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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice A.K. Patnaik**	Chief Justice & Patron
2.	**Hon'ble Shri Justice R.S. Garg**	Chairman
3.	**Hon'ble Shri Justice Dipak Misra**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
5.	**Hon'ble Shri Justice K. K. Lahoti**	Member
6.	**Hon'ble Shri Justice R.S. Jha**	Member

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J.P. Gupta Director

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Manohar Mamtani Addl. Director

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The domain of law is very large and our knowledge about law is just a drop in this mighty ocean. Lord Maculay has rightly said – "Knowledge advances by steps and not by leaps". To improve our knowledge in this field, we should cultivate the habit of continuous reading and learning. Learning is an unending process. Without developing this habit, one cannot sharpen the skills of logical thinking.

Nowadays the Institute is imparting training to the newly appointed Civil Judges Class II. As these Officers are the foundation of the lowest rung of the Judiciary, the Institute aims to prepare them as good Judges for the coming generation through this Institutional Training. But this object can be achieved only when the Judges take this training whole-heartedly and follow the path shown by learned Senior Judges.

On the other hand, they should also bear in mind that they have chosen this noble profession so they should not be carried away by the sweetness of success that they have just tasted. This is a very small achievement but a lot more has to be attained. For this, the first and foremost duty of a Judicial Officer is to inculcate the habits of honesty, patience and the quality to hear more and speak less. We should maintain the high dignity of this profession. Nothing should be done to belittle it. Our character speaks volumes about us.

Everyday new developments are taking place in our field. To keep pace with these developments, we have to remain abreast

with the latest case laws and other books relating to law which will boost our self-confidence. A man of letters will face every situation boldly. In this field nothing can be achieved on the basis of imagination, therefore, we should not compromise when it comes to hard work.

In Part I of this issue, we are privileged enough to include a lecture based on 'Substitution of Legal Representatives' by Hon'ble Shri Justice K.K. Lahoti, Judge, High Court of Madhya Pradesh and other Bi-monthly articles.

Part II is abound with various latest important pronouncements of the Supreme Court and of our own High Court.

In Part III, as usual, Notifications are included. Due to paucity of space, Part IV does not find place in this issue.

We have to remain committed with the noble work at our hands. The Institute in its capacity will always be ready to help you with the problems faced by you in dispensation of speedy, qualitative and inexpensive justice. To wipe the tears of the common litigant must be our goal and we should make all endeavour in that direction.

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If you just help in creating an atmosphere (of education), the rest will be done by the atmosphere itself. Even the wingless leaves rise high like birds when a powerful storm comes.

– VINOBA BHAVE

APPOINTMENT OF ADDITIONAL JUDGE IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Anang Kumar Patnaik, Chief Justice, High Court of Madhya Pradesh administrated the oath of office to Hon'ble Justice Smt. Indrani Dutta as Additional Judge of High Court of Madhya Pradesh on 1st July, 2008 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur

Hon'ble Justice Smt. Indrani Dutta was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 16th November, 1949. Joined Judicial Service as Civil Judge Class-II on 08.09.1975, promoted as Civil Judge Class-I on 14.12.1983, as C.J.M. on 13.06.1988 and promoted as officiating District Judge on 10.07.1989, granted selection grade on 12.05.1997, super-time scale on 16.06.2003. Worked as Additional District Judge and Presiding Officer, Special Court (SC/ST Act), Dewas in 1997, Special Judge for trail of cases under SC/ST (P.A.) Act, Indore w.e.f. 07.08.2000 and Presiding Officer, Family Court, Indore w.e.f. 14.05.2002. Was District & Sessions Judge, Vidisha prior to her elevation.

During her tenure as Judicial Officer, she was posted in various Districts like Raipur, Rajnand Gaon, Bilaspur, Durg, Harda, Seoni, Dewas, Indore, Bhopal, Vidisha etc.

Took oath as Additional Judge, High Court of Madhya Pradesh on 1st July, 2008

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HON'BLE SHRI JUSTICE S.K. KULSHRESTHA DEMITS OFFICE

Hon'ble Shri Justice S.K. Kulshrestha demitted office on His Lordship's attaining superannuation. Born on October 2, 1946. Designated Senior sAdvocate in the year 1995. Was appointed as Deputy Government Advocate in the High Court in 1980 and Government Advocate in 1984. Continued as Government Advocate till 1989. Again in 1994, was appointed as Additional Advocate General. Continued on the post of Additional Advocate General till elevation.

Was Government Counsel in a large number of Inquiry Commissions, was also counsel for many Corporate and statutory bodies. Practised mostly on the Civil, Criminal and Constitutional side.

Appointed as an Additional Judge of the Madhya Pradesh High Court on January 24, 1996 and Permanent Judge on December 18, 1996.

Appointed as Administrative Judge of Indore Bench on 29.08.2005.

His Lordship was accorded forewell ovation on September 26, 2008 in the High Court of Madhya Pradesh, Bench Indore.

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

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HON'BLE MISS JUSTICE SHEELA KHANNA DEMITS OFFICE

Hon'ble Miss Justice Sheela Khanna demitted office on Her Lordship's attaining superannuation. Born on October 7, 1946. Joined judicial service on 03.04.1970. She was promoted as Civil Judge Class-I w.e.f. 14.06.1984. Promoted as Additional District & Sessions Judge w.e.f. 27.04.1987 and posted as District & Sessions Judge at Narsinghpur, Gwalior, Indore etc.

Elevated as an Additional Judge of the Madhya Pradesh High Court on October 11, 2004 and Permanent Judge on November 25, 2005.

His Lordship was accorded forewell ovation on September 26, 2008 in the High Court of Madhya Pradesh, Bench Indore.

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

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PART - I

SUBSTITUTION OF LEGAL REPRESENTATIVES

(Lecture delivered by Hon'ble Shri Justice K.K. Lahoti during Induction Training to the Newly Appointed Civil Judges Class II in the Institute)

The substitution of legal representative is envisaged under Order 22 of the C.P.C. Usually in the cases after death of parties either plaintiff or defendant, this question arises. Controversy arises only when the application is not filed within time or there is a dispute in determination of question as to legal representative. Legal representative has been defined in Section 2 (11) of the C.P.C. which reads thus:-

> **Section 2 (11) :-** "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermediates with the estate of the deceased and where a party sues or is used in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

The Apex Court in *Custodian of Branches of BANCO National Ultramarine Vs. Nalini Bai Naique AIR 1989 SC 1589* has interpreted the definition of legal representative thus:-

> "Legal representative" as defined in Civil Procedure Code which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermediates with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person pwho may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as executors or administrators in possession of the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". If there are many heirs, those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased.

Now, the relevant provisions under Order 22 of CPC may be seen. Order 22 comes into play on death, marriage and insolvency of parties. Here we are concerned with the death of a party and substitution of legal representatives in a case.

Firstly, Order 22 Rule 1 deals with the right to sue. Order 22 Rule 1 reads thus:-

> **"Rule 1 : No abatement by party's death, if right to sue survives** – The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."

Aforesaid provision provides that the death of plaintiff or depedant shall not cause the suit to abate, if right to sue survives. What is the right to sue can be understood in simple words – "right to seek relief".

In nutshell, if a party applying for substitution is entitled to same relief which the plaintiff had claimed, then right to sue survives on the legal representative, but in case he cannot claim any relief against defendant, right to sue does not survive. Similar is the position with the defendant. If relief against defendant is in persona like plaintiff, and after the death of defendant, plaintiff cannot claim relief against defendant, then right to sue does not survive and in that condition, the suit stands abated and cannot be proceeded further. In the suit where the claim is filed on torts, the suit abates on the death of plaintiff. But, it will depend upon the facts of each case and this aspect has to be seen in the facts of each case.

Rule 2 Order 22 of the CPC deals with where one of several plaintiffs or defendants dies and right to sue survives. Rule 2 reads thus:-

> **Rule 2. Procedure where one of several plaintiffs or defendants dies and right to sue survives :-** Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed pat the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Rule 3 of Order 22 provides procedure in case of death of one of several plaintiffs or sole plaintiff. Rule 3 read thus:-

> **Rule 3. Procedure in case of death of one of several plaintiffs or of sole plaintiff -** (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause

the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Rule 3 (1) is very specific. It provides if right to sue survivies on the legal representative, the legal representative can apply for substitution in place of plaintiff who has died. In case of more than one of plaintiffs, another plaintiff can file an application for substitution of legal representative of deceased plaintiff and in the case legal representative decided not to continue as plaintiff then those can be substituted as defendant in the case. Sub-rule 2 of Rule 3 provides that where within time limited by law, no application is made under sub-rule (1), suit shall abate and defendant on filing an application shall be entitled for costs which he may have incurred in defending the suit and can be recovered from the estate of the deceased plaintiff. The limitation for filling an application for substitution is 90 days from the date of death. The limitation is provided under Article 120 of the Limitation Act which reads thus:-

Description of suit	**Period of limitation**	**Time from which period begins to run**
120. Under the Code of Ciil Procedure 1908 (5 of 1908), to have the legal plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent, as the case may be.

The period of limitation shall begin to run from the date of death of a party. Article 120 applies in both situations in respect of the death of plaintiff or defendant.

The abatement as provided in sub-rule (2) of Rule (3) is automatic and for this no specific order is required and on expiry of 90 days, legal representative has to seek a specific order from the Court for setting aside the abatement and in this regard provision is envisaged in Order 22 Rule 9 C.P.C. which provides for an order to set aside the abatement.

Order 22 Rule 4 deals with the procedure in case of death of one of several defendants or of sole defendant. Rule 4 reads thus:-

4. Procedure in case of death of one of several defendants or of sole defendant.

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant not withstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where –

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

4A. Procedure where there is no legal representative

(1) If, in any suit it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court –

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

Rule 4 is very important and has been drafted in such a manner that it deals every situation which may arise in the suit and usually matter is contested by the parties in respect of the exigencies which arise under rule 4. Sub-rule (1) of Rule 4 is identical to sub-rule (1) of Rule 3 which provides that if right to sue survives on the legal heir of the defendant after the death of defendant, the Court on an application made in this regard shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Sub-rule (2) of Rule 4 provides the defence which a legal representative can take and in this regard, it has been specifically provided that he can take a defence appropriate to his character as legal representative of the deceased defendant. The Apex Court in Vidyawati vs. Man Mohan & others AIR 1995 SC 1953 has considered the situation where the legal representative was having independent right, title and interest in the property and such legal representative can set up his/her own right, interest and title in the property, otherwise legal representative has to step in the shoes of defendant and can contest the suit.

Sub-rule (3) of Rule 4 deals with the situation that if within a period of 90 days, no application is filed for substitution of legal representative of the defendant, the suit shall abate as against the deceased defendant. The abatement is automatic and no specific order from the Court is required. After 90 days, the suit is abated against the defendant.

Sub-rule (4) has been inserted in the statute book by Amendment of 1976 which provides that where a defendant dies, the Court may exempt the plaintiff, if it thinks fit, from substituting the legal representative of any such defendant who has failed to file a written statement or who having filed it, has failed to appear and contest the suit at the hearing and in that condition, the judgment may be pronounced against the said defendant and inspite of death of defendant, the judgment and decree shall have the same force and effect as if it has been pronounced before death took place. This is a very important amendment. On two exigencies, one if defendant has failed to file a written statement or if he has filed it but has failed to appear and content the suit at the hearing, inspite of the fact that the legal representatives are not brought on record, the suit can be proceeded and decided against the defendant. Earlier law was that against a dead person the decree was nullity, but only in these peculiar circumstances without impleading legal representative, the suit can be proceeded.

Sub-rule (5) provides that if the plaintiff was ignorant of the death of a defendant then while dealing application after a period of 90 days, the statute provides that it will be a ground to set aside the abatement.

Rule 5 provides when there is a dispute in respect of legal representative of a deceased or where more than one person claim to be legal representative of the deceased plaintiff or defendant, the Court has to decide the question under Rule 5 and can allow the application of one who in the opinion of the Court is legal representative and reject application of other. While dealing rule 5, the Court may also consider it appropriate to impaled one person as a legal representative and another as defendant if in the opinion of the Court, presence of both is necessary for the decision of the suit. Usually this question arises where a will was bequeathed by the deceased party.

Rule 6 provides that if hearing is concluded and case is reserved for order or for pronouncing the judgment and because of the death of any party, there shall be no abatement, a judgment may be pronounced in that situation.

Rule 7 provides the exigencies that in case of marriage of a female party, suit shall not abate.

Rule 9 of Order 22 provides effect of abatement or dismissal. Rule 9 of Order 22 reads thus:-

> **9. Effect of abatement or dismissal**
>
> (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented any sufficient cause from

continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).

[Explanation – Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order]

This provision is applicable in the case of plaintiff and defendant.

If an application is not filed within a period of 90 days, the suit abates or is dismissed and no fresh suit shall be brought on the same cause of action. This is an estoppel against the plaintiff and on the same cause of action, a subsequent suit cannot be brought by the plaintiff or his legal heirs. Sub-rule (2) of rule 9 provides that the legal representative of plaintiff may apply for an order to set aside the abatement or dismissal or in case application is not filed within a period of 90 days for substitution of legal heirs of defendant, an application can be filed for setting aside the abatement on proving fact that the party was prevented by any sufficient cause from filing such an application and the Court can set aside abatement or dismissal upon such term as to costs or otherwise, as it thinks fit. Now the question arises what is the period of limitation. The period of filing an application for setting aside the abatement is provided under Article 121 of the Limitation Act which provides 60 days limitation from the date of abatement. For ready reference, Article 121 of the Limitation Act can be seen which reads thus:-

Description of suit	**Period of limitation**	**Time from which period begins to run**
121. Under the same Code for an order to set aside an abatement	Sixty days	The date of abatement

So, after a period of 90 days, further period of 60 days is provided for setting aside abatement and in that regard, if application is filed within such a period of 60 days under sub-rule (2) of Rule 9, abatement can be set aside on proving sufficient cause in this regard.

