients of – Merely inciting the feeling of community or group without any reference to any other community or group cannot attract either S. 153-A or S. 505 (2) – The intention to cause disorder or incite the people to violence is the *sine qua non* – The intention has to be judged from whole context – Isolated passages or sentences here or from there cannot be taken into account – The effect of the words must be judged from standard of reasonable, strong, firm and courageous men and not of those of weak and vacillating mind.

Manzar Sayeed Khan v. State of Maharashtra and another

Judgment dated 05.04.2007 passed by the Supreme Court in Criminal Appeal No. 491 of 2007, reported in (2007) 5 SCC 1

Held:

Section 153-A IPC, as extracted hereinabove, covers a case where a person by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities or acts prejudicial to the maintenance of harmony or is likely to disturb the public tranquillity. The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written, and published. The matter complained of within the ambit of Section 153-A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.

In *Ramesh v. Union of India, (1988) 1 SCC 668* this Court held that TV serial Tamas did not depict communal tension and violence and the provisions of Section 153-A IPC would not apply to it. It was also not prejudicial to the national integration falling under Section 153-B IPC. Approving the observations of Vivian

Bose, J. in *Bhagwati Charan Shukla v. Provincial Govt, AIR 1947 Nag 1* the Court observed that

> "the effect of the words must be judged from the standards of reasonable, a strong-minded, firm and courageous and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.... It is the standard of ordinary reasonable man or as they say in English law "the man on the top of a Clapham omnibus'." (*Ramesh case* (Supra), SCC p. 676, para 13)

Again in *Bilal Ahmed Kaloo v. State of A.P. (1997) 7 SCC 431* it is held that the common feature in both the sections viz. Sections 153-A and 505 (2), being promotion of feeling of enmity, hatred or ill will "between different" religious or racial or linguistic or regional groups or castes, and communities, it is necessary that at least two such groups or communities should be involved. Further, it was observed that merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections.

●

304. INDIAN PENAL CODE, 1860 – Sections 306 & 498-A

Abetment of suicide – Proof – Only evidence against the accused are three dying declarations – Dying declarations are contradictory to each other – In first dying declaration she stated that while pumping stove her saree caught fire and accused tried to save her – In the subsequent one she stated she poured kerosene on her in person and set herself ablaze because she was angry with her husband – Accused entitled to benefit of doubt.

Sanjay v. State of Maharashtra

Reported in AIR 2007 SC 1368

Held:

.... The only evidence against the appellant are the three alleged dying declarations of the appellant's wife Seema. In the first dying declaration Seema stated that while she was pumping stove it suddenly burst and her saree caught fire. She shouted loudly and then her husband rushed towards her and extinguished the fire by pouring water on her. This is the first dying declaration and nothing has been alleged against the appellant in it. Rather it shows that the appellant tried to save his wife Seema. In the subsequent dying declaration Seema is said to have stated that she poured kerosene on her in person and set her ablaze because she was angry with her husband.

In our opinion in view of the different dying declarations it would not be safe to uphold the conviction of the appellant and we have to give him the benefit of doubt. It cannot be said in this case that the prosecution has proved the appellant's guilt under Section 306, I.P.C. of abetting the suicide beyond reasonable doubt.

●

305. INDIAN PENAL CODE, 1860 – Section 420

An act can result in both civil and criminal liability – Dishonestly induced the complainant to deliver Rs. 2000/- as part payment alleged for sale of land, knowingly that he is not the owner of the land – Offence u/s 420 of the Act is made out.

N. Devindrappa v. State of Karnataka

Judgment dated 07.05.2007 passed by the Supreme Court in Criminal Appeal No. 686 of 2007, reported in (2007) 5 SCC 228

Held:

The finding of fact of both the courts below is that the appellant dishonestly induced the complainant to deliver him Rs. 2000 as advance in case as part-payment alleged for sale of the plot of land in question, knowing fully that he was not the owner of the said plot. It has been held that the appellant deceived the complainant. It has also come in evidence that the appellant had similarly deceived several other persons by saying that he would allot plots to them and he took money in advance but did not give them the plot. Thus, it appears that the appellant had cheated many persons and not merely the complainant.

●

306. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 7

Age of juvenile, ascertainment of – Law explained.

Age must be determined by the trial Court by holding an enquiry – If two views are possible, then the view favourable to accused ought to be accepted.

Ummed Singh v. State of M.P.

Reported in 2007 (3) MPLJ 214

Held:

On perusal of both the orders of the Court below, it does not appear that enquiry was conducted by the learned Magistrate. When an application was filed on behalf of the petitioner mentioning himself to be below 18 years of age at the time of incident, it was obligatory on the learned Magistrate to hold an enquiry under section 7 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act). As observed by the Apex Court in *Gopinath Ghosh vs. State of W.B., AIR 1984 SC 237* in the case of *Bhola Bhagat v. State of Bihar, 1998 Cri. L.J. 390* and by this Court in *Rajendrasingh @ Sonu s/o Gopal Singh, 2002 (3) MPLJ 315,* although these judgments are related to the former enactments but on the same point. The provisions being similar this observation of the Court is equally applicable to the provisions of this Act. In absence of such enquiry, the observation of the learned Judge in impugned order dt. 17.2.2003 that no academic record has been produced on behalf of the petitioner, is of no importance. Unless an opportunity is provided to the party while holding an enquiry to produce the evidence in support of its claim

such observation does not call for. Vide copy of mark-sheet of primary school education 1995 his date of birth appears 20-12-1986. It is correct or not can be decided after holding an enquiry. If it could not be filed in the trial Court the petitioner cannot be blamed because no such opportunity was given to him. Although it all depends on the facts and circumstances of the case, but at the same time it cannot be denied that sometimes the age mentioned in the school record and stated in the statements of the parents are deserved to be accepted. For this, judgment delivered by the Apex Court in *Bishnu vs. State of Maharashtra, (2006) 1 SCC 283* and order passed by this Court in *Sandeep @ Pappi vs. State of M.P., 1994 (2) C.Cr.J.128* (MP) are to be perused. A juvenile cannot be tried along with the other co-accused persons as observed in Bablu vs. State, 2006 (4) MPHT 302.