Sub-rule (3) of Rule 9 provides that in case such an application is not filed within a period of 60 days, after expiry of period provided under Article 121, section 5 of the Limitation Act shall apply to applications under sub-rule (2), meaning thereby if no application for setting aside abatement is filed within a period of 150 days, the party can apply seeking condensation of delay on proving sufficient cause by filling an application under Section 5 of the Limitation Act so,

position in nut shell is that a period of 90 days is provided for filing an application for substitution of legal heir. A further period of 60 days is provided for setting aside abatement under sub-rule (2) of Rule 9 and even if within a period of 150 days, no application is filed then an application under Section 5 of the Limitation Act shall be required for setting aside abatement. Now it is settled law that a composite application under sub-rule (2) of Rule 9 of Order 22 CPC and section 5 of the Limitation Act can be filed in this regard. Under both provisions sufficient cause is to be proved by the plaintiff and Court has to record its finding that the plaintiff was having sufficient cause for not filing the application within a period of 90 days or 150 days, as the case may be and on recording a specific finding in this regard, the abatement can be set aside and legal heirs can be brought on record.

All these applications are to be filed supported by an affidavit.

So far as dealing with such an application the Apex Court in *Bhagwan Swaroop Vs. Mool Chand AIR 1983 SC 355 and Sital Prasad Saxena Vs. Union of India AIR 1985 SC 1* has held that this is a procedural law and the Court should adopt a liberal approach in condoning delay and setting aside abatement. Until and unless the party is grossly negligent in applying for substitution or for setting aside the abatement, normally the approach of the Court should be to allow such an application.

Order 22 rule 10 C.P.C. reads thus :-

> **10. Procedure in case of assignment before final order in suit**
>
> (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.
>
> (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Aforesaid provision has been made to meet out the exigency where before final order in the suit is passed, the party assigns, creates or interest is devolved to a third party during pendency of the suit, by the leave of the Court, the suit may be continued by or against such person. This provision has been made to meet out such exigencies because provisions of section 52 of the Transfer of Property Act about lis pendens are applicable. In these circumstances, a leave of the Court is required for impleading such a person to be continued as plaintiff or defendant.

Order 22 rule 10A CPC reads thus:-

10A. Duty of pleader to communicate to Court death of a party.

Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

This is a new provision inserted by the Amendment of 1976 which cast a duty on a counsel to inform to the Court in respect of death of party for whom he is representing, provided he is having knowledge in this regard. This provision further provides that for the purpose of information, the contract between the pleader and the deceased party shall be deemed to subsist. An application can be filed on getting this information by the other side for substitution of legal representatives and it would be a ground to condone the delay in filing such an application, provided the death is not in the knowledge of the other party seeking condonation of delay. In this regard, judgment of the Apex Court in *Gangadhar Vs. Raj Kumar (1984) 1 SCC 121* may be seen which is an authority on the issue.

Order 22 rule 11 reads thus :-

11. Application of Order to appeals.

In the application of this Order to appeals, so far as may be, the word "plaintiff shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal

This rule relates to appeals and the order has been made applicable to the appeals also.

Order 22, rule 12 CPC is again in important provision which reads thus:-

12. Application of Order to proceedings :

Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

This exigency arises at many times because in the execution proceedings, an objection is raised that the decree-holder or the judgment-debtor has died and the proceedings are abated. But this rule specifically provides that provisions or order 22 CPC are not applicable to the execution of any decree or order. So in the execution proceedings at any time, substitution can be made. Normal rule of procedure is that by or against a dead person. no proceeding can continue and the substitution is to be made.

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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, 2008. The Institute has received articles from various districts. Articles regarding topic no. 1 and 5 received from Khandwa, and Neemuch respectively, are being included in this issue. Due to paucity of space, articles regarding topic nos. 2 and 4 will be published in December, 2008 issue of JOTI. As we have not received worth publishing article regarding topic no. 3 it shall be sent to other group of districts for discussion in future:

1. Whether a decree is required to be framed on rejection of plaint under Order 7 Rule 11 C.P.C.?

   क्या आदेश 7 नियम 11 सिविल प्रक्रिया संहिता के अन्तर्गत वाद पत्र नामजूंर करने पर आज्ञप्ति की विरचना की जाना आवश्यक हैं ?

2. State the scope and limitations of the Role of Magistrate and other agencies under the Protection of Women from Domestic Violence Act, 2005?

   घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 के अन्तर्गत मजिस्ट्रेट सहित अन्य संस्थाओं की भूमिका की सीमाएं एवं क्षेत्र समझाइये ?

3. 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 है ?

4. Examine the law relating to execution of various orders passed under the Protection of Women from Domestic Violence Act, 2005?

   घरेलू हिंसा से महिलाओं का सरंक्षण अधिनियम, 2005 के अन्तर्गत पारित विभिन्न आदेशों के निष्पादन संबंधी विधि का परीक्षण कीजिए ?

5. What would be the liability of insurance company u/s 147 (1) (b) of Motor Vehicle Act, 1988, if more than one owners of the different goods or their authorised representatives dies or bodily injured in motor accident while they were traveling with their goods in Goods Carriage?

   मोटर यान अधिनियम की धारा 147 (1) (ख) के अधीन बीमा कम्पनी का क्या दायित्व होगा यदि किसी मोटर दुर्घटना में विभिन्न माल के मालिक या उनके अधिकृत प्रतिनिधि अपने माल के साथ किसी माल वाहक यान में जा रहे हैं?

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WHETHER A DECREE IS REQUIRD TO BE FRAMED ON REJECTION OF PLAINT UNDER ORDER 7 RULE 11 OF C.P.C.

Judicial Officers
District Khandwa

According to Order 7 Rule 11 of C.P.C. the plaint shall be rejected on any of six grounds i.e.

Rejection of plaint.— The plaint shall be rejected in the following cases : —

(a) where it does not disclose a cause of action:

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(d) where the suit appears from the statement in the plaint to be barred by any law:

(e) where it is not filed in duplicate:

(f) where the plaintiff fails to comply with provisions of Rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Section 2(2) of C.P.C. defines the word "decree" which includes the "rejection of plaint"

Whenever an objection is raised before the Court on any of said six grounds, the Court may decide this objection without pronouncing the judgment. Even the Court can exercise such power before registering the case or before filing of written statement by defendant.

Since Court does not adjudicate the dispute finally, hence Court merely passes an order and not pronounces the judgment. Such order shall have effect of decree, therefore, appealable. It becomes more clear from the provision of Order 7 Rule 12 of C.P.C. which says that while rejecting the plaint, the Judge shall record the order. Meaning thereby that on rejection of plaint, the Court shall not pronounce the judgment but shall pass an order.

In the same context, provision of Order 7 Rule 13 of C.P.C. is also important which provides that whenever a plaint is rejected, the plaintiff may file a fresh plaint. Apart from this, in certain circumstance the Court may restore the rejected plaint under Section 151 of C.P.C. as held in *Ganges River Transport v. Reliance Jute and Industries Ltd. and others, AIR 1982 Cal. 290.*

It becomes more evident from the law laid down in *Firm Muni Lal Ram Chand through Ram Chand v. Kalam Singh and another, AIR 1943 Lah. 121* wherein it was held that dismissal of suit and rejection of plaint are not identical. If a plaint does not disclose a cause of action, the only legal order that can be passed is one of rejection of plaint under Order 7 Rule 11 and not of dismissal. In the case of rejection by virtue of Order 7 Rule 13, the plaintiff is not precluded from bringing a fresh suit on the same cause of action, while in a case of dismissal this course is not open to him.

Moreover Section 33 and order 20 Rules 1 and 6 of C.P.C. provides that decree shall be framed only after pronouncement of judgment. The only exception of said Rule is Order 23 Rule 3 of C.P.C. which says that after passing the order regarding compromise, satisfaction or agreement, the Court shall pass a decree in accordance.

In dismissal of suit, a decree is passed while in rejection of plaint the order is passed which is merely appealable having affect of decree. It means that in first case a decree is drawn up while in second case a decree is not needed to be drawn, the only reason of not framing a decree as said herein before is that on rejection of plaint, the Court does not adjudicate the dispute finally.

With this the Rule 177 of M.P. Civil Court Acts & Rules needs to be mentioned which lays down that no formal decree shall be drawn in case of rejection of plaint under Order 7 Rule 11 of C.P.C. In such cases a schedule of costs shall be drawn up just below the order passed.

It is pertinent to mention that Hon'ble High Court of M.P. has held in *Jai Narayan Charitable Register Society v. Kurand Verma and others, 1999 (1) Vidhi Bhaswar 210 and Nammoo Devangan v. Sita Ram* and *others, 1999 (2) Vidhi Bhaswar 207* that formal decree is necessary to be drawn in case of rejection of plaint. But much before in 1979 our own High Court had laid down in *Ram Dulari Bai v. Gomati Bai, 1979 MPWN 197* that decree needs to be drawn only in case of dismissal of suit while in case of rejection of plaint Rule 177 of M.P. Civil Court Acts & Rules is relevant which says that formal decree shall not be drawn up in case of rejection of plaint. This case *Ram Dulari Bai* (supra) was not discussed in latter two cases of year 1999. Therefore, law laid down in previous case *Ram Dulari Bai* (supra) shall prevail. [Please see: *Wali Mohammed v. Batul Bai, 2003 (2) MPLJ 513 (FB)]*

In conclusion, we can say that when a plaint is rejected under Order 7 Rule 11 of C.P.C., it is not required to frame a decree.

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मोटरयान अधिनियम, 1988 की धारा 147 (1) (ख) के अधीन बीमा कम्पनी का क्या दायित्व होगा यदि किसी मोटर दुर्घटना में विभिन्न माल के मालिक या उनके अधिकृत प्रतिनिधि अपने माल के साथ किसी माल वाहक यान में जा रहे हैं ?

न्यायिक अधिकारीगण
जिला–नीमच

मोटर यान अधिनियम, 1939 (संक्षेप में पुराना अधिनियम) की धारा 2 (8) में माल यान (Goods Vehicle) को निम्नानुसार परिभाषित किया गया है –

> 'माल यान' से ऐसा कोई मोटरयान अभिप्रेत है, जो केवल माल देने के काम के लिए निर्मित या अनुकूलित है या ऐसा मोटरयान भी, जो ऐसा निर्मित या अनुकूलित नहीं है, उस दशा में अभिप्रेत है, जब उसका उपयोग माल ढोने के अतिरिक्त यात्रियों के लिए किया जाता है।

मोटर यान अधिनियम, 1988 (संक्षेप में नवीन अधिनियम) की धारा 2 (14) में माल वाहन (Goods Carriage) को निम्नानुसार परिभाषित किया गया है :–

> 'माल वाहन' से ऐसा कोई मोटरयान अभिप्रेत है, जो केवल माल ढोने के काम के लिए निर्मित या अनुकूलित है या ऐसा मोटरयान भी, जो ऐसा निर्मित या अनुकूलित नहीं है, उस दशा में अभिप्रेत है, जबकि उसका उपयोग केवल माल ढोने में किया जाता है।

दोनों अधिनियम में परिभाषित माल यान एवं माल वाहन में दो सारभूत अन्तर (Significant Distinction) है –

> प्रथम– पुराने अधिनियम में यान (Vehicle) शब्द का उपयोग किया गया, जबकि नवीन अधिनियम में उसके स्थान पर वाहन (Carriage) शब्द का उपयोग किया गया।
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> द्वितीय– पुराने अधिनियम में यान में माल के अतिरिक्त यात्रियों को ले जाना अनुज्ञात (Allowed) था, परन्तु नवीन अधिनियम में वाहन में यात्रियों को ले जाना अनुज्ञात नहीं है, क्योंकि अग्रलिखित शब्दों 'यात्रियों के अतिरिक्त' (In addition to passengers) को विलोपित (Omitted) कर दिया गया। परिभाषा में उक्त परिवर्तन के पीछे विधायिका (Legislative) की यह स्पष्ट मंशा है कि माल वाहन में यात्रीगण यात्रा न करें केवल उसका उपयोग माल ढोने हेतु हो। इस संबंध में सर्वोच्च न्यायालय द्वारा *न्यू इंडिया एश्योरेन्स कम्पनी लिमिटेड बनाम वेदवती एवं अन्य 2007 A.C.J.1043= 2007AIR SCW 1505* में दिए गए निर्णय का पैरा–13 अवलोकनीय है।

नवीन अधिनियम की धारा 147 के प्रावधान बीमा पालिसियों की अपेक्षाएँ एवं दायित्व की सीमाएं उपबंधित करते हैं। आलोच्य विषय के परिप्रेक्ष्य में इस धारा की 147 (1) (ख) (i) सुसंगत है। यह धारा उसमें अधिनियम क्रमांक 54/94 द्वारा संशोधन होने के पूर्व निम्नानुसार थी –

> ''उस यान का किसी सार्वजनिक स्थान में उपयोग करने से किसी व्यक्ति की मृत्यु या शारीरिक क्षति होने से या किसी पर व्यक्ति (Third Party) की किसी संपत्ति को नुकसान पहुँचाने की बावत् उसके द्वारा उपगत दायित्व''

उल्लेखनीय है कि उक्त धारा के प्रावधान पुराने अधिनियम की धारा 95 (1) (ख) (i) के अनुरूप (Correspond) थे।

इस धारा का अधिनियम क्रमांक 54/94, जो कि दिनांक 14/11/94 से प्रभावी है, द्वारा संशोधन करने के उपरांत स्वरूप निम्नानुसार हो गया है –

> ''उस यान का किसी सार्वजनिक स्थान में उपयोग करने से यान में जा रहे माल के स्वामी या उसके अधिकृत प्रतिनिधि को शामिल करते हुए किसी व्यक्ति की मृत्यु या शारीरिक क्षति होने या किसी पर व्यक्ति की किसी संपत्ति को नुकसान पहुँचाने के सम्बन्ध में उसके द्वारा उपगत् दायित्व''

इस धारा का संशोधन पूर्व एवं संशोधन पश्चात् का तुलनात्मक अध्ययन किया जावे तो यह सुस्पष्ट है कि उसमें अग्रलिखित शब्द ''यान में जा रहे माल के स्वामी या उसके अधिकृत प्रतिनिधि'' बढ़ाये गये हैं।

वर्ष 1994 के संशोधन पूर्व बीमा कम्पनी उस स्थिति में भी क्षतिधन देने के लिए उत्तरदायी थी, जब कोई व्यक्ति माल वाहन में निःशुल्क यात्री (Gratuatous Passenger) के रूप में यात्रा कर रहा हो। इस संबंध में सर्वोच्च न्यायालय द्वारा *न्यू इण्डिया एश्योरेन्स कम्पनी लिमिटेड बनाम सतपाल सिंह, AIR 2000 SC 235=2000 A.C.J. 1* में दिया गया निर्णय अवलोकनीय है।

इस धारा में वर्ष 1994 में हुए उक्त संशोधन पश्चात् बीमा कम्पनी उस स्थिति में ही क्षतिधन देने के लिए उत्तरदायी है, जब माल वाहन में व्यक्ति माल के स्वामी या उसके अधि त प्रतिनिधि की हैसियत से यात्रा कर रहा हो। इस संबंध में सर्वोच्च न्यायालय द्वारा *न्यू इण्डिया एश्योरेन्स कम्पनी लिमिटेड बनाम आशारानी, AIR 2003 SC 607= 2003 A.C.J. 1* तथा *नेशनल इंश्योरेन्स कम्पनी लिमिटेड बनाम बलजीत कौर, 2004 ACJ 428=2004 AIR SCW 212=(2004)2 SCC 1* के मामलों में दिया गया निर्णय अवलोकनीय है।

सर्वोच्च न्यायालय में *ओरियेण्टल इंश्योरेन्स कम्पनी लिमिटेड बनाम देवीरेड्डी कोण्डा रेड्डी एवं अन्य, 2003 (1) TAC 481=AIR 2003 SC 1009* गये निर्णय के पैरा–12 तथा वेदवती (उपरोक्त) के मामले में निर्णय के पैरा–14 में यह अभिनिर्धारित किया कि नवीन अधिनियम में ऐसा कोई प्रावधान नहीं है कि माल वाहन के स्वामी का यह सांविधिक दायित्व (Statutory Liability) होगा कि वह उसके माल वाहन का बीमा वाहन में यात्रा करने वाले किसी भी श्रेणी के व्यक्ति/व्यक्तियों के लिए करावे। सार्वजनिक सेवा यान के माल वाहन के ड्रायवर एवं कण्डक्टर के संबंध में माल वाहन के स्वामी का दायित्व कर्मकार प्रतिकर अधिनियम

1923 (Workeman's Compensation Act) के अधीन उदभूत होता है। विधि की इस प्रतिपादना (Proposition of Law) से यह निष्कर्ष निकलता है कि बीमा कम्पनी माल के साथ यात्रा कर रहे माल स्वामी या उसके अधिकृत प्रतिनिधि को मोटर दुर्घटना होने पर क्षतिधन उस दशा में देने के लिए जिम्मेदार होगी, जब माल वाहन के स्वामी ने इस हेतु उसे अतिरिक्त प्रीमियम दी हो।

सर्वोच्च न्यायालय ने *नेशनल इंश्योरेन्स कम्पनी लिमिटेड बनाम चौलेट्टी भारतम्मा एवं अन्य, 2008 ACJ 268=AIR 2008 SC 4847* के मामले में दिये गये निर्णय के पैरा–8 में यह कहा है कि नवीन अधिनियम यह कल्पना (Contemplation) नहीं करता है कि माल वाहन में अनेकों यात्री अपने थोड़े से माल के साथ यात्रा करे तथा पैरा–17 में यह कहा है कि माल के स्वामी का अर्थ माल वाहन की कैबिन में यात्रा करने से है।

सर्वोच्च न्यायालय ने *नेशनल इंश्योरेन्स कम्पनी लिमिटेड बनाम अंजना श्याम एवं अन्य, 2008 (1) MPLJ 1= AIR 2007 SC 2870* के मामले में बीमा कम्पनी की क्षतिधन देने की जिम्मेदारी अभिनिर्धारित की है। इस मामले में यह ठहराया गया कि बीमा कम्पनी मोटर दुर्घटना होने पर उस संख्या तक के यात्रियों को क्षतिधन देने के लिए जिम्मेदार होगी, जिस संख्या तक के यात्रियों का उसने प्रीमियम लेकर बीमा किया है।

चौलेट्टी भारतम्मा तथा अंजना श्याम (उपरोक्त) के मामले में प्रतिपादित विधि की प्रायोज्यता (Applicability) को अग्रलिखित उदाहरण द्वारा स्पष्ट किया जा सकता है–

1. एक केबिन युक्त माल वाहन के साथ मोटर दुर्घटना वर्ष 2007 में घटित हुई। परिवहन कार्यालय ने इस माल वाहन को केबिन में छह व्यक्तियों की बैठक क्षमता (Seating Capacity) के साथ परमिट जारी किया था, जिसमें ड्रायवर व क्लीनर सम्मिलित थे। माल वाहन के स्वामी ने बीमा कम्पनी को छह व्यक्तियों का बीमा कराने हेतु अतिरिक्त प्रीमियम का भुगतान किया था। दुर्घटना समय इस माल वाहन में आठ व्यक्ति उनके माल के साथ यात्रा कर रहे थे। चूँकि, परमिट की शर्तों अनुसार इस माल वाहन में ड्रायवर व क्लीनर के अतिरिक्त चार व्यक्ति ही अपने–अपने माल के साथ यात्रा कर सकते थे। अतः बीमा कम्पनी मात्र इन चार व्यक्तियों को क्षतिधन देने के लिए जिम्मेदार रहेगी।

2. परिवहन कार्यालय ने एक ट्रेक्टर–ट्राली का पंजीयन माल वाहन के रूप में किया और एक बैठक क्षमता के साथ परमिट जारी किया। यह बैठक क्षमता ड्रायवर की थी। ट्रेक्टर–ट्रॉली के स्वामी ने उसका बीमा ड्रायवर की जोखिम हेतु कराया। दुर्घटना समय इस ट्रेक्टर के साथ संलग्न ट्रॉली में दस माल स्वामी अपने–अपने माल के साथ यात्रा कर रहे थे। इस मामले में बीमा कम्पनी उक्त माल स्वामियों को क्षतिधन देने के लिए जिम्मेदार नहीं होगी।

इस स्टेज पर यह उल्लेख करना उपयुक्त रहेगा कि मध्यप्रदेश उच्च न्यायालय ने *कंधी उर्फ कन्हैयालाल साहू एवं अन्य बनाम गोविन्द सिंह धुर्वे, 2004 (3) M.P.L.J. 277* के मामले में निर्णय के पैरा–15 में यह अभिनिर्धारित किया कि बीमा कम्पनी का मोटर यान अधिनियम 1988 की धारा 147 के अधीन यह सांविधिक दायित्व है कि वह क्षतिधन की अदायगी दावेदारों को करे। बीमा कम्पनी उसके दायित्व से इस आधार पर बच नहीं सकती कि दुर्घटना समय माल वाहन में बीमा पॉलिसी में वर्णित संख्या से अधिक माल स्वामी अपने–अपने माल के साथ यात्रा कर रहे थे। इस आधार पर इस मामले में सभी माल स्वामियों को क्षतिधन देने के लिए, माल वाहन के स्वामी व ड्रायवर के साथ बीमा कम्पनी को संयुक्त अथवा पृथक–पृथक जिम्मेदार ठहराया, लेकिन यह सिद्धान्त सर्वोच्च न्यायालय द्वारा पूर्वोक्त चौलेट्टी भारतम्मा एवं अंजना श्याम के न्याय दृष्टांतों में प्रतिपादित विधि को देखते हुए अनुकरणीय नहीं रहता है।

उपरोक्त विवेचन के आधार पर हमारा इस विधिक प्रश्न का उत्तर यह है कि यदि माल वाहन के स्वामी ने बीमा कम्पनी को अतिरिक्त प्रीमियम देकर माल के साथ यात्रा करने वाले स्वामियों या उनके अधिकृत प्रतिनिधियों का बीमा कराया है और ऐसे माल वाहन के साथ दुर्घटना नवीन अधिनियम की धारा 147 (1) (ख) (i) में हुए संशोधन पश्चात् होती है तो बीमा कम्पनी परिवहन क़ार्यालय द्वारा जिस बैठक क्षमता के साथ माल वाहन का परमिट दिया है, उस क्षमता तक के माल स्वामियों या उनके अधिकृत प्रतिनिधियों को क्षतिधन देने के लिए जिम्मेदार है बशर्ते वे माल वाहन के केबिन में यात्रा कर रहे हों।

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Crisis and deadlocks when they occur have at least this advantage : They force us to think.

– JAWAHARLAL NEHRU

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 विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

बालक या विधि के विरोध में, किशोर से संबंधित आपराधिक प्रकरण में किस प्रकार की साक्ष्य से आयु का निर्धारण किया जाएगा ?

किशोर न्याय द्धबालकों की देखरेख और संरक्षण अधिनियम, 2000 की धारा 7–ए के अन्तर्गत किसी न्यायालय द्वारा एवं धारा 49 (1) के अन्तर्गत किशोर न्याय बोर्ड द्वारा आयु का निर्धारण करने संबंधी जाँच में विचार में ली जाने योग्य साक्ष्य के संबंध में दिनांक 26.10.2007 से प्रभावशील हुए केन्द्रीय सरकार द्वारा निर्मित न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2007 का नियम 12 महत्वपूर्ण है जिसके अनुसार न्यायालय या बोर्ड, जैसा भी प्रकरण हो, का यह कर्तव्य है कि ऐसे बालक या विधि के विरोध में किशोर की आयु का निर्धारण इस हेतु प्रस्तुत आवेदन पत्र की तिथि से 30 दिवस की अवधि में करें।

न्यायालय या बोर्ड से यह भी अपेक्षित है कि आयु निर्धारण हेतु जाँच के लिये वह निम्नानुसार साक्ष्य प्राप्त करें :–

प्रथमतः मैट्रिकुलेशन या समतुल्य प्रमाण पत्र, यदि उपलब्ध हो एवं **उसके अभाव में**

द्वितीयतः प्ले स्कूल को छोड़कर ऐसे स्कूल द्वारा प्रदत्त जन्म प्रमाण पत्र जिसमें सर्वप्रथम भाग लिया गया हो, एवं **उसके अभाव में**

तृतीयतः निगम या म्युन्सिपल प्राधिकारी या पंचायत द्वारा प्रदत्त जन्म प्रमाण पत्र

चतुर्थतः उक्त वर्णित किसी भी प्रकार की साक्ष्य **के अभाव में** ही विधिवत गठित हुए चिकित्सा बोर्ड से चिकित्सकीय मत लिया जाएगा जो ऐसे किशोर या बालक की आयु की घोषणा करेगा किन्तु यदि चिकित्सकीय मत से किशोर या बालक की आयु का निश्चित निर्धारण नहीं किया जा सकता हो तब न्यायालय या बोर्ड, यदि उचित समझे, संबंधित किशोर या बालक की आयु को एक वर्ष की सीमा में नीचे की ओर मानते हुए उसे लाभ दे सकता हैं।

उक्त नियम के अनुसार आयु के उक्त वर्णित प्रमाण इस अधिनियम की प्रयोज्यता हेतु आयु के निश्चयात्मक प्रमाण होंगे।

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क्या धारा 354 एवं 377 भा.द.वि. के अन्तर्गत दण्डनीय अपराधों के विचारण में द.प्र.सं. की धारा 327 (2) के प्रावधान लागू होंगे ?

द.प्र.स. की धारा 327 (2) के अनुसार भा.द.वि. की धारा 376, 376–क, 376–ख, 376–ग एवं 376–घ के अंतर्गत दण्डनीय अपराध का विचारण बंद कमरे में (Camera Trial) किया जाना अपेक्षित हैं किन्तु उक्त प्रावधान में भा.द.वि. की धारा 354 एवं 377 के अंतर्गत दण्डनीय अपराध सम्मिलित नहीं किये गये हैं जबकि उक्त अपराध के पीड़ित व्यक्ति एवं साक्षियों की भी लगभग वही स्थिति होती है जो बलात्संग की पीड़ित महिला की होती हैं।

इस संबंध में उच्चतम न्यायालय द्वारा न्यायदृष्टान्त ***साक्षी विरूद्ध भारत संघ एवं अन्य, ए.आई.आर. 2004 सु.को. 3566*** में यह निर्देश दिए गए हैं कि दण्ड प्रक्रिया संहिता की धारा 327 (2) के प्रावधान भा.द.वि. की धारा 354 और 377 के अंतर्गत दण्डनीय अपराधों के विचारण और जाँच में भी लागू होंगे। इस प्रकार उक्त न्याय दृष्टांन्त में सर्वोच्च न्यायालय द्वारा दिए गए निर्देशानुसार भा.द.वि. की धारा 354 और 377 के अपराधों में भी न्यायालय के लिये यह आवश्यक है कि बंद कमरे में विचारण या जाँच करें।

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बच्चों के यौन उत्पीड़न एवं बलात्संग के प्रकरणों में साक्ष्य लिपिबद्ध किये जाने हेतु क्या सावधानियां अपेक्षित हैं ?