Both the Courts below have simply relied on the ossification test without considering fact that there is a presumption of having 2-3 years margin in either side as observed by the Apex Court in *Jaya Mala vs. Home Secy., Government of J and K and others, 1982 Cri. L.J. 1777* and also by this Court in *Akeel S/o Rehman Khan vs. State of M.P. 1998 (2) MPLJ 199 = 1998 Cri.L.J. (M.P.) 82,* after conducting the enquiry if two views are possible for the purpose of determination of the age then the view favourable to the accused ought to be accepted. In such cases, hyper technical approach should always be avoided as observed by the Apex Court in *Rajinder Chandra vs. State of Chhattissgarh and another, AIR 2002 SC 748.*

●

307. LAND ACQUISITION ACT, 1894 – Sections 4 & 6

Public purpose – Land acquired for particular purpose can be utilized for another public purpose – Acquisition cannot be invalidated solely on this ground.

Ravi Khullar and another v. Union of India and others

Judgment dated 30.03.2007 passed by the Supreme Court in Civil Appeal No. 1704 of 2007, reported in (2007) 5 SCC 231

Held :

The learned Additional Solicitor General appearing on behalf of the respondents submitted that having regard to the authorities on the subject the question is no longer res integra. It is not as if lands acquired for a particular public purpose cannot be utilised for another public purpose. He contended that as long as the acquisition is not held to be mala fide, the acquisition cannot be invalidated merely because the lands which at one time were proposed to be utilised for a particular public purpose, were later either in whole or in part, utilised for some other purpose, though a public purpose. He, therefore, submitted that some change of user of the land, as long as it has a public purpose, would not invalidate the acquisition proceeding which is otherwise valid and legal.

In *Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800* this Court noticing the submission of learned counsel for the petitioner that the excess land out of the lands which were acquired for a country fair was utilised for carving out plots for the housing colony, held that it did not invalidate the acquisition. This Court observed": (SCC p. 802, para 5)

> "Apart from the fact that a housing colony is a public necessity, once the original acquisition is valid and title has vested in the municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in Section 6(3) declaration."

The same principle has been reiterated in *Mangal Oram v. State of Orissa, (1977) 2 SCC 46*

The learned Additional Solicitor General also relied upon the decision of this Court in *Northern Indian Glass Industries v. Jaswant Singh, (2003) 1 SCC 335* wherein this Court has held that the High Court was not right in ordering restoration of land to the respondents on the ground that the land acquired was not used for the purpose for which it was acquired. It was held that after passing of the award and possession taken under Section 16 of the Act the acquired land vests with the Government free from all encumbrances. Even if the land is not used for the purpose for which it is acquired, the landowner does not get any right to ask for restoration of possession.

●

308. LIMITATION ACT, 1963 – Article 65

Adverse possession – Ingredients of – There must be intention to dispossess – Intention to dispossess should not be substituted for intention to possess – Possession must be hostile so as to give reasonable notice and opportunity to real owner.

P.T. Munichikkanna Reddy and Ors. v. Revamma and Ors.

Reported in AIR 2007 SC 1753

Held:

Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficied in a standard adverse possession case. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts Limitation Act and it also assists the Court to unearth as the intention to dispossess.

Importantly intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to

possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (wilful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long, enough to indicate their acquiescence.

It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse use gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as partinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner. Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continunous and wilful neglect but also on account of possessor's positive intent to dispossess. Therefore, it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the paper-owner of the property.

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309. M.P. SAMAJ KE KAMJOR WARGON KE KRISHI BHUMIDHARAKON KE UDHAR DENEWALON KE BHUMI HADAPNE SAMBANDHI KUCHAKRON SE PARITRAN TATHA MUKTI ADHINIYAM, 1977 – Section 2 (f)

(i) Bar created u/s 12 of the Act over lender of money not to enter into prohibited transaction of loan – Has the overriding effect of any other law – Transaction of loan entered into by money lender in the name of some other person in order to defeat provisions of the Act is covered under protective umbrella of the Act.

(ii) Question as to whether transaction is prohibited or not is to be decided by the SDO and not by the Civil Judge.

Ram Prasad through LRs. v. Harishankar and others
Reported in 2007 (2) MPLJ 238

Held :

Section 14 of the Act creates bar of jurisdiction of Civil Courts. No Civil Court shall have any jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the SDO

or the Collector. The question which has arisen in the instant case as per defendants' pleading was clearly a question to be decided, dealt with or settled by the SDO and in case appeal is filed before the Collector the order of Collector is final, there is bar of jurisdiction of Civil Court to entertain and to decide the question which is required to be decided by the competent authority under Act 3 of 1977. There is bar created under section 12 of the Act over lender of money not to enter into prohibited transaction of loan notwithstanding any other law for the time being in force and as per section 3, the Act 3 of 1977 has the overriding effect on the provisions of any other law for the time being in force, the submission raised by Shri Pranay Verma that as sale deed is not in name of lender of money transaction is not within the purview of Act 3 of 1977, is liable to be rejected at threshold. In case it is prohibited transaction of loan as pointed out clearly by defendants in the written statement, that it was an amount of loan of Ratan Singh, which had swelled, as a collateral security without payment of consideration, the sale deed was got executed by Ratan Singh in the name of plaintiff. Thereafter in order to usurp the land he got the suit filed. As per defendants sale deed was not to be acted upon. Considering the prohibition on transaction of loan under section 2 (f) which may be entered into, in order to defeat the provision of the Act 3 of 1977, is clearly covered under protective umbrella of the Act, even if it is entered by the money lender in the name of some other person as per section 2 (f) such a transaction is void, scope of the Act 3 of 1977 cannot be narrowed down as submitted by Shri Pranay Verma so as to take care of those transaction entered into in the name of money lender. There may be several dubious modes adopted by unscrupulous money lender to grab the land. What in essence is prohibited under the Act 3 of 1977 that cannot be ignored, overlooked by Courts nor allowed to by-passed by money lender by adopting dubious modes or under guise of Benami transaction or any other law as Act 3 of 1977 has overriding effect as specifically provided under section 3.

As the question as to transaction is prohibited transaction or not has to be gone into by the competent authority SDO, I have discussed and mentioned the above aspects only with a view to find out whether judgment and decree rendered by the Court below is in accordance with law and answer is in an affirmative. These questions are to be decided by SDO not by the Civil Court, discussion made should not be taken to be a decision on those issues thus order of remand to obtain the decision of the SDO is in tune with the decision given by this Court way back in *Seth Ratilal Tribhuwandas Mirani vs. Smt. Gangabai Gopiji Bishnoi and others, 2003 (3) MPLJ 197, Sardar Arjun Singh vs. Gangaram, 1982 MPWN 462* and *Hiralal Thakurdas Chowkse vs. Hatesingh Laxman Singh, 1984 MPLJ 32.*

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310. MOTOR VEHICLES ACT, 1988 – Sections 140 & 166
'Right to apply for compensation' vis-a-vis 'entitlement to compensation' are two different concepts – Legal representative whether dependant or not has right to apply for compensation –

Dependency has nexus with quantum of compensation – Liability in terms of S. 140 of the Act does not cease because of absence of dependency.

Smt. Manjuri Bera v. Oriental Insurance Co. Ltd.

Reported in AIR 2007 SC 1474

Held :

There are several factors which have to be noted. The liability under Section 140 of the Act does not cease because there is absence of dependency. The right to file a claim application has to be considered in the background of right to entitlement. While assessing the quantum, the multiplier system is applied because of deprivation of dependency. In other words, multiplier is a measure. There are three stages while assessing the question of entitlement. Firstly, the liability of the person who is liable and the person who is to indemnify the liability, if any. Next is the quantification and Section 166 is primarily in the nature of recovery proceedings. As noted above, liability in terms of Section 140 of the Act does not cease because of absence of dependency.

Judged in that background where a legal representative who is not dependant files an application for compensation, the quantum cannot be less than the liability referable to Section 140 of the Act. Therefore, even if there is no loss of dependency the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the liability flowing from Section 140 of the Act.

In my opinion, "No Fault Liability" envisaged in Section 140 of the said Act, is distinguishable from the rule of "Strict Liability". In the former, the compensation amount is fixed. It is Rs. 50,000/- in cases of death [Section 140 (2)]. It is a statutory liability. It is an amount which can be deducted from the final amount awarded by the Tribunal, Since, the amount is a fixed amount/crystallized amount, the same has to be considered as part of the estate of the deceased. In the present case, the deceased was an earning member. The statutory compensation could constitute part of his estate. His legal representative, namely, his daughter has inherited his estate. She was entitled to inherit his estate. In the circumstances, she was entitled to receive compensation under "No Fault Liability" in terms of Section 140 of the said Act. My opinion is confined only to the "No Fault Liability" under Section 140 of the said Act. That section is a Code by itself within the Motor Vehicles Act, 1988.

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311. MOTOR VEHICLES ACT, 1988 – Sections 147, 2 (34)

Accident took place when the tractor was ploughing the field – Insurance Company took the plea that accident did not occur at public place – 'Public place' in terms of S. 2 (34) of the Act, meaning of.

Smt. Hira Bai & Ors. v. Pratap Singh & Anr.

Reported in AIR 2007 MP 134 (DB)

Held :

A Full Bench of Madras High Court in the case of *United India Insurance Co. Ltd. v. Parvathi Devi and others, 1999 ACJ 1520* has held as under :-

> "16. The definition of 'public place' is very wide. A perusal of the same reveals that the public at large has a right to access though that right is regulated or restricted. It is also seen that this Act is beneficial legislation, so also the law of interpretation has to be construed in the benefit of public. In the overall legal position and the fact that if the language is simple and unambiguous, it has to be construed in the benefit of the public, we are of the view that the word 'public place', wherever used as a right or controlled in any manner whatsoever, would attract Section 2 (34) of the Act. In view of this, as stated, the private place used with permission or without permission would amount to be a 'public place'.
>
> 17. In view of what we have discussed above, we hold that the expression 'public place' for the purpose of Chapter VIII of the Motor Vehicles Act. 1939 will cover all places including those of private ownership where members of the public have an access whether free or controlled in any manner whatsoever."

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312. MOTOR VEHICLES ACT, 1988 – Sections 147, 149 & 166

(i) Insurance policy in terms of S. 147 is not intended to cover persons other than third party – "Any Person" in S.147 (i) (b) is to be understood as third party except liability arising under Workmen's Compensation Act, 1923 – Driver, owner and employee of the owner is not covered under third party – Principle laid down in *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297* is applicable only in claims by third party.

(ii) Impleadment of driver – Contract of indemnity – Primary liability is of the driver – Liability of owner of vehicle is vicarious liability – Therefore driver is necessary party and should be impleaded.

Oriental Insurance Co. Ltd. v. Meena Variyal and others

Judgment dated 02.04.2007 passed by the Supreme Court in Civil Appeal No. 5825 of 2006, reported in (2007) 5 SCC 428

Held :

Section 149 (1) cannot be used to enlarge the liability if it does not exist in terms of Section 147 of the Act.

In claims by a third party, there cannot be much doubt that once the liability of the owner is found, the insurance company is liable to indemnify the owner, subject of course, to any defence that may be available to it under Section 149 (2) of the Act. In a case where the liability is satisfied by the insurance company

in the first instance, it may have recourse to the owner in respect of a claim available in that behalf. However, the whole protection provided by Chapter XI of the Act is against third-party risk. Therefore, in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable merely by resorting to the ratio of *Swaran Singh, (2004) 3 SCC 297.*

On facts, the victim was the Regional Manager of the Company that owned the car. He was using the car given to him by the Company for use. The position was that a Regional Manager of the Company, which was owner of the vehicle, was himself driving the vehicle of the Company and during the course of it, he died in an accident, whether the accident occurred due to his negligence or otherwise. Whether he is treated as the owner of the vehicle or as an employee, he is not covered by the insurance policy taken in terms of the Act. Neither was the Insurance Company, in the case on hand, liable to indemnify the owner insured (the employer company) in respect of the death of one of its employees who was not the driver, nor can the deceased be understood as a workman coming within the Workmen's Compensation Act, 1923 otherwise. Only by entering into a special contract by the insured with the insurer could such a person as the deceased be brought under coverage. There is no case that there is any special contract in that behalf in this case nor is there an award under the Workmen's Compensation Act that is required to be satisfied by the insurer. In these circumstances, it is held that the appellant Insurance Company was also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the vehicle. The High Court was in error in modifying the award of the Tribunal in that regard.