न्याय दृष्टांन्त ***साक्षी विरूद्ध भारत संघ एवं अन्य, ए.आई.आर. 2004 सु.को. 3566*** में बच्चों के यौन उत्पीड़न या बलात्संग के मामलों के संबंध में यह मत व्यक्त किया गया है कि ऐसे प्रकरणों में अभियुक्त की दृष्टि मात्र ही पीड़ित या साक्षी के मन में अत्यधिक भय उत्पन्न कर सकती हैं और ऐसी दशा में यह संभव है कि पीड़ित या साक्षी घटना का पूर्ण विवरण न दे सके और उस दशा में न्याय का हनन हो सकता है अतः ऐसे प्रकरणों के विचारण के लिये सर्वोच्च न्यायालय द्वारा निम्न निर्देश दिये गये हैं :–

(1) पीड़ित और साक्षी तथा आरोपी के मध्य पर्दा या अन्य कोई ऐसा साधन प्रयुक्त किया जाए ताकि पीड़ित और साक्षी आरोपी का शरीर या चेहरा न देख पाए।

(2) प्रतिपरीक्षण में घटना से प्रत्यक्षतः संबंधित प्रश्न लिखकर न्यायालय के पीठासीन अधिकारी को दिये जाने चाहिये जो न्यायालय द्वारा पीड़ित या साक्षी के समक्ष स्पष्ट भाषा में और इस प्रकार रखें जाएंगे जिससे उन्हें शर्मिदंगी न हो।

(3) ऐसे साक्षियों को आवश्यकतानुसार कथन के मध्य विश्राम भी दिया जाना चाहिए।

सर्वोच्च न्यायालय द्वारा उक्त न्याय दृष्टाँत में यह भी व्यक्त किया गया है कि उक्त वर्णित निर्देश उन निर्देशों के अतिरिक्त है जो उच्चतम न्यायालय द्वारा ***पंजाब राज्य विरूद्ध गुरमीत सिंह, ए.आई.आर. 1996 सु.को. 1393*** के प्रकरण में दिये गये हैं।

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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**

PART - II

NOTES ON IMPORTANT JUDGMENTS

429. ACCOMMODATION CONTROL ACT:

EAST PUNJAB RENT RESTRICTION ACT, 1949 – Section 13

Eviction on the ground of sub-tenancy – Tenant not parted with exclusive possession of premises – Mere accommodating to sit, fix and operate sewing machine in order to assist tenant in his cloth business is not creating sub-tenancy – Such act may at best be said to be creating licence – Therefore, landlord not entitled to obtain decree for eviction.

Smt. Nirmal Kanta (D) by L.Rs. v. Ashok Kumar & Anr.

Reported in AIR 2008 SC 1768

Held:

What constitutes sub-letting, has repeatedly fallen for the consideration of this Court in various cases and it is now well-established that a sub-tenancy or a sub-letting comes into existence when the tenant inducts a third party/stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof. The lessor and/or a landlord seeking eviction of a lessee or tenant alleging creation of a sub-tenancy has to prove such allegation by producing proper evidence to that effect. Once it is proved that the lessee and/or tenant has parted with exclusive possession of the demised premises for a monetary consideration, the creation of a sub-tenancy and/or the allegation of sub-letting stands established.

From the evidence that has come on record, it appears that the respondent No. 2 had been accommodated by the respondent No. 1 to assist him in his cloth business by helping customers to assess the amount of cloth required for their particular purposes. The said activity did not give the respondent No. 2 exclusive possession for that part of the shop room from where he was operating and where his sewing machine had been affixed. The aforesaid issue has been correctly decided both by the Rent Controller as also the High Court. The main ingredient of the creation of a sub-tenancy and/or grant of a sub-lease not having been established, it may at best be said that the respondent No. 2 was a licensee under respondent No. 1 which would not entitle the appellant-landlord to obtain a decree for eviction against the respondent No.1 tenant on the ground of sub-letting.

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*430. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a)

(i) Notice u/s 12 (1) (a) of M.P. Accommodation Control Act, validity of – Although notice was sent, yet neither it was alleged that appellant is tenant nor demand of arrears of rent was made – Held, valid demand of arrears of rent cannot be said to have been given – Consequently, suit for ejectment of the tenant not maintainable on ground referred to in S. 12 (1) (a) of the Act.

(ii) Disclaimer of derivative title after admission, effect of – Defendant denied the derivative title of the plaintiff inspite of earlier admission – Additional ground of eviction by plaintiff taken under S. 12 (1) (c) of the Act, on account of disclaimer of title, by way of amendment – Defendant did not bother to amend the written statement to deny allegations made in the plaint – No explanation given by him as to under what circumstances he was compelled to deny the title of the plaintiffs – Held, denial is not bonafide – Passing decree of eviction against the tenant under S. 12 (1) (c), held proper.

Devraj v. Naina Devnani and others

Reported in 2008 (3) MPLJ 239

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*431. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a)

Trial Court, having regard to evidence adduced before it, came to conclusion that plaintiff had established his claim for eviction on the bonafide ground – First Appellate Court interfered with the findings of the facts recorded by the Trial Court on due and proper appreciation of evidence without assigning sufficient and cogent reasons – Held, the finding recorded by the First Appellate Court are based upon misreading of evidence – The Appellate Court ought not to have reversed the finding of the Trial Court without recording sufficient and cogent reasons therefor.

Ramchandra v. Smt. Kamladevi and others

Reported in 2008 (3) MPLJ 319

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432. ACCOMMODTION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b) and (f)

(i) 'Sub-letting', meaning of – It means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent.

(ii) Tenant and the alleged sub-tenant were admittedly real brothers – There was admission on the part of plaintiff that both of them were tenants of his father – Thsere was no evidence on record that out of the whole disputed land which portion has been put into exclusive possession of the alleged sub-tenant by the original tenant – Held, the ground of eviction under S. 12 (1) (b) of the Act is not made out.

Shivjibhai and another v. Jagdishchandra and others
Reported in 2008 (3) MPLJ 87

Held:

It has not been disputed that defendant-appellant No. 2 is the brother of defendant-appellant No. 1. There has been statement of PW-3 Krishanlal Mahajan as also of DW-1 Shivjibhai on record. PW-3 has stated that vide Ex. P/1, the rent note, disputed land was given to defendant-appellant Shivji. He has further stated that Shivji has given disputed land to his brother Shyamji on sub-tenancy. DW-1 Shivaji has stated that ever since their inception as joint tenant, they are carrying on joint business on the entire disputed land. On perusal of Ex.P/1 it gives an idea that the tenancy started singly with defendant-appellant No. 1. However, it has not been disputed that originally the rent was that the rate of Rs. 100-00 per month which subsequently stood revised to Rs. 125-00 per month that means there has been subsequently oral agreement modifying the original contract of tenancy. Hence, in these circumstances Ex. D/5, the copy of a plaint between the parties from other suit, cannot be excluded from evidence and the provisions of section 92 of the Evidence Act do not create a bar thereto. Ex. D/5 which was excluded by the learned lower Appellate Court on the ground that section 92 of the Evidence Act prohibited its admission into evidence is thus not correct. On its consideration it is found that therein vide Para 2 the tenancy under reference was joint and both the defendants were put as joint tenants over the disputed land. This is an admission made by the legal representative *Krishnalal, respondent No. 2., AIR 1976 SC 2400, Niranjan Kumar and others v. Dhyan Singh and another* is authority as to that under given set of circumstances the provisions of section 92 of the Evidence Act may not be applicable. The instant is one of those cases wherein provisions of section 92 of the Evidence Act stands excluded. As per Ex. D/5 and the above stated admission, it is to be observed that admissions made in pleadings are best evidence of the facts of which they speak. A reference in this connection may be made to *2004 (2) MPLJ 169 = 2004 (1) MPJR 511, Smt. Mohini and others v. Smt. Vidyawati Rathore and others.* As such the findings recorded by the learned trial Court and confirmed by the learned Appellate Court regarding the tenancy being single needs interference of this Court. It is in fact joint right from the inception and in favour of the appellants, the defendants. On this short ground alone the ground of eviction under sub-section (1) clause (b) of section 12 of the Act is needed to be regarded as not made out.

Besides it has been found that in the evidence the substance of which has already been seen earlier, it was nowhere come on record that out of the whole disputed land which half portion has been put into exclusive possession of the alleged sub-tenant by the original tenant. Here it is to be remembered that sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. Further it is to be remembered that in the present circumstances of the case the evidence is only suggestive of the fact that the alleged sub-tenant,

sthe brother of the tenant, is only the user of the disputed land. Thus, from the evidence necessary ingredients to constitute sub-tenancy within the meaning of clause (b) of sub-section (1) of section 12 of the Act is not made out. Both the learned Courts below did not properly construe the above provision relating to sub-letting. In this connection a respectful reference may be made to *M/s Delhi Stationers and Printers v. Rajendra Kumar, AIR 1990 SC 1208.*

The learned lower Appellate Court was not justified in confirming the decree passed under section 12 (1) (b) of the Act as also the learned lower Appellate Court was not justified in holding that ground under section 12 (1) (b) ibid is made out in the circumstances when the tenant and the alleged sub-tenant were admittedly real brothers. As also in the light of clear admission made by the plaintiff in Ex. D/5 describing both the defendants to be tenant of his father Vallabhdas, the lower Appellate Court was not justified in holding a case of sub-tenancy as made out.

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433. ACCOMMODATION CONTORL ACT, 1961 – Sections 12 (3) & 13 (1)

(i) Admission in pleadings vis-à-vis admission in testimony – Court may accept a part and reject the rest of the part of the testimony of a witness but so far as admission in pleading is concerned, it may be accepted as a whole or not at all.

(ii) Plaintiff filed suit for eviction against tenant on various grounds including the ground covered by S. 12 (1) (a) of the Act – The tenant cannot be permitted to raise the plea that he is entitled to the protection of S. 12 (3) of the Act at the stage of Second Appeal – In absence of specific denial of the fact of non-payment of rent, the fact would be deemed to be admitted – Eviction from the premises is unavoidable.

Santosh (Smt.) and others v. Mohd. Sharif and others

Reported in 2008 (3) MPLJ 351

Held:

There is no quarrel with the proposition of law that an admission in pleadings is quite different than an admission in the testimony of a witness. As observed by the Privy Council in *M.M. Essbhoy v. M. Haridas, AIR 1915 PC 2* it may be permissible for a Court/tribunal to accept a part and reject of rest any of any witness's testimony, but so far as admission in pleading is concerned, it cannot be so dissected. It may be accepted as a whole or not at all.

In the case on hand, there was a clear averment in the plaint by the plaintiff of non-payment of any rent by the appellants since September 1, 1981 despite the decree for recovery of rent having been passed against their predecessor occupier. There was no specific denial of this fact. Even otherwise, the tenant did not plead payment of any rent or its deposit before any authority. In absence of specific denial, this fact would be deemed to be admitted on the ground of non-traverse by the tenant. Learned counsel for the tenant strenuously urged

before us that the appellants-tenant is entitled to the protection of Section 12 (3) of the Act and that the appellants had in fact deposited arrears of rent within the meaning of Section 13 (1) of the Act. We cannot permit this plea raised at this stage. The only plea taken by the appellants-tenant being the denial of relationship of landlord and tenant between the parties and having failed to establish same on the uncontroversial facts, eviction from the premises is unavoidable. So far as proviso to Order VIII, Rule 5 (1) is concerned, it merely states that the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. A wrong exercise of discretion would not give rise to substantial question of law to interfere with findings of fact. Even otherwise, looking to the nature of the pleadings we are of the view that the Courts below were not wrong in refusing to exercise discretion in favour of the appellants.

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***434. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 13 (2)**

Provisional Rent, fixation of – Reasonal provisional rent can be fixed after summary inquiry on the basis of rent receipts, rent shown in the property tax register or in the absence of any documentary evidence only on the basis of affidavits – It is not permissible to fix provisional rent without holding summary inquiry by taking into the extraneous considerations like financial status of the parties, locality of the suit premises and the prevailing rent.

Smt. Meera Kori v. Mohd. Faheem Siddqui

Reported in 2008 (III) MPJR 12

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435. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 35 CIVIL PROCEDURE CODE, 1908 – Section 47

S.35 of the M.P. Accommodation Control Act clothes the Rent Controlling Authority with powers of Civil Court to provide a complete forum in respect of execution of the orders passed by it – All the questions falling within the purview of S.47 of the Code of Civil Procedure are to be dealt with only by the Rent Controlling Authority and none else.

Ashish Sahu v. Sushila Devi Chouhan

Reported in 2008 (3) MPLJ 383

Held:

Section 47 of the Code of Civil Procedure provides that all questions arising between parties to the suit in which decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. In view of the specific language used under section 47 of the Code, the Rent Controlling Authority which was exercising power of Civil Court for execution of order was having jurisdiction to decide such dispute arises between the parties and for this purpose is vested

with power of Section 47 of the Act. If for the sake of argument, contention of learned Counsel for respondent is accepted, then position will be very anomalous. On one hand Section 35 of the Act provides the Rent Controlling Authority powers of Civil Court to execute its orders and when any question arises, between the parties in respect of execution, discharge or satisfaction of the decree, the Rent Controlling Authority would stay its hands on the ground that it has no power to decide such question, then in those circumstances, where the party would go. The intention of Section 35 of the Act is very clear and it provides a complete forum in respect of execution of the orders passed by the Rent Controlling Authority. In case of arising any such exigency, all the questions falling within the purview of Section 47 of the Code are to be dealt with only by the Rent Controlling Authority and none else. In these circumstances, the Rent Controlling Authority erred in holding that it has no power to decide the question raised by the petitioner under Section 47 of the Code.

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***436. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (1) (e) & 34 (2)**

In view of the provision of S. 34 r/w/s 2 (1) (e) of the Arbitration and Conciliation Act, 1996, an application for modification or setting aside the award can only be entertained by the Principal Civil Court of original jurisdiction inspite of order passed u/s 11 (6) of the Act by the High Court or Supreme Court.

Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency

Judgment dated 24.01.2007 passed by the Supreme Court in IAs Nos. 1 and 2 in SLP (C) No. 18344 of 2004 reported in (2008) 6 SCC 741

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***437. ARBITRATION AND CONCILIATION ACT, 1996 – Section 8**
TRANSFER OF PROPERTY ACT, 1882 – Sections 106 & 111

(i) Objection as to existence of Arbitration Clause, raising of – The objection pertaining to existence of arbitration clause should be taken immediately at the first instance as per the provision of S. 8 of the Arbitration and Conciliation Act.

(ii) Lease – Determination of by forfeiture – Lease can only be forfeited when there is express violation of express condition by the lessee – Before the right of re-entry is exercised, it is necessary to terminate the tenancy by way of notice in writing – It is also necessary on the part of the competent Court to adjudicate the question regarding breach of the conditions of lease – Possession can only be obtained on the basis of the decree of the Court by filing of suit for possession and not directly taking the law in hand.