... Ordinarily, a contract of insurance is a contract of indemnity. When a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment of compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurance company. A third party for whose benefit the insurance is taken, is therefore entitled to show, when he moves under Section 166 of the Motor Vehicles Act, that the driver was negligent in driving the vehicle resulting in the accident; that the owner was vicariously liable and that the insurance company was bound to indemnify the owner and consequently, satisfy the award made. Therefore, under general principles, one would expect the driver to be impleaded before an adjudication is claimed under Section 166 of the Act as to whether a claimant before the Tribunal is entitled to compensation for an accident that has occurred due to alleged negligence of the driver. Why should not a Tribunal insist on the driver of the vehicle being impleaded when a claim is being filed ?

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

Claim for compensation cannot be dismissed on the basis of mistake in mentioning exact number of offending vehicles in F.I.R. lodged, particularly when exact number is clear by other circumstances.

Sonu v. Jagdish Prasad & Ors.

Reported in AIR 2007 MP 110 (DB)

Held :

The provisions for Motor Vehicle Act regarding compensation have been enacted for dispensing social justice to victims of it. Thus, on account of some minor mistakes or technicalities, the claimants could not be deprived for the benefit of it. Some time the mistake in mentioning the exact number of the vehicle in lodging the FIR could take place due to oversight or on account of some human error but mere on this count the claim petition cannot be thrown over board if the exact number of vehicle is proved by other circumstances. This question was answered by this Court earlier in the case of *Narendrakumar v. Ku. Shakubai, AIR 1988 MP 197* wherein it was held as under :–

> "Having heard the learned counsel for the parties and having considered the evidence and the award passed by the learned Tribunal. We have come to the conclusion that this appeal as well as the cross-objection deserve to be dismissed. The learned counsel for the appellant has contended that the identity of the bus in question has not been established. The basis of his contention is that the First Information Report dated 6.6.1981 (Ex. C/2) mentioned the number of the bus as MPO-5059 instead of MPU-5059. However, the First Information Report also mentions that the bus belonged to Pawan Travels'. The description, therefore, sufficiently fixes the identity of the bus in question and minor mistake apparently due to oversight in mentioning the letter 'O' instead of 'U' can be of no help to the appellant for disputing the identity and involvement of the bus in question in the accident. The contention is, therefore, devoid of substance and is rejected."

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314. MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Section 401

CIVIL PROCEDURE CODE, 1908 – Section 11 & Order VII Rule 11

(i) Service of notice, purpose of – Law expained.

Purpose of serving notice u/s 401 of the Act is to convey intention of plaintiff to file suit – If any relief is granted to plaintiff within stipulated period, then his suit is liable to be dismissed.

(ii) If provisions relating to notice are sufficiently complied with, merely on technicalities, suit cannot be dismissed – Even if notice is found to be defective, consequence will be return of plaint and not dismissal.

(iii) Res judicata primarily applies between past and future litigation – Principle of res judicata applies also between two stages in the same litigation.

Khursheed Ahmad v. Mehrunnisha and another

Reported in 2007 (3) MPLJ 74

Held:

The notice on behalf of Corporation is to be served on the Commissioner and none else. Only the description of the notice will change and as per applicant, notice is to be served on the Municipal Corporation through Commissioner, Jabalpur while in the present case, the notice has been served on the Commission, Municipal Corporation, Jabalpur. The net result of both shall remain as it is and ultimately the notice has to reach in the hands of the Commissioner for taking cognizance to give relief as demanded in the notice. It is not the case of respondent No. 3 that any prejudice is caused to respondent No. 3 by servicing aforesaid notice.

The entire purpose of service of notice is to intimate the Municipal Corporation about the intention of the plaintiff of filing of the suit and if any relief is granted to the plaintiff within the aforesaid period,then his suit is liable to be dismissed. In the present case, no such relief was granted by the corporation and the house of the plaintiff was noticed to demolish. In these circumstances, the suit was filed. The sufficient compliance of the provision appears to have been made. The parites are now in the Court, and the Court has to do substantial justice between the parties and merely on the technicalities, the suit cannot be dismissed.

In view of the Division Bench's judgment of this Court in *Harmesh Chandra Dua v. Nagar Palika Nigam, Gwalior, 2005 (4) MPLJI 38* even if the notice is found to be defective, the consequence will return of the plaint and not dismissal, as has been held in *Jal Parady Karmchari Kalyan Sangh v. Ayukt Nagar Nigam, Jabalpur, 2005 (3) MPLJ 145.*

But in this case, another glaring feature is that the applicant filed similar application before the trial Court on 6-10-2005. The aforesaid appliclation came up for heraing before the trial Court and was dismissed by the trial Court on merits. When the similar question was considered and decided by the trial Court, then the applicant cannot reiterate the same objection in the same proceeding at a later stage. The Apex Court in *Satyadhyan Ghosal vs. Smt. Deorajin Debi, AIR 1960 SC 941,* considering the effect of interlocutory order passed at an early stage held that it cannot be re-agitated at subsequent stage in the same matter. It is held thus :

> "(7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties

in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

(8) The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the same litigation consider the matter again."

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315. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Cheques issued against time barred debt – Held, promise to pay time barred debt is also valid and enforceable contract u/s 25 (3) of Contract Act – Further held, such cheques come within the sweep of S.138.

P.N. Gopinathan v. Sivadasan Kunju & Anr.

Reported in 2007 CrLJ 2776 (Ker.)