Cine Exhibitors Pvt. Ltd. v. Gwalior Development Authority & Ors.

Reported in 2008 (III) MPJR 21

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438. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34

If two interpretations of the clauses of agreement were possible and the one interpretation has been adopted by the Arbitrator, that would not be a ground to make interference in the Awards passed by the Arbitrator as it could not be said to be a misconduct committed by the Arbitrator.

Narmada Construction v. Western Coalfields Ltd.

Reported in 2008 (3) MPLJ 356 (DB)

Held:

We are not inclined to accept the submission with respect to short supply of cement and thereby causing obstruction/delay in completion of work on part of WCL for various reasons referred to by the Arbitrator, particularly that cement was available after September, 1993 and throughout in the year 1994, still the work was not completed by the Contractor and there was no absolute obligation upon the WCL to supply the cement for same time has been considered by the Arbitrator, that was the stand of WCL also. In spite of availability of cement after September, 1993 as found by the Arbitrator work was not completed, thus it has material bearing on the claim made by Contractor with respect to loss of profit. The reason for not completing the work was that there was short supply of cement, the point has been dealt with by the Arbitrator, and it could not be shown that findings recorded by Arbitrator were perverse or illegal. Even if two interpretations of the clauses of agreement were possible and the one interpretation has been adopted by the Arbitrator, that would not be ground to make interference in the Awards passed by the Arbitrator as it could not be said to be a misconduct committed by the Arbitrator.

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439. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 (3) Proviso and 43 (1)

LIMITATION ACT, 1963 – Sections 5, 14 & 29 (2)

(i) For challenging award u/s 34 (2) specific provision to extend limitation prescribed in Proviso to Section 34 (3) excludes applicability of general provision of S. 5 of Limitation Act – Court, therefore, cannot extend limitation beyond 30 days prescribed even if sufficient cause is shown for it.

(ii) S. 14 of Limitation Act is applicable to application submitted u/s 34 of the Arbitration and Conciliation Act – Concept of due diligence and good faith for S. 14 also explained.

Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others

Judgment dated 03.04.2008 passed by the Supreme Court in Civil Appeal No. 2461 of 2008, reported in (2008) 7 SCC 169

Held :

A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the Court.

Section 29(2) of the Limitation Act, inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule, the provisions of Section 3 shall apply as if such period was the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes a certain period of limitation as well as provision for extension upto specified time limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act.

(ii) However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted under Section 34 of the Act of 1996.

Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said Section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;s

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

The policy of the Section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (*sic* of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded. There is no provision in the Arbitration and Conciliation Act, 1996 which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act.

We may notice that in similar circumstances the Division Bench of this Court in *State of Goa v. Western Builders, (2006) 6 SCC 239* has taken a similar view. As observed earlier the intention of the legislature in enacting Section 14 of the Act is to give relief to a litigant who had approached the wrong forum. No canon of construction of a statute is more firmly established than this that the purpose of interpretation is to give effect to the intention underlying the statute. The interpretation of Section 14 has to be liberal. The language of beneficial provision contained in Section 14 of the Limitation Act must be construed liberally so as to suppress the mischief and advance its object. Therefore, it is held that the provisions of Section 14 of the Limitation Act are applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award.

Further, there is fundamental distinction between the discretion to be exercised under Section 5 of the Limitation Act and exclusion of the time provided in Section 14 of the said Act. The power to excuse delay and grant an extension

of time under Section 5 is discretionary whereas under Section 14, exclusion of time is mandatory, if the requisite conditions are satisfied. Section 5 is broader in its sweep, than Section 14 in the sense that a number of widely different reasons can be advanced and established to show that there was sufficient cause in not filing the appeal or the application within time. The ingredients in respect of Section 5 and 14 are different. The effect of Section 14 is that in order to ascertain what is the date of expiration of the 'prescribed period', the days excluded from operating by way of limitation, have to be added to what is primarily the period of limitation prescribed.

To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this Judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essentially pre-requisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.

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440. CIVIL PROCEDURE CODE, 1908 – Section 9 and Order 8 Rule 1
Suit against partnership firm – Written statement, filing of –

(i) Written statement filed by a person on behalf of the firm cannot be cancelled merely because there is no averment in the written statement about he being partner of the firm.

(ii) Merely because the partnership firm has been made party through other partner, it cannot be said that only the partner whose name is shown by the plaintiff can file written statement and appear in the suit for the firm.

White Ways v. Vijay Choudhary and others
Reported in 2008 (3) MPLJ 224

Held:

True it is, in the written statement filed on behalf of the defendant No. 2 by Vikram Dawar there is no specific averments that he is a partner of the defendant No.2 partnership firm. However there is no denial of the averments under section 151 of the Code of Civil Procedure before the trial Court and the averments made in this petition supported by the partnership deed that Vikram Dawar is partner of the defendant No. 2 firm White Ways. On the other hand, from the partnership deed and the details of the partners shown in the documents filed along with this petition it is very clear that Vikram Dawar is partner of the defendant No. 2 firm White Ways.

In the case of *Pokhardas Gabrani v. Sewaram Girdharilal, AIR 1929 Sind 192* in a suit against a firm summons was served on a person as partner in the firm. The partner though he was not served in the individual capacity filed a written statement in his own name and not as representative of the firm. In the circumstances it was held that there was nothing individual in the defence and as such a technical flaw can be corrected by Court even at argument stage.

Thus the written statement filed by Vikram Dawar on behalf of the firm cannot be cancelled merely because there is no averment in the written statement about he being partner of the firm. In the light of the judgment passed in case of *Pokhardas Gabrani v. Sewaram Girdharilal* (supra) this being a technical flaw deserves to be corrected in the light of unchallenged averments in the reply filed by Vikram Dawar to the application filed by the plaintiffs before the trial Court and the un-controverted averments made by the petitioner in this petition that Vikram Dawar is a partner of the petitioner defendant No. 2 firm. The said Vikram Dawar being partner of a defendant No. 2 firm may not been joined by the plaintiffs in the suit showing him as partner of the firm still he is entitled to file the written statement and defend the suit on behalf of the defendant No. 2 firm. Merely because the partnership firm has been made party through other partner it cannot be said that only the partner whose name is shown by the plaintiff can file written statement and appear in the suit for the firm.

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441. CIVIL PROCEDURE CODE, 1908 – Section 11

***Res judicata* – First suit instituted for permanent injunction on the basis of possession but it was also decided that possession of the property had been delivered on the basis of the purported oral agreement of sale even the question of agreement and delivery of possession in terms there of was not in issue nor one party to the agreement was party in the first suit – Second suit instituted for declaration of title and recovery of possession – Held, not barred by the principles of *res judicata*.**

Williams v. Lourdusamy and another

Judgment dated 22.04.2008 passed by the Supreme Court in Civil Appeal No. 2894 of 2008, reported in (2008) 5 SCC 647

Held:

The principles of res-judicata although provide for a salutary principle that no person shall be harassed again and again, have its own limitations. In O.S. No. 402 of 1987, the respondent No. 2 was not impleaded as a party. In his absence therefore, the issue as to whether respondent No. 2 had entered into an oral agreement of sale or not could not have been adjudicated upon. The said Court had no jurisdiction in that behalf. If that was decided in the said suit, the findings would have been nullities.

[See *Chief Justice of Andhra Pradesh and another etc. v. L.V.A. Dikshitulu and others, AIR 1979 SC 193 at 198* and *Hasham Abbas Sayyad v. Usman Abbas Sayyad (2007) 2 SCC 355*]

As a matter of fact even such an issue was not framed. The High Court, therefore, in our opinion posed unto itself a wrong question. In a suit for permanent injunction, the Court had rightly proceeded on the basis that on the date of the institution of the suit, the first respondent was in possession of the disputed land or not. It was not required to enter into any other question. It, in fact, did not.

It is one thing to say that a person is in possession of the land in suit and it is another thing to say that he has a right to possess pursuant to or in furtherance of an agreement for sale which would not only bind the vendor but also bind the subsequent predecessor. Had such an issue been framed, the appellant or the respondent No. 2 could have contended that Section 53 A of the Transfer of Property Act had no application. For application of Section 53A of the Act, an agreement has to be entered into in writing. The said section provides for application of an equitable doctrine of part performance. Requisite ingredients therefor must be pleaded and proved.

A competent Court of law has dismissed the suit for specific performance of contract filed by the first respondent opining that the respondent had failed to prove the existence of an oral agreement. If the suit for specific performance of contract had not been decreed in favour of the first respondent, the question of his continuing to remain in possession in part performance of contract would not arise.

Appellant herein filed a suit for declaration of title and recovery of possession. He proceeded on the basis that the first respondent was in possession.

The learned Trial Judge and the first Appellate Court, in our opinion, have rightly held that the principle of res-judicata was not attracted in this case.

In *Sajjadanashin Sayed MD. B.E. EDR. (D) by LRs. v. Musa Dadabhai Ummer and Others, (2000) 3 SCC 350* this Court considered the cases where in spite of specific issue and an adverse finding in an earlier suit, the same was not treated as res-judicata being purely incidental or auxiliary or collateral to the main issue stating:

"24. Before parting with this point, we would like to refer to two more rulings. In *Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14* this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari, AIR 1965 Mad 355* held (see para 8 therein) that the previous suit was only for injunction relating to the crops. Maybe, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above-referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the *facts of each case* and whether the finding as to title was treated as *necessary* for grant of an injunction in the earlier suit and was also the *substantive* basis for grant of injunction. In this context, we may refer to *Corpus Juris Secundum* (Vol. 50, para 735, p. 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> 'Where title to property is *the* basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was *essential* to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title'."

Following the principle of law as enunciated in the aforementioned decision, we are of the opinion that the principle of res-judicata is not attracted to the facts of the case.

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***442. CIVIL PROCEDURE CODE, 1908 – Section 34**

Scope – If a loan is for commercial transaction, appellant is entitled to contractual rate of interest and the court cannot limit rate of interest to 6% p.a. – Held, appellant is entitled to interest at the rate of contractual rate of interest i.e. 15% p.a. from the date of decree till realization. (1999) 6 SCC 51 (Rel.).

State Bank of India v. M/s Siddharth Hotel & ors.

Reported in I.L.R. (2008) M.P. NOC 61

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443. CIVIL PROCEDURE CODE, 1908 – Section 92

Section 92 of the Code would attract where the suit is of a representative character instituted in the interest of the public and not merely for vindication of the individual or personal rights of the plaintiff.

Vidyodaya Trust v. Mohan Prasad R. & Ors.

Reported in AIR 2008 SC 1633

Held :

In *Swamy Parmatmanand Saraswati and Anr. v. Ramji Tripathi and Anr., AIR 1974 SC 2141* it was held that it is only the allegations in the plaint that should be looked into in the first instance to see whether the suit falls within the ambit of Section 92. But if after evidence is taken it is found that the breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in fact or reason but is made only with a view to bringing the suit under the Section, then suit purporting to be brought under Section 92 must be dismissed.

In *R.M. Narayana Chettiar and Anr. v. N. Lakshmanan Chettiar and Ors., AIR 1991 SC 221* it was held that normally notice should be given before deciding the question as to whether leave is to be granted.

If in a given case notice has not been given and leave has been granted, it is open to the Court to deal with an application for revocation and pass necessary orders.

On a close reading of the plaint averments, it is clear that though the colour of legitimacy was sought to be given by projecting as if the suit was for vindicating public rights the emphasis was on certain purely private and personal disputes.

In *Sugra Bibi v. Hazi Kummu Mia, AIR 1969 SC 884* it was held that the mere fact that the suit relates to public trust of religious or charitable nature and the reliefs claimed fall within some of the clauses of sub-Section (1) of Section 92 would not by itself attract the operation of the Section, unless the suit is of a representative character instituted in the interest of the public and not merely for vindication of the individual or personal rights of the plaintiffs.

To put it differently, it is not every suit claiming reliefs specified in Section 92 that can be brought under the Section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights. As a decisive factor the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought. The Courts have to be careful to eliminate the possibility of a suit being laid against public trusts under Section 92 by persons whose activities were not for protection of the interests of the public trusts. In that view of the matter the High Court was certainly wrong in holding that the grant of leave was legal and proper. The impugned order of the High Court is set aside. The appeal is allowed but without any order as to costs.

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444. CIVIL PROCEDURE CODE, 1908 – Section 100
LIMITATION ACT, 1963 – Section 5
Delay in filing of appeal by the State, condonation of – First Appellate Court dismissed the application for condonation of delay filed by the State u/s 5 of the Limitation Act in which it was submitted that real brother of the O.I.C. became seriously ill and subsequently died and which was barred by 12 days holding that no sufficient ground is made out – Held, lower Appellate Court ought to have considered the application in objective manner with pragmatic approach – The ground shown for the condonation, held sufficient while condoning the delay the case was remanded back to the lower Appellate Court for disposal on merit.

State of M.P. and another v. Suresh and another
Reported in 2008 (4) MPHT 56

Held:

In case of *Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others, reported in AIR 1987 SC 1353,* Hon'ble the Supreme Court has held as under: –

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of the justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that: –

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen in that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

   Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the non-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore,

have to inform with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits."

Thus, considering the law laid down by the Apex Court, it is not in dispute that the State is impersonnel machinery and for the reason mentioned above the Officer-in-Charge could not file appeal and there was only 12 days' delay. As explained by the Officer-in-Charge, in my opinion, there was sufficient ground for condonation of delay in this case. Lower Appellate Court should have taken pragmatic approach in considering the application and should have considered the law laid down by the Apex Court in objective manner. Accordingly. this appeal is allowed. The impugned order passed by the Lower Appellate Court is set side and I.A. No. 1/97, an application for condonation of delay is allowed and delay in filing appeal is condoned. The case is remanded back to the Lower Appellate Court to hear and decide the appeal on merits.