Held:

I shall, for the purpose of arguments in this case, assume that the liability is time barred. I say so because no such specific plea is raised before the Courts below. Even assuming it to be time-barred, when the cheque is written and signed, there is a promise to pay the amount to the payee, through the drawee of course. Such promise, even if the liability is barred, is valid and enforceable under law in view of S.25 (3) of the Contract Act. Thereafter when the delivery takes place, the drawal is completed. Such cheque drawn is issued for the discharge of a liability, which is promised under the cheque itself. That being so, do not find any reason to refer the matter to a Division Bench for further consideration. The argument of the learned counsel for the petitioner that there must be another agreement – other than the cheque – in order to reckon the promise in the cheque to be a valid agreement for the purpose of S.25 (3) connot obviously be accepted. The promise made in the cheque is an enforceable agreement as is declared in S.25(3) of the contract Act. The cheque issued (delivered) for the discharge of the said promise/liability is thus perfectly within the sweep of Section 138.

In this context it will not be inapprosite to note that the Supreme Court in *A.V. Murthy V. B.S. Nagabasavanna, AIR 2002 SC 985 :* (2002 Cri LJ 1479) in paragraph

5 had adverted to this aspect. The observations therein also tend to support the conclusion of the Division Bench in Ramakrishnan (2003 (2) Ker LT 613) referred earlier. However, I do note that the Supreme Court has not expressed any final opinion or conclusion on that aspect and it was only noted that on this ground – that the liability is barred by limitation and the cheque is issued for the discharge of such a liability, a prosecution cannot be and need not be quashed. The challenge raised on this first ground must, in these circumstances, fail.

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316. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 141

In complaint accused No. 1 is described as 'business concern' and not company or firm – Complaint does not describe in which capacity accused No. 2 to 6 working – Vicarious liability of Directors, partners or other persons in charge of business of company or firm arises only where offence is committed by company or firm – 'Business concern' is neither company nor firm – Difference between 'business concern' and 'firm or company' – Explained.

Raghu Lakshminarayanan v. M/s Fine Tubes

Reported in 2007 CrLJ 2436 (SC)

Held:

The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before the Court in *M/s. Ashok Transport Agency v. Awadhesh Kumar and another, (1998) 5 SCC 567* wherein this Court stated the law in the following terms:–

> "6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to a proprietary concern enable the propritor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor

of proprietary business "in sofar as the nature of such case permits." "This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a 'Company' or a 'Partnership Firm' as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite thata proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act.

A Constitution Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (AIR 2005 SC 3512)* furthermore categorically stated that the complaint petition must contain the requisite averments to bring about a case within the purview of Section 141 of the Act so as to make some persons other than company vicariously liable therefor. (See also *Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya (AIR 2006 SC 3086)* and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (2007)(3) SCALE 245*)

It is interesting to note that the term "Director" has been defined. It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purivew thereof, nobody else can be prosecuted by was of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

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317. RENT CONTROL AND EVICTION :

Bonafide requirement of landlord – Subsequent event – When can be taken into consideration – Law explained.

Ram Kumar Barnwal v. Ram Lakhan (Dead)

Judgment dated 14.05.2007 passed by the Supreme Court in Civil Appeal No. 2480 of 2007, reported in (2007) 5 SCC 660

Held:

It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the Tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. No limitation can be contemplated on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. For making the right or remedy

claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

The court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.

Such subsequent event may be one purely of law or founded on facts. In the former case, the court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bting it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond the pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 CPC. Such subsequent event, the court may permit being introduced into the pleading by way of amendment as it would be necessary to do so for the purpose of deermining the real questions in controversy between the parties.

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318. SERVICE LAW :

CONSTITUTION OF INDIA – Article 311

Termination of services – Principles of natural justice, applicability of – Law explained.

Secretary, A.P. Social Welfare Residential Educational Institutions v. Pindiga Sridhar & Ors.

Reported in AIR 2007 SC 1527

Held :

By now, it is well settled principle of law that the principles of natural justice cannot be applied in a straights-jacket formula. Its application depends upon the facts and circumstances of each case. To sustain the complaint of the violation of principles of natural justice one must establish that he was prejudiced for non-observance of the principles of natural justice. In the present case, the fact on which the appellant terminated the services of the respondent appointed on compassionate ground was admitted by the respondent himself that when he applied for the post on compassionate ground by its application dated 6-5-1996, his mother was in service. So also when he secured the appointment by an order dated 22-11-2002 his wife was in service since 3-8-1997 as Extension

Officer in Rural Development and later on promoted as Mandal Parished Development Officer at the time when he was appointed on compassionate ground. These facts clearly disclose that the appointment on compassionate ground was secured by playing fraud. Fraud clocks everything. In such admitted facts, there was no necessity of issuing show cause notice to him. The view of the High Court that termination suffers from the non-observance of the principles of natural justice is, therefore clearly erroneous. In our view, in the given facts of this case, no prejudice whatsoever has been caused to the respondent...

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319. SPECIFIC RELIEF ACT, 1963 – Section 28

Suit for specific performance of contract decreed – Plaintiff failed to pay purchase money within stipulated period – Held, power of rescission of contract is discretionary – Defendant may apply in the same suit for rescission of contract – Further held, no fresh proceeding is needed.

Chanda (Dead) Through L. Rs. v. Rattni and Anr.

Reported in AIR 2007 SC 1514

Held:

Section 28 of the Act needs as follows :

> **28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.** – (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.
>
> (2) Where a contract is rescinded under sub-section (1), the court –
>
> (a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and
>
> (b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely :–

(a) the execution of a proper conveyance or lease by the vendor or lessor:

(b) the delivery of possession, or partition and separate possession of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under the section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court."

The present section corressponds to Section 35 (c) of the Specific Reilef Act, 1877 (hereinafter referred to as the 'repealed Act') under which it was open to the Vendor or lessor in the circumstances mentioned in that Section to bring a separate suit for rescission; but this Section goes further and gives to the Vendor or lessor the right to seek rescission in the same suit, when after the suit for specific performance is decreed the plaintff fails to pay the purchase money within the period fixed. The present section, therefore, seeks to provide complete relief to both the parties in terms of a decree for specific performance in the same suit without requiring one of the parties to initiate separate proceedings. The object is to avoid multiplicity of suits. Likewise under the present provision where the purchaser or lessee has paid the money, he is entitled in the suit for specific performance to the reliefs as indicated in sub-section (3) like, partition, possession etc. A suit for specifc performance does not come to an end on passing of a decree and the Court which has passed the decree for specific performance retains the control over the decree even after the decree has been passed.

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320. STAMP ACT, 1899 – Sections 33 & 35

Insufficiently stamped instruments – Duty of Courts – Law explained.

Satyanarayan v. Ramsingh deceased through LRs. Prithwisingh and others

Reported in 2007 (3) MPLJ 384

Held:

Section 33 of the Indian Stamps Act enjoins a duty to impound the instrument insufficiently stamped. After the document is impounded under section 35 of

the Act, two courses are open to the Court. The first course is to admit the document in evidence subject to the exceptions upon payment of the duty chargeable thereon and penalty, if so tendered by the party producing the document. After the stamp duty and the penalty are so paid, the Court is required to send to the Collector Stamps an authenticated copy of the document together with the certificate in writing stating the amount of duty and the penalty levied in respect of the instrument and also to send such amount to the Collector Stamps as is provied by sub-section (1) of section 35 of the Act. Second course open to the Court is when the party producing the document fails to pay the duty and the penalty, the Court must send the original document to the Collector Stamps who shall then take necessary steps for realizing the stamp duty and the penalty. There is no other course open to the Court like keeping the unstamped document on the record without realising the stamp duty and the penalty. The jurisdiction to decide the question of the stamp duty conferred by proviso to section 35 of the Act is only incidental to the reception of the document in evidence. If the party producing the document wants adjudication by the Collector Stamps, then the Court must follow the procedure prescribed in sections 33 and 38 (2) of the Act and it is impermissible to impose such a decision on a party. The demand of the duty and the penalty by the Court under section 35 of the Act is only provisional liable to be altered by the procedure prescribed in other sections of the Act. If, instead of adopting the procedure prescribed in section 35 and section 38 of the Act, the Judge passes on order directing the impounding and payment of penalty without passing any appropriate order under the Proviso to section 35 of the Act, the order is without jurisdiction. In the present case, from the perusal of the order impugned, it is clear that the Court below has imposed its decision on the plaintiff without leaving the option of adjudication by the Collector Stamps. The order impugned is, thus, unsustainable in law and accordingly, it is hereby setaside. Learned trial Judge is directed to proceed in the matter in accordance with law and refer the matter to the Collector Stamps for adjudication. The trial Court shall forward the necessary papers to the Collector Stamps along with the copy of this order within a period of 15 days from the date of receipt of this order and shall also give a date for appearance of the parties before the Collector Stamps. The Collector Stamps shall consider and decide the matter within a period of two months from the date of receipt of papers and the copy of the order from the Court-below after affording opportunity of hearing to the respective parties. The trial Court after obtaining the decision of the Collector Stamps shall thereafter proceed to decide the suit in accordance with law.

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING DESIGNATING COURT(S) OF SESSIONS AS SPECIAL COURT(S) FOR TRIAL OF OFFENCES PUNISHABLE U/S 4 OF THE MONEY LAUNDERING ACT

No. S.O. 841(E), dated January 1, 2007. (Published in the Gazette of India Extraordinary Part II, Section 3(ii), No. 566, dated 1st January, 2007) – **In exercise of the powers conferred by sub-section (1) of Section 43 of the Prevention of Money-laundering Act, 2002** (15 of 2003) and in consultation with the Chief Justice of respective High Courts, the Central Government designates the Court (s) of Sessions, as mentioned in Annexure, as Special Court (s) for the area (s) specified in the said Annexure against the said Courts, for trial of offence punishable under Section 4 of the said Act.

Annexure

S. No.	State/ Union Territory	Court of Session notified as Special Court under the Prevention of Money-laundering Act, 2002	Area specified for trial of offence punishable under Section 4 of the Prevention of Money-laundering Act, 2002
1.	-------	----------	----------
2.	-------	----------	----------
3.	-------	----------	----------
4.	-------	----------	----------
5.	-------	----------	----------
6.	-------	----------	----------
7.	-------	----------	----------
8.	-------	----------	----------
9.	-------	----------	----------
10.	-------	----------	----------
11.	-------	----------	----------
12.	Madhya Pradesh	Sessions Court, Gwalior	Gwalior, Shivpuri, Guna, Ashoknagar, Datia, Sheopur, Morena, Bhind
		Sessions Court, Indore	Indore, Dhar, Jhabua, Khargone, Barwani, Khandwa, Burhanpur, Ujjain, Dewas, Ratlam, Shajapur, Mandsaur, Neemuch.
		Sessions Court, Bhopal	Bhopal, Sehore, Raisen, Rajgarh, Vidisha, Betul, Hoshangabad, Harda
		Sessions Court, Sagar	Sagar, Damoh, Panna, Chhatarpur Tikamgarh.
		Sessions Court, Jabalpur	Jabalpur, Narsinghpur, Chhindwara Seoni, Mandla, Dindori, Balagahat, Rewa, Shahdol, Anuppur, Umaria, Sidhi, Satna, Katni.
13.	-------	----------	----------
14.	-------	----------	----------
15.	-------	----------	----------
16.	-------	----------	----------
17.	-------	----------	----------
18.	-------	----------	----------
19.	-------	----------	----------
20.	-------	----------	----------

NOTIFICATION REGARDING AMENDMENT IN EARLIER NOTIFICATION RELATING TO DESIGNATING SPECIAL COURTS FOR DISPOSAL OF CASES UNDER MADHYA PRADESH NIKESHEPAKON KE HITON KA SANRAKSHAN ADHINIYAM, 2000

F.No. 1-3/2004/21-B (1)- In exercise of the powers conferred by sub-section (1) of Section 7 of the Madhya Pradesh Nikeshepakon Ke Hiton Ka Sangrakshan Adhiniyam, 2000 (No. 16 of 2001), the State Government, with the concurrence of the Chief Justice of High Court of Madhya Pradesh, hereby, makes the following amendments in this Department's Notification F. No. 1-3/2004/ 21-B(1), dated 11th May, 2004 which was published in the Madhya Pradesh Gazette (Part-1), dated 21st May, 2004 and hereby designate the Court specified in columu (2) of the Schedule in relation to area specified corresponding entries in column (3) thereof as Special Courts specified in column (4) of the said schedule for the purpose of disposal of cases under the aforesaid Act, namely :-