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***445. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10, Order 22 Rules 4 & 9 Substitution of legal heirs – Application under Order 22 Rules 4 & 9 along with application under Section 5 of Limitation Act and setting aside abatement filed – Applications subsequently withdrawn with liberty to file application under Order 1 Rule 10 if law permits – Held, after withdrawal of applications filed under Order 22 Rules 4, 9 & 11, appellant has no authority to bring such heirs on record under Order 1 Rule 10 r/w Order 22 Rule 10 – Application under Order 1 Rule 10 dismissed – Appeal stands abated against dead defendant/respondent.**

Anoop Choudhary v. Smt. Usha Bhargava

Reported in I.L.R. (2008) M.P. 1763

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446. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 20, Order 9 Rule 13 r/w/s 151 and Section 114 & Order 47 Rule 1

(i) Defendant was residing in foreign country for the last 25 years, was never served with any notice of the suit though plaintiff had full knowledge of his correct address – Substituted service on defendant effected at his village address could not be held sufficient and effective – Ex parte decree held improper and caused prejudice to defendant.

(ii) Remedies available to the defendant for setting aside of such ex parte decree stated.

(iii) Courts in a situation of the present nature have extensive power to set aside an ex parte order on the grounds of principles of natural justice.

Rabindra Singh v. Financial Commissioner, Cooperation, Punjab and others

Judgment dated 14.05.2008 passed by the Supreme Court in Civil Appeal No. 3574 of 2008, reported in (2008) 7 SCC 663

Held:

In the plaint of the suit filed by Respondent 4 herein, the address of the appellant was stated to be at "Village Khotheran, District Nawanshahr".

The parties are brothers. The allegation of the appellant that he had been residing in the United States of America for last more than 25 years was not, therefore, unknown to Respondent 4 herein. If, even according to Respondent 4-plaintiff, the appellant had executed a general power of attorney in favour of somebody, notices could have been served on him through his constituted attorney. The said fact could have been disclosed in the plaint itself and steps could have been taken to serve the summons upon the said constituted attorney. No such step was taken. Nothing was shown that he could have accepted notice on behalf of the appellant and defend the suit.

A substituted service furthermore is meant to be resorted to to serve the notice at the address known to the parties where he had been residing last. The appellant had been residing in the United States of America for the last about 25 years. He, thus, ceased to stay for all intent and purport at Village Khotheran, District Nawanshahr. Therefore, no substituted service could have been effected on him for service of notice at that address.

In *Great Punjab Agro Industries Ltd. v. Khushian, (2005) 13 SCC 503* this Court held: (SCC pp. 503-04, para 3)

> "3. In view of the order that we propose to pass, it is not necessary to recite the entire facts leading to the filing of the present appeal. Suffice it to say that the suit was decreed *ex parte* by an order dated 16-4-1994. The application for setting aside the ex parte order has been rejected by the courts below. Hence, the present petition. The notice to the appellant is by way of substituted service. The substituted service was published in *The Tribune and Punjab Kesari* which have circulation only in the State of Punjab. Admittedly, the appellant stays at Bombay. The newspapers in which the notice was published by way of substituted service, namely, *The Tribune and Punjab Kesari* have no circulation in Bombay. Order 5 Rule 20(1-A) CPC enjoins that if the service of notice is by advertisement in the newspaper, it shall be in the daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided. In the instant case, the procedure prescribed under Order 5 Rule 20 (1-A) with

> regard to substituted service has been violated. In the premises, it cannot be said that the summons upon the defendant were effectively served. In this view of the matter, the ex parte decree dated 16-4-1994 is set aside."

[See also *Naresh Chandra Agarwal v. Bank of Baroda, (2001) 3 SCC 163* and *Kewal Ram v. Ram Lubhai, (1987) 2 SCC 344*]

Knowledge on the part of the constituted attorney would not be such which would come on the way of the appellant in maintaining an application for setting aside an ex parte decree.

Admittedly, the partition had been effected between the parties by metes and bounds. He could at least in the final decree proceedings, raise several objections as regards allotment of lands. He did not get such an opportunity. Where principles of natural justice are required to be complied with, non-affording of an opportunity itself causes prejudice. [See *S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379*]

We are, therefore, of the opinion that the courts below ought to have held that the appellant had been able to establish sufficient cause for an order setting aside the ex parte decree.

(ii) For sufficient cause for an order setting aside the ex parte decree also refer to *Y.P. Srivastava v. R.K. Raizada, (2000) 3 SCC 54 and Tea Auction Ltd. v. Grace Hill Tea Industry, (2006) 12 SCC 104.* A defendant in a suit has more than one remedy as regards setting aside of an ex parte decree. He can file an application for setting aside the ex parte decree; file a suit stating that service of notice was fraudulently suppressed; prefer an appeal and file an application for review.

In *Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787* this Court held:

> "26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation I appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

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447. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 & Order 1 Rule 10 SPECIFIC RELIEF ACT, 1963 – Section 19

(i) Amendment of plaint – Proposed amendment may substantially change the nature and character of original suit – Such amendment not permissible.

(ii) Stranger to an agreement for sale cannot be added as a party in a suit for specific performance of such contract except the party comes within the scope of Section 19 of Specific Relief Act.

Bharat Karsondas Thakkar v. M/s Kiran Construction Co. & Ors.
Reported in AIR 2008 SC 2134

Held:

Having carefully considered the submissions made on behalf of the respective parties, and the decisions cited on their behalf, we are of the view that the Division Bench of the High Court erred in law in allowing the amendment of the plaint sought for by the respondent No. 1 herein as the plaintiff in the suit. Even if the bar of limitation is not taken into account, the plaintiff, namely, the respondent No. 1 herein, is faced with the ominous question as to whether the amendment of the pleadings could have at all been allowed by the High Court since it completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale entered into between its assignee and the vendors of the assignees. Along with that is the other question, which very often raises its head in suits for specific performance, that is, whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963. The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of "parties to the agreement". The appellant also does not come within the ambit of Section 19 of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in *Kasturi v. Iyyamperunal and Ors., 2000 AIR SCW 2368* While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, Their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character.

In the instant case, the appellant obtained the consent decree on the strength of an agreement said to have been entered into between the Vaitys and K.L. Danani who brought the said agreement to the partnership which was formed by him with two other persons. Although, this fact was brought to the notice of the learned advocates for the respondent No. 1 on 27th March, 1984, no steps were taken by the said respondent to amend the plaint at that stage.

Instead, the respondent No. 1 waited till a consent decree was passed before applying for amendment of the plaint. The proper course of action for the respondent No. 1 would have been to challenge the consent decree not in its suit for specific performance, but in a separate suit for declaration that the consent decree ought not to have been passed and the same was not binding on the respondent. By seeking amendment of the plaint in its suit for specific performance, the respondent No. 1 has created its own difficulties by substantially changing the nature and character of the original suit, which is not permissible in law. If, as was held in *Durga Prasad v. Deep Chand, AIR 1954 SC 75* the impleadment of the appellant was only for the purpose of joining him in the conveyance if the respondent No. 1's suit ultimately succeeded, the ratio of the said decision would possibly have been applicable to the facts of this case. Unfortunately, that is not the case here, since the respondent No. 1 has by amending the plaint prayed for a declaration that the consent decree obtained by the appellant was not binding on him and also for a declaration that the consent decree was null and void and was liable to be quashed.

In our view, the decision of this Court in *Durga Prasad's case* (supra), cannot be brought to the aid of the case made out by respondent No. 1. Furthermore, the Division Bench of the High Court also appears to have committed an error in observing that the decision in *Anil Kumar Singh v. Shivnath Mishra, 1995 SCW 1782* was not applicable to the facts of this case, despite the fact that on a consideration of the provisions of Order 1 Rule 10 and Order 22 Rule 10 of the Code, this Court held that since the plaintiff in the said matter was merely seeking the specific performance of an agreement of sale, any attempt to implead a third party to the contract in the suit would be hit by the provisions of Section 15 (a) of the Specific Relief Act, 1963. In fact, in *Anil Kumar Singh's case* (supra) in a suit for specific performance, the respondent, who was not a party to the contract but wanted to be impleaded as a defendant on the ground that he had acquired subsequent interest as a co-owner by virtue of a decree obtained from the court, was held not entitled to be joined as defendant either under Order 1 Rule 3 or under Order 1 Rule 10 (ii) of the Code having regard to the provisions of Sections 15 and 6 of the Specific Relief Act, 1963.

As it appears the respondent No. 1, was proceeding before a wrong forum to establish its stand that the decree obtained by the appellant was a nullity and was not binding on it.

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448. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17, Order 8 Rule 5 and Order 12 Rule 6
EVIDENCE ACT, 1872 – Section 58
(i) Categorical admission cannot be resiled from but in a given case it may be explained or clarified – A suit may be decreed on admission under Order 12 Rule 6 – Even vague or evasive denial may be treated to be an admission under Order 8 Rule 5.

(ii) Admission in pleadings is admissible u/s 58 of the Evidence Act – These are fully binding on the party that makes them and constitute a waiver of proof.

Gautam Sarup v. Leela Jetly and others

Judgment dated 07.03.2008 passed by the Supreme Court in Civil Appeal No. 1808 of 2008, reported in (2008) 7 SCC 85

Held:

An admission made in a pleading is not to be created in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore.

In *State of Haryana v. M.P. Mohla, (2007) 1 SCC 457* this Court stated:

> "25. The law as regards the effect of an admission is also no longer res *integra*. Whereas a party may not be permitted to resile from his admission at a subsequent stage of the same proceedings, it is also trite that an admission made contrary to law shall not be binding on the State."

A thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order XII Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been mace or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom.

A Three Judge Bench of this Court speaking through Ray, CJ in *Modi Spinning & Weaving Mills Co. Ltd. v. Ladha Ram & Co., (1976) 4 SCC 320* sopined :

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court."

Yet again in *Union of India v. Pramod Gupta (Dead) by LRs. & Ors., (2005) 12 SCC 1* this Court held:

"... Before an amendment can be carried out in terms of Order 6 Rule 17 of the Code of Civil Procedure the court is required to apply its mind on several factors including viz. whether by reason of such amendment the claimant intends to resile from an express admission made by him. In such an event the application for amendment may not be allowed (See *Modi Spg. & Wvg, Mills Co. Ltd. v. Ladha Ram & Co., Heeralal v. Kalyan Mal, (1990) 1 SCC 278* and *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, (2005) 11 SCC 314*)"

What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.

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449. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18
LIMITATION ACT, 1963 – Article 137

(i) Final decree proceedings, initiation of – For final decree no limitation is provided and proceedings for final decree may be initiated at any point of time.

(ii) Decree, execution of – What can be executed is a final decree and not a preliminary decree.

Smt. Kamla Bai Patel (Kuchwaha) v. Smt. Vidhyawati Patel & Others

Reported in 2008 (4) MPHT 40

Held:

Order 20 Rule 18 of the CPC specifically provides that where the partition and separation cannot be conveniently made without further inquiry, the Court shall pass a preliminary decree declaring the rights of the several parties interested in the property and issue such further directions as may be required. The judgment and decree dated 4-9-1987 was under Order 20 Rule 18 (2) of the Code. So the aforesaid judgment and decree were preliminary in nature.

For final decree no limitation is provided and final decree proceedings may be initiated at any point of time. The Apex Court in *Hasham Abbas Sayyad v. Usman Abbas Sayyad and others, (2007) 2 SCC 355* considering this question held that: –

"9. 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."

In view of the settled law by the Apex Court, it is found that the Trial Court erred in arriving at a finding that the present application was barred by limitation and such application ought to have filed within a period of 3 years as required under Art. 137 of the Limitation Act. The aforesaid findings of the Trial Court are hereby set aside.

In so far as initiating the proceedings for final decree are concerned, the aforesaid proceedings could have been initiated at any point of time. The Apex Court in *Mool Chand & others v. Dy. Director, Consolidation and others, (1995) 5 SCC 631* considering the question held that a preliminary decree in a partition suit, is steps in the suit which continues until the final decree is passed. So the proceedings shall be continued to be pending before the Court until and unless a final decree is passed in the matter. The Trial Court can therefore, pass a final decree either suo motu or on an application by any of the parties such order as is necessary for giving effect to the preliminary decree and to conclude the proceedings. As no procedure is prescribed in the Code of Civil Procedure, hence the Court can proceed in the matter for drawing a final decree in the suit. In these circumstances if any such application was filed by the applicant then it cannot be treated as barred by limitation. [See *A. Manjundappa vs. Sonnappa and others, AIR 1965 Mysore 73*]

In this case, on filing of the application by the applicant though in the shape of execution, the Trial Court proceeding further in the mater, appointed a Commissioner to give effect to the preliminary decree. The Commissioner report was filed in the matter in which objections were filed by the parties.

Looking to the entire nature of the proceedings before the Trial Court, these proceedings may be treated as final decree proceedings though the application was filed as an execution of preliminary decree.

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450. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 54 & 66

Execution of decree – Before attachment of property and issuance of sale, proclamation notice to judgment debtor is mandatory – In absence of it, sale is nullity.

Similarly value of property is also required to put in the proclamation in order to facilitate intending builders to make right assessment about the price or property.

M/s Mahakal Automobiles & Anr. v. Kishan Swaroop Sharma
Reported in AIR 2008 SC 2061

Held:

When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

(a) Attachment of the Immoveable Property;

(b) Proclamation of Sale by Public Auction;

(c) Sale by Public Auction.

Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

The admitted position that has emerged is that:

(i) There was no notice served upon the Judgment-Debtor under Order 21 Rule 54 (1-A).

(ii) There was no valuation of the property carried out;

(iii) There was no proclamation of sale as per the statutory provisions of the M.P. Civil Court Rules, 1961 read with Order 21 Rule 66.

(iv) There was no publication of the sale.