AMENDMENT

(1) In the said Notification, in the Schedule for serial number 11,12,14,19,21 and 40 and entries relating thereto, the following serial numbers and entries relating thereto shall be substituted, namely :-

SCHEDULE

S.No.	Designated Court	Areas (Revenue District)	Special Court
(1)	(2)	(3)	(4)
"11.	Sessions Judge, East Nimar (Khandwa)	East Nimar (Khandwa)	Special Court East Nimar (Khandwa)
11-A	First Additional Sessions Judge, Burhanpur	Burhanpur	Special Court, Burhanpur
12.	Sessions Judge, Guna	Guna	Special Court, Guna
12-A.	First Additional Sessions Judge, Ashoknagar	Ashoknagar,	Special Court, Ashoknagar
14.	Sessions Judge, Hoshangabad	Hoshangabad	Special Court Hoshangabad
14-A	Sessions Judge, Harda	Harda	Special Court, Harda
19.	Sessions Judge, Mandla	Mandla	Special Court, Mandla
19-A	First Additional Sessions Judge, Dindori	Dindori	Special Court Dindori
21	Sessions Judge, Morena	Morena	Special Court, Morena
21-A.	Sessions Judge, Sheopur	Sheopur	Special Court, Sheopur
40	Sessions Judge,Mandleshwar	West Nimar (Khargone)	Special Court, Mandleshwar
40-A.	Sessions Judge, Barwani	Barwani	Special Court, Barwani

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/.

(एन.के. गुप्ता)

प्रमुख सचिव, मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग भोपाल

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MADHYA PRADESH ELECTRICITY (MANNER OF SERVICE OF NOTICE, ORDER AND DOCUMENT) RULES, 2006

Notification No. 2312-XIII-2006 dated the 17th April, 2006. ***[Published in M.P. Rajpatra Part IV (Ga) dated 14-4-2006 Page 217]*** **–**

1. Short title and commencement. – (1) These rules may be called the Madhya Pradesh Electricity (Manner of Service of Notice, Order and Documents) Rules, 2006.

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

(3) Word and expressions used but not defined in these rules shall have the same meaning as assigned to them in the Electricity Act, 2003.

2. Manner of Service of Notice, Order or Document. – Every notice, order or documents under the provisions of the Electricity Act, 2003 (36 of 2003) required or authorized to be addressed to any person or owner or occupant of the premises may be served in the following manner, namely :–

(i) By delivery through courier or Registered Postal Service with acknowledgement by way of written receipt duly signed by addressee.

(ii) By giving description of the premises or person, affixing it on the conspicuous part of the premises in the presence of two witnesses, in the absence of or if the owner or occupant denies to receive the notice, order or documents to whom these served.

(iii) By publication in the news paper having circulations in the area of addressee, or of the usual or last known place of abode or the business of the person.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

NO. 43 OF 2005

[26th October, 2006.]

An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

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

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.-

(1) This Act may be called the Protection of Women from Domestic Violence Act, 2005.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.

In this Act, unless the context otherwise requires,-

(a) **"aggrieved person"** means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(b) **"child"** means any person below the age of eighteen years and includes any adopted, step or foster child;

(c) **"compensation order"** means an order granted in terms of section 22;

(d) **"custody order"** means an order granted in terms of section 21;

(e) **"domestic incident report"** means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person;

(f) **"domestic relationship"** means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

(g) **"domestic violence"** has the same meaning as assigned to it in section 3;

(h) **"dowry"** shall have the same meaning as assigned to it in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961);

(i) **"Magistrate"** means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place;

(j) **"medical facility"** means such facility as may be notified by the State Government to be a medical facility for the purposes of this Act;

(k) **"monetary relief"** means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved person as a result of the domestic violence;

(l) **"notification"** means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

(m) **"prescribed"** means prescribed by rules made under this Act;

(n) **"Protection Officer"** means an officer appointed by the State Government under sub-section (1) of section 8;

(o) **"protection order"** means an order made in terms of section 18;

(p) **"residence order"** means an order granted in terms of sub-section (1) of section 19;

(q) **"respondent"** means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;

(r) **"service provider"** means an entity registered under sub-section (1) of section 10;

(s) **"shared household"** means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent

is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

(t) **"shelter home"** means any shelter home as may be notified by the State Government to be a shelter home for the purposes of this Act.

CHAPTER II
DOMESTIC VIOLENCE

3. **Definition of domestic violence.**-For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.-For the purposes of this section,-

(i) *"physical abuse"* means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) *"sexual abuse"* includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) *"verbal and emotional abuse"* includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) *"economic abuse"* includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether

payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan,* property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person *or* her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.- For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

CHAPTER III

POWERS AND DUTIES OF PROTECTION OFFICERS, SERVICE PROVIDERS, ETC.

4. Information to Protection Officer and exclusion of liability of informant.-

(1) Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

(2) No liability, civil or criminal, shall be incurred by any person for giving in good faith of information for the purpose of sub-section (1).

5. Duties of police officers, service providers and Magistrate.- A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person-

(a) of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a

residence order, a compensation order or more than one such order under this Act;

(b) of the availability of services of service providers;

(c) of the availability of services of the Protection Officers;

(d) of her right to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987);

(e) of her right to file a complaint under section 498A of the Indian Penal Code (45 of 1860), wherever relevant:

Provided that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

6. Duties of shelter homes.- If an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, such person in charge of the shelter home shall provide shelter to the aggrieved person in the shelter home.

7. Duties of medical facilities.- If an aggrieved person or, on her behalf a Protection Officer or a service provider requests the person in charge of a medical facility to provide any medical aid to her, such person in charge of the medical facility shall provide medical aid to the aggrieved person in the medical facility.

8. Appointment of Protection Officers.- (1) The State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act.

(2) The Protection Officers shall as far as possible be women and shall possess such qualifications and experience as may be prescribed.

(3) The terms and conditions of service of the Protection Officer and the other officers subordinate to him shall be such as may be prescribed.

9. Duties and functions of Protection Officers.- (1) It shall be the duty of the Protection Officer-

(a) to assist the Magistrate in the discharge of his functions under this Act;

(b) to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;

(c) to make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;

(d) to ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made;

(e) to maintain a list of all service providers providing legal aid or counselling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;

(f) to make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;

(g) to get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

(h) to ensure that the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

(i) to perform such other duties as may be prescribed.