In *Deshbandhu Gupta v. N.L. Anand @ Rajinder Singh, 1992 AIR SCW 3682* it was held as follows:

> "The Proclamation should include the estimate, if any, given by either judgment-debtor or decree holder or both the parties. Service of Notice on judgment-debtor under Order 21 Rule 66 (2) unless waive by appellants or remained *ex-parte,* is a fundamental step in the procedure of the Court in execution, judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not mislead or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In *Gajadhar Prasad v. Babu Bhakta Ratan, AIR 1973 SC 2593,* this Court after noticing the conflict of judicial opinion among the High Courts, said that a review of the authorities as well as amendments to Rule 66 (2) (e) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept the *ipse dixit* of one side. It is certainly not necessary for it to state its own estimate.
>
> But, the essential facts which had a bearing on the very material question of value of the property and which could

assist the purchaser in forming his own opinion must be stated, i.e. the value of the property, that is, after all, the whole object of Order XXI, Rule 66 (2) (e) CPC. The Court has only to decide what are all these material particular in each case. We think that this is an obligation imposed by Rule 66 (2) (e). In discharging it, the Court normally state the valuation given by both the Decree Holder as well as the Judgment Debtor where they both have valued the property, and it does not appear fantastic."

"The absence of Notice causes irremediable injury to the judgment debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended so that the prospective bidders would know the value so as to make up their mind to offer the price and to attempt that sale of the property and to secure competitive bidders and fair price to the property sold. Absence of Not to the Judgment Debtor disables him to offer his estimate of the value who better know its value and to publicise on his part, canvassing and bringing the intended bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. A sale made, therefore, without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a Court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration at time be possible."

In *M/s. Shalimar Cinema v. Bhasin Film Corporation and Another, AIR 1987 SC 2081* it was held that the court has a duty to ensure that the requirement of Order 21 Rule 66 has properly applied. It is incumbent on the court to be scrupulous in the extreme.

451. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 102, 98 & 29

Transferee *pendente lite* has no right to raise objection regarding execution of decree.

Even the execution cannot also be stayed under O. 21 R. 29 wherein suit has been instituted by the judgment debtor.

Usha Sinha v. Dina Ram & Ors.

Reported in AIR 2008 SC 1997

Held:

It may be appropriate if we note the relevant provisions of law. Rules 97 to 106 of Order XXI of the Code deal with "Resistance or obstruction to delivery of possession to decree holder or purchaser". Rule 97 enables the decree holder or auction purchaser to complain to Executing Court if he/she is resisted or obstructed in obtaining possession of such property by 'any person'. The Court on receipt of such application will proceed to adjudicate it. Rule 101 requires the Court to make full fledged inquiry and determine all questions relating to right, title and interest in the property arising between the parties to the proceeding or their representatives. The Court will then pass an order upon such adjudication (Rule 98). Rule 99 permits any person other than the judgment debtor who is dispossessed by the decree holder or auction purchaser to make an application to Executing Court complaining such dispossession. The Court, on receipt of such application, will proceed to adjudicate it (Rule 100). Rule 103 declares that an order made under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

Rule 102 clarifies that Rules 98 and 100 of Order XXI of the Code do not apply to transferee pendente lite. That rule is relevant and material and may be quoted in extenso:

> **102.** ***Rules not applicable to transferee pendente lite.—*** Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Bare reading of the rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction

from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the rule has been enacted.

Keeping in view the avowed object, the expression 'transferee from the judgment debtor' has been interpreted to mean the 'transferee from a transferee from the judgment-debtor [Vide *Vijayalakshmi Leather Industries (P) Ltd. v. K. Narayanan, Lalitha, AIR 2003 Mad 203*].

It is thus settled law that a purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent Court. The doctrine of 'lis pendens' prohibits a party from dealing with the property which is the subject matter of suit. 'Lis pendens' itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Rule 102, therefore, clarifies that there should not be resistance or obstruction by a transferee *pendente lite*. It declares that if the resistance is caused or obstruction is offered by a transferee pendente lite of the judgment debtor, he cannot seek benefit of Rule 98 or 100 of Order XXI.

In *Silverline Forum Pvt. Ltd. v. Rajiv Trust, 1998 AIR SCW 1544* this Court held that where the resistance is caused or obstruction is offered by a transferee pendente lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the decree was passed. Once the finding is in the affirmative, the Executing Court must hold that he had no right to resist or obstruct and such person cannot seek protection from the Executing Court.

Rule 29 of Order 21 deals with cases wherein a suit has been instituted by the judgment debtor against the decree-holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of proceedings. As such merely because the suit filed by the purchaser *pendente lite* to declare the decree under execution as void and illegal is pending adjudication, the execution could not be stayed under R. 29. Moreover if the purchaser succeeds in the suit and decree is passed in his favour, he can take appropriate proceedings in accordance with law and apply for restitution.

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452. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27 (1) (b) & Order 6 Rule 17

Additional evidence at appellate stage – When permissible? Law explained.

Amendment of pleading at appellate stage – Is permissible if the same does not work injustice to other party and also necessary for determination of question in controversy.

North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by LRs.

Reported in AIR 2008 SC 2139

Held:

We have considered the submissions of the learned counsel in the light of the documents on record. We are constrained to observe that the High Court has altogether failed to consider the application filed by the appellant under Order 41 Rule 27 C.P.C. We also feel that even the application under Order 6 Rule 17 C.P.C. has not been dealt with in its correct perspective and the High Court was in error in rejecting the same on the sole ground that such an application was not maintainable at the stage of second appeal.

Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced are:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, [clause (a) of sub, rule (1)] or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, [clause (aa), inserted by Act 104 of 1976] or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. [clause (b) of sub-rule (1)].

It is plain that under clause (b) of sub-rule (1) of Rule 27 Order 41 C.P.C., with which we are concerned in the instant case, evidence may be admitted by an appellate authority if it 'requires' to enable it to pronounce judgment 'or for any other substantial cause'. The scope of the rule, in particular of clause (b) was examined way back in 1931 by the Privy Council in *Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors., AIR 1931 P.C. 143.* While observing that the provisions of Section 107 as elucidated by Order 41 Rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal, it was observed as follows:

"Under Cl. (1) (b) it is only where the appellate Court 'requires' it, (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent."

Again in *K. Venkataramiah v. A. Seetharama Reddy & Ors., 1963 2 SCR 35* a Constitution Bench of this Court while reiterating the afore-noted observations in *Parsotim's case* (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits.

Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors., AIR 1957 SC 363* which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. [Also see: *Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar, (1990) 1 SCC 166*]

*453. CONSTITUTION OF INDIA – Articles 19 & 19 (1) (g)

(i) To practice any profession or to carry on any occupation, trade or business – Condition in N.I.T. that Firm should have successfully executed work contract of similar type awarded by MPPGCL/MPSEB/MPEB without any default – Held – Prescribing terms and conditions and qualifications for tender does not permit interference to be made by Writ Court – Action of tendering authority can be interfered with only if it is found to be tainted with malice or is misuse of statutory power and taken in arbitrary manner.

(ii) Protection of certain rights regarding freedom of speech, etc. – Fundamental Right guaranteed under Article 19 is absolute but subject to reasonable restrictions.

(iii) To practice any profession, or to carry on any occupation, trade or business – Condition in N.I.T. that only those Firms shall be eligible if no litigation is pending – Held – Any rule, regulation or condition which prevents a person from litigating his grievance in a Court of Law is unsustainable – Condition quashed as unjustified.

B.S.N. Joshi & Sons Ltd. v. State of Madhya Pradesh & Ors.

Reported in I.L.R. (2008) M.P. 1671 (DB)

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*454. CONSTITUTION OF INDIA – Article 226

Grounds to challenge constitutional validity – If the act of repository of power is in conflict with Constitution, or governing Act or general principles of law of land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

M.P. Cement Manufacturers Association v. State of M.P. & anr.

Reported in I.L.R. (2008) M.P. 1665

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*455. CONSUMER PROTECTION ACT, 1986 – Sections 2 (1) (d) (ii) & 2 (1) (o) EMPLOYEES PENSION SCHEME, 1995

Regional Provident Fund Commissioner is responsible for the working of the Employees Pension Scheme, 1995 – Hence, he is a 'service giver' within the meaning of S. 2 (1) (o) and the concerned worker of the company by becoming a member of the Employees Pension Scheme is 'Consumer' within the meaning of S. 2 (1) (d) (ii) of Consumer Protection Act, 1986.

Regional Provident Fund Commissioner v. Bhavani

Judgment dated 22.04.2008 passed by the Supreme Court in Civil Appeal No. 6447 of 2001, reported in (2008) 7 SCC 111

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456. CONTRACT ACT, 1872 – Section 130

Lawful agreement of continuing guarantee contrary to S. 130 of Contract Act – Protection to the guarantor as per S. 130 not available due to waiver – Guarantor could not revoke/withdraw such guarantee.

Sita Ram Gupta v. Punjab National Bank and others

Judgment dated 10.03.2008 passed by the Supreme Court in Civil Appeal No. 1878 of 2008, reported in (2008) 5 SCC 711

Held:

The agreement of guarantee clearly provides that the guarantee shall be a continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time, the said accounts may show no liability against the borrower or may even show a credit in his favour but shall continue to be a guarantee and remain in operation in respect of all subsequent transactions. This was an agreement entered into by the appellant with the Bank, which is binding on him. Therefore, the question arises whether the statutory provision under Section 130 of the Act shall override the agreement of guarantee. In our view, the agreement cannot be said to be unlawful nor the parties have alleged that it was unlawful either before the Trial Court or before the High Court. Let us, therefore, keep in mind that the agreement of guarantee entered into by the appellant with the Bank was lawful.

The question is whether the appellant, having entered into such an agreement of guarantee with the Bank, had waived his right under the Act. In our view, the High Court has rightly held and we too are of the view that the appellant cannot claim the benefit under Section 130 of the Act because he had waived the benefit by entering into the agreement of guarantee with the Bank. In *Shri Lachoo Mal Vs. Shri Radhey Shyam, (1971) 1 SCC 619,* this Court observed that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle. In Halsbury's Laws of England, Vol. 8, 3rd Edn., it has been stated in para 248 at page 143 as under:-

> *"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the Legislature has expressly provided that any such agreement shall be void."*

In *Brijendra Nath Bhargava and Anr. v. Harsh Wardhan and Ors., (1988) 1 SCC 454,* it has been observed at page 461 in para 10 that if a party had given up the advantage he could take of a position of law, it was not open to him to

change and say that he could avail of that ground. The same principle has been followed in *Bank of India and Ors. v. O.P. Swarnakar & Ors., (2003) 2 SCC 721.*

Having entered into the agreement in the manner indicated above, in our view, it was, therefore, not open to the appellant to turn around and say that in view of Section 130 of the Act, since the guarantee was revoked before the loan was advanced to defendant Nos. 1 to 4 and 6, he was not liable to pay the decretal amount as a guarantor to the Bank as his guarantee had already stood revoked. In this view of the matter, we are not in a position to accept the submissions of the learned counsel for the appellant and we hold that in view of the nature of guarantee entered into by the appellant with the Bank, the statutory provision under Section 130 of the Act shall not come to his help. The findings arrived at by the High Court while deciding the first appeal were that the amount shown due in the accounts of the Bank against the appellant and the defendants was neither cleared by the defendants nor by the appellant. Therefore, even if a letter was written to the Bank by the appellant on 31st of July, 1980 withdrawing the guarantee given by him, it was contrary to the clause in the agreement of guarantee, as noted herein earlier. Therefore, it was not open to the appellant to revoke the guarantee as the appellant had agreed to treat the guarantee as a continuing one and was bound by the terms and conditions of the said guarantee. For this reason, it is difficult to accept the submissions of the learned counsel for the appellant that in view of the statutory provision under Section 130 of the Act, after the revocation of the guarantee by the appellant, he was not liable to pay the decretal amount to the Bank.

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***457. CRIMINAL PROCEDURE CODE, 1973 – Section 125**
MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986
Claim for maintenance by Muslim women who is not divorced – Held – Application for maintenance by such Muslim women is maintainable – Revision allowed.
Jumana Bai v. Mushtaq Ali
Reported in I.L.R. (2008) M.P. 1839

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***458. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 156, 190 (1) & 200**
(i) It is well settled that civil proceedings and criminal proceedings can proceed simultaneously – Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See *M.S. Sheriff v. State of Madras, AIR 1954 SC 397, Iqbal Singh Marwah v. Meenakshi Marwah, (2005) 4 SCC 370 and Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants, (2005) 12 SCC 226*]
(ii) It is furthermore trite that Section 195 (1) (b) (ii) of the Code of Criminal Procedure would not be attracted where a forged document has been filed – It was so held by a Constitution Bench

of this Court in *Iqbal Singh Marwah* (supra) that Section 195 (1) (b) (ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in *custodia legis*.

P. Swaroopa Rani v. M. Hari Narayana alias Hari Babu

Judgment dated 04.03.2008 passed by the Supreme Court in Civil Appeal No. 1734 of 2008, reported in (2008) 5 SCC 765

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459. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3) & 200

(i) Criminal law regarding vicarious liability of Directors etc. of the Company explained.

(ii) Exercise of jurisdiction by Magistrate summoning an accused in a criminal case is a serious matter – Cautions pointed out.

Maksud Saiyed v. State of Gujarat and others

Judgment dated 18.09.2007 passed by the Supreme Court in Criminal Appeal No. 1248 of 2007, reported in (2008) 5 SCC 668

Held:

Allegations contained in the complaint petition, as noticed by the learned Magistrate, may give rise to tortuous liability on the part of Dena Bank. Principal allegations were made against the bank, who had acted on behalf of the bank was not disclosed. The acts of omission and commission on the part of the bank, if any, by withholding export bills of the bank may give rise to a statutory violation on its part but the respondents (Directors) were not personally liable therefor.

Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

It will bear repetition to state that throughout the complaint petition, no allegation had been made as against any of the respondents herein that they

had any thing to deal with personally either in discharge of their statutory or official duty.

This Court in *Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and others, (1998) 5 SCC 749,* held as under:

> "28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The learned Magistrate, in our opinion, shall have kept the said principle in mind.

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460. CRIMINAL PROCEDURE CODE, 1973 – Section 188
CIVIL PROCEDURE CODE, 1908 – Section 11
Where jurisdictional issues goes to the root of the matter, can be permitted to be raised at any stage of the proceeding – Principles analogous to *res judicata* have no application with regard to criminal cases.