(2) The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.

10. Service providers.- (1) Subject to such rules as may be made in this behalf, any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860) or a company registered under the Companies Act, 1956 (1 of 1956) or any other law for the time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance shall register itself with the State Government as a service provider for the purposes of this Act.

(2) A service provider registered under sub-section (1) shall have the power to-

(a) record the domestic incident report in the prescribed form if the aggrieved person so desires and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence took place;

(b) get the aggrieved person medically examined and forward a copy of the medical report to the Protection Officer and the police station within the local limits of which the domestic violence took place;

(c) ensure that the aggrieved person is provided shelter in a shelter home, if she so requires and forward a report of the lodging of the aggrieved person in the shelter home to the police station within the local limits of which the domestic violence took place.

(3) No suit, prosecution or other legal proceeding shall lie against any service provider or any member of the service provider who is, or who is deemed to be, acting or purporting to act under this Act, for anything which is in good faith done or intended to be done in the exercise of powers or discharge of functions under this Act towards the prevention of the commission of domestic violence.

11. Duties of Government.-The Central Government and every State Government, shall take all measures to ensure that-

(a) the provisions of this Act are given wide publicity through public media including the television, radio and the print media at regular intervals;

(b) the Central Government and State Government Officers including the police officers and the members of the judicial services are given periodic sensitization and awareness training on the issues addressed by this Act;

(c) effective co-ordination between the services provided by concerned Ministries and Departments dealing with law, home affairs including law and order, health and human resources to address issues of domestic violence is established and periodical review of the same is conducted;

(d) protocols for the various Ministries concerned with the delivery of services to women under this Act including the courts are prepared and put in place.

CHAPTER IV
PROCEDURE FOR OBTAINING ORDERS OF RELIEFS

12. Application to Magistrate.- (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for

the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

13. Service of notice.- (1) A notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

(2) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

14. Counselling.- (1) The Magistrate may, at any stage of the proceedings under this Act, direct the respondent or the aggrieved person, either singly or jointly, to undergo counselling with any member of a service provider who possess such qualifications and experience in counselling as may be prescribed.

(2) Where the Magistrate has issued any direction under sub-section (1), he shall fix the next date of hearing of the case within a period not exceeding two months.

15. Assistance of welfare expert.- In any proceeding under this Act, the Magistrate may secure the services of such person, preferably a woman, whether related to the aggrieved person or not, including a person engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions.

16. Proceedings to be held in camera.- If the Magistrate considers that the circumstances of the case so warrant, and if either party to the proceedings so desires, he may conduct the proceedings under this Act in camera.

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

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

18. Protection orders.- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being *prima facie* satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from-

(a) committing any act of domestic violence;

(b) aiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

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

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

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

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

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

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

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

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

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return the possession of the aggrieved person her *stridhan* or any other property or valuable security to which she is entitled to.

20. Monetary reliefs.- (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay

monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,-

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

21. Custody orders.- Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

22. Compensation orders.- In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved

person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

23. Power to grant interim and *ex parte* orders.- (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an *ex parte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

24. Court to give copies of order free of cost.- The Magistrate shall, in all cases where he has passed any order under this Act, order that a copy of such order, shall be given free of cost, to the parties to the application, the police officer in-charge of the police station in the jurisdiction of which the Magistrate has been approached, and any service provider located within the local limits of the jurisdiction of the court and if any service provider has registered a domestic incident report, to that service provider.

25. Duration and alteration of orders.- (1) A protection order made under section 18 shall be in force till the aggrieved person applies for discharge.

(2) If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.

26. Relief in other suits and legal proceedings.- (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

27. Jurisdiction.- (1) The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which-

(a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or

(b) the respondent resides or carries on business or is employed; or

(c) the cause of action has arisen,

shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.

(2) Any order made under this Act shall be enforceable throughout India.

28. Procedure.- (1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

29. Appeal.- There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

CHAPTER V
MISCELLANEOUS

30. Protection Officers and members of service providers to be public servants.- The Protection Officers and members of service providers, while acting or purporting to act in pursuance of any of the provisions of this Act or any rules or orders made thereunder shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

31. Penalty for breach of protection order by respondent.- (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

32. Cognizance and proof.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sub-section (1) of section 31 shall be cognizable and non-bailable.

(2) Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (1) of section 31 has been committed by the accused.

33. Penalty for not discharging duty by Protection Officer.- If any Protection Officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause, he shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

34. Cognizance of offence committed by Protection Officer.- No prosecution or other legal proceeding shall lie against the Protection Officer unless a complaint is filed with the previous sanction of the State Government or an officer authorised by it in this behalf.

35. Protection of action taken in good faith.- No suit, prosecution or other legal proceeding shall lie against the Protection Officer for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

36. Act not in derogation of any other law.- The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

37. Power of Central Government to make rules.- (1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the qualifications and experience which a Protection Officer shall possess under sub-section (2) of section 8;

(b) the terms and conditions of service of the Protection Officers and the other officers subordinate to him, under sub-section (3) of section 8;

(c) the form and manner in which a domestic incident report may be made under clause (b) of sub-section (1) of section 9;

(d) the form and the manner in which an application for protection order may be made to the Magistrate under clause (c) of sub-section (1) of section 9;

(e) the form in which a complaint is to be filed under clause (d) of sub-section (1) of section 9;

(f) the other duties to be performed by the Protection Officer under clause (i) of sub-section (1) of section 9;

(g) the rules regulating registration of service providers under sub-section (1) of section 10;

(h) the form in which an application under sub-section (1) of section 12 seeking reliefs under this Act may be made and the particulars which such application shall contain under sub-section (3) of that section;

(i) the means of serving notices under sub-section (1) of section 13;

(j) the form of declaration of service of notice to be made by the Protection Officer under sub-section (2) of section 13;

(k) the qualifications and experience in counselling which a member of the service provider shall possess under sub-section (1) of section 14;

(l) the form in which an affidavit may be filed by the aggrieved person under sub-section (2) of section 23;

(m) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.