Fatma Bibi Ahmed Patel v. State of Gujarat and another
Judgment dated 13.05.2008 passed by the Supreme Court in Criminal Appeal No. 873 of 2008, reported in (2008) 6 SCC 789

Held:

The appellant indisputably is a citizen of Mauritius. Alleged offence was committed in Kuwait. Complaint filed in the Court of CJM, Navsari (Gujarat, India) wherein an application was filed by her stating that the complaint petition filed without obtaining the requisite sanction u/s 188 of CrPC, was bad in law. The same was dismissed. Thereafter, appellant filed the second application on the basis of jurisdictional error of taking cognizance which was also rejected.

The learned counsel submitted that as in the earlier application, the appellant merely complained of the absence of any sanction, this application should not be entertained. We do not agree. Principles analogous to res judicata have no application with regard to criminal cases. An accused has a fundamental right in terms of Article 21 of the Constitution of India to be proceeded against only in accordance with law. The law which would apply in India subject of course to the provisions of Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure is that the offence must be committed within the territory of India. If admittedly, the offence has not been committed within the territorial limits of India, the provisions of the Indian Penal Code as also the Code of Criminal Procedure would not apply. If the provisions of said Acts have no application as against the appellant, the order taking cognizance must be held to be wholly illegal and without jurisdiction. The jurisdictional issue has been raised by the appellant herein. Only because on a mistaken legal advise, another application was filed, which was dismissed, the same by itself, in our opinion, will not come in the way of the appellant to file an appropriate application before the High Court particularly when by reason thereof her fundamental right has been infringed.

This Court, in a matter like the present one where the jurisdictional issue goes to the root of the matter, would not allow injustice to be done to a party. The entire proceedings having been initiated illegally and without jurisdiction, all actions taken by the court were without jurisdiction, and thus are nullities. In such a case even the principle of res judicata (wherever applicable) would not apply.

In *Chief Justice of Andhra Pradesh and Others v. L.V.A. Dixitulu and others, AIR 1979 SC 193 at 198,* this Court held:

> "If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in this case."

[See also *Union of India v. Pramod Gupta, (2005) 12 SCC 1*]

Where a jurisdictional issue is raised, save and except for certain categories of the cases, the same may be permitted to be raised at any stage of the proceedings.

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461. CRIMINAL PROCEDURE CODE, 1973 – Section 197

Protection u/s 197 is available when the act falls within the scope and range of official duties of the public servant concerned.

How to be tested that the alleged act has reasonable connection with the official duties? Explained.

Anjani Kumar v. State of Bihar & anr.

Reported in AIR 2008 SC 1992

Held:

Section 197 (1) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to his question is in the affirmative, it may be said that such act was committed by the

public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in *Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44* thus:

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

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

The above position was highlighted in *R. Balakrishna Pillai v. State of Kerala and Anr., 1996 AIR SCW 293, State of H.P. v. M.P. Gupta, 2003 AIR SCW 6887, State of Orissa through Kumar Raghvendra Singh and Ors. v. Ganesh Chandra Jew, 2004 AIR SCW 1926* and *Rakesh Kumar Mishra v. State of Bihar* and *Ors., 2006 AIR SCW 189.*

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***462. CRIMINAL PROCEDURE CODE, 1973 – Section 197**

S.197 of the Code, applicability of – Prosecution of public servant – As per allegation in the complaint the Revenue Officer was involved in the conspiracy with the co-accused who forged the signature of the complainant on partition papers and the Revenue Officer passed orders for such partition – Held, it appears that the alleged act was performed by the accused petitioner in the capacity of public servant not removable from his officer save by or with the sanction of the Government – Alleged act of the accused is having a direct nexus with the official duty – Therefore, sanction u/s 197 of the Code is required for his prosecution from the competent Government before taking cognizance against him.

S.S. Trivedi v. State of M.P. and another

Reported in 2008 (3) MPLJ 387

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***463. CRIMINAL PROCEDURE CODE, 1973 – Section 200**
SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 4

(i) Complaint – It is the duty of Magistrate to see as to whether criminal complaint is filed in proper form and whether any person has been made accused improperly or illegally.

(ii) Complaint filed against applicant alleging that departmental enquiry was initiated against him on false allegation and he was dismissed from service – Held – Non-applicant No. 1 failed to establish that how the departmental enquiry was initiated on false allegations and that too with an ulterior motive – Taking of cognizance illegal and erroneous – Petition allowed.

(iii) Criminal complaint filed by non-applicant discloses that atrocities began on 03.11.1987 – Act was not in force at the relevant time – Even if complaint is filed after coming into force of Act, it has got no retrospective effect – No cognizance could have been taken.

Saubir Bhattacharya & ors. v. Jai Prakash Kori & anr.
Reported in I.L.R. (2008) M.P. 1849

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464. INDIAN PENAL CODE, 1860 – Sections 121 & 123
CRIMINAL PROCEDURE CODE, 1973 – Section 222

(i) Accused was charged u/s 120 IPC but ultimately convicted u/s 123 IPC holding it is a minor offence of the offences he faced trial.

(ii) Conviction without framing separate charge for minor offences as per S. 222 of CrPC is permissible.

Shaukat Hussain Guru v. State (NCT) Delhi and another
Judgment dated 14.05.2008 passed by the Supreme Court in Writ Petition (Crl.) No. 106 of 2007, reported in (2008) 6 SCC 776

Held:

In the present case, the Court has specifically dealt with the question whether the offence under Section 123, IPC of which the accused was not charged, is a minor offence falling under the charges framed, and held that the fact that there was no charge against the accused under this particular Section, does not, in any way, result in prejudice to him because the charge of waging war and other allied offences are the subject matter of charges. It was held that the accused Shaukat is not in any way handicapped by the absence of charge under Section 123, IPC. The case which he had to meet under Section 123 is no different from the case relating to the major charges which he was confronted with. In the face of the stand he had taken and his conduct even after the attack, he could not have pleaded reasonable excuse for not passing on the information. It was held that viewed from any angle, the evidence on record justifies his conviction under Section 123, IPC.

Section 222 of the Code of Criminal Procedure, 1973 (Cr.P.C.) authorizes and gives jurisdiction to the court to convict an accused of the charge which has not been framed, if he is found guilty of a minor offence. The court need not frame a separate charge before the conviction is rendered on a minor offence. In *Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577,* this Court has held in paras 15 and 16 as under:

> "15. Section 222(1) of the Code deals with a case "when a person is charged with an offence consisting of several particulars". The section permits the court to convict the accused "of the minor offence, though he was not charged with it". Sub-section (2) deals with a similar, but slightly different situation.
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> 16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence."

In another case of *Suman Sood v. State of Rajasthan, (2007) 5 SCC 634* (in para 29), a 2-Judge Bench of this Court was of the view that:

> "... Now, it is well settled that if the accused is charged for a higher offence and on the evidence led by the prosecution, the court finds that the accused has not committed that offence but is equally satisfied that he has committed a lesser offence, then he can be convicted for such lesser offence. Thus, if A is charged with an offence of committing murder of B, and the court finds that A has not committed murder as defined in Section 300 IPC but is convinced that A has committed an offence of culpable homicide not amounting to murder (as defined in Section 299 IPC), there is no bar on the court in convicting A for the said offence and no grievance can be made by A against such conviction".

To prove an offence under Section 121, IPC, the prosecution is required to prove that the accused is guilty of waging war against the Government of India or attempts to wage such war, or abets the waging of such war, whereas for proving the offence under Section 123, IPC against the accused the prosecution is required to prove that there was a concealment by an act or by illegal omission of existence of a design to wage war against the Government of India and he

intended by such concealment to facilitate, or he knew that such concealment will facilitate, the waging of war. In the present case, the accused was charged under Section 121, IPC for waging war against the Government of India or attempting to wage such war or abetting the waging of such war. The concealment of such fact by an act or illegal omission with an intention to facilitate, or knowing that such concealment will facilitate, waging of war, even in the absence of proof of his involvement in waging of war against the Government of India, will constitute an offence and an accused can always be convicted for the concealment of such fact under Section 123, IPC. The prosecution having been successful in proving the necessary ingredients of Section 123, IPC, it would constitute a minor offence of a major offence and, therefore, the petitioner was convicted under Section 123, IPC which is a minor offence of the offences he faced trial.

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465. CRIMINAL PROCEDURE CODE, 1973 – Section 313

Examination of accused by Court – Exemption from personal attendance other than summons cases – Circumstances and procedure explained.

Keya Mukherjee v. Magma Leasing Ltd. & Anr.

Reported in AIR 2008 SC 1807

Held:

It is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word "may" in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the court not alleviate the difficulties. If the court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions

personally presenting himself in court. If there are other accused in the same case, and the court has already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the court personally and answer the court questions? Why should a criminal court be rendered helpless in such a situation?

The one category of offences which is specifically exempted from the rigour of Section 313(1)(b) of the Code is "summons cases". It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a "summons case". Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty.

Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, can not the court extend a helping hand to an accused who is placed in a predicament deserving such a help?

Section 243(1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in written statements (Section 233(2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided

such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

(a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.

(b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

(c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning. The Court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused.

In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code.

The above position was indicated in *Basav Raj R. Patil v. State of Karnataka, 2000 AIR SCW 3692.*

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***466. CRIMINAL PROCEDURE CODE, 1973 – Section 319**
INDIAN PENAL CODE, 1860 – Section 379
ELECTRICITY ACT, 1910 – Sections 39 & 44
Trial of the offence of theft of electricity by Company – During trial, prosecution filed application u/s 319 of the Code for taking cognizance against petitioner alleging that he was Managing Director of the Company – Trial Court allowed the application – Held, petitioner was not Managing Director of the Company since much before the incident and during his tenure metering system of the Company was working properly – Hence, the petitioner cannot be held liable for the alleged offence – Further held, unless the Court is hopeful that there is a reasonable prospect of the case as against the newly brought

accused ending in conviction of the offence concerned, the Court should refrain from taking cognizance against such new person.

Subhash Chandra Jain v. State of M.P.

Reported in 2008 (3) MPHT 379

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*467. CRIMINAL PROCEDURE CODE, 1973 – Section 319 (4)

Accused summoned u/s 319 of the Code – Mode of trial – Thereafter, de novo trial is mandatory against him – The witnesses have to be examined afresh – Mere tendering the witnesses for cross-examination is not sufficient – Fresh examination-in-chief is must – The words 'could be tried together with the accused' in Section 319 (1) are only directory.

In the judgment of *Shashikant Singh v. Tarkeshwar Singh and Ors., (2002) 3 SCR 400* it was held:

"The intention of the provision here is that wherein the course of any enquiry into, or trial of, an offence, it appears to the Court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At the stage, the Court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatory to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross examination on the newly added accused is the mandate of Section 319 (4). The words 'could be tried together with the accused' in Section 319 (1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319 (1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

Nishan Singh v. State of Punjab

Reported in AIR 2008 SC 1661

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***468. CRIMINAL PROCEDURE CODE, 1973 – Section 321**

(i) **It is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution – He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well-founded or that there are other circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution – The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn.**

(ii) **Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution – If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution.**

(iii) **Two cross cases, arising out of the same incident were pending – An application was filed for withdrawal of prosecution of one of the parties calling the case to be of a simple nature – Held, simply because the offences being slightly different, calling one case of a simple nature and another not of a simple nature is not justified – Compelling one of the two parties to face the trial and giving benefit to the other party while withdrawing the case pending against it ought not to be allowed.**

RamnareshTyagi and another v. Arjun Mohan Singh and others
Reported in 2008 (3) MPLJ 96

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469. CRIMINAL PROCEDURE CODE, 1973 – Section 462

Cognizance of offence – Limitation – Condonation of delay – Delay cannot be condoned without notice to the accused.

P.K. Choudhury v. Commander, 48 BRTF (GREF)
Reported in AIR 2008 SC 1937

Held:

The learned Judicial Magistrate did not issue any notice upon the appellant

to show cause as to why the delay shall not be condoned. Before condoning the delay the appellant was not heard. In *State of Maharashtra v. Sharadchandra Vinayak Dongre and others, 1994 AIR SCW 4301* this Court held:

> "In our view, the High Court was perfectly justified in holding that he delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay."

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470. CRIMINAL TRIAL:

(i) Identification by sniffer dog is only for purpose of investigation and not for evidence.

(ii) Appreciation of circumstantial evidence in context of presumption as to conduct of accused explained.

Dinesh Borthakur v. State of Assam

Judgment dated 13.03.2008 passed by the Supreme Court in Criminal Appeal No. 687 of 2007, reported in (2008) 5 SCC 697

Held:

So far as the evidence relating to the reaction of sniffer dog is concerned, this Court in *Abdul Rajak Murtaja Dafedar v. State of Maharashtra, (1969) 2 SCC 234* stated the law, thus:

> "There are three objections which are usually advanced against reception of [the evidence of dog tracking]. First, since it is manifest that the dog cannot go into the box and give his evidence on oath and consequently submit himself to Cross-examination, the dog's human companion must go into the box and the report the dog's evidence and this is clearly herarsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inference...."

Yet again in *Gade Lakshmi Mangaraju alias Ramesh v. State of A.P., (2001) 6 SCC 205,* this Court opined:

> "There are inherent frailties in the evidence based on sniffer or tracker dog. The possibility of an error on the part of the dog or its master is the first among them..... The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals....

Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."

The law in this behalf, therefore, is settled that while the services of a sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused.

(ii) A finding of guilt cannot be based on a presumption. Before arriving at an inference that the appellant has committed an offence, existence of materials therefor ought to have been found. No motive for committing the crime was identified which, in the facts and circumstances of the case, was relevant. How the links in the chain of the circumstances led to only one conclusion that the appellant and the appellant alone was guilty of commission of the offence has not been spelt out by the learned Trial Judge.

The courts below did not record any finding on the basis of any material brought on record by the prosecution that the appellant was seen at the place of occurrence of crime between 11.30 am to 4/5.00 pm. The least the prosecution, in this behalf, could do was to examine the co-employees of the appellant who had been working in his office to find out as to when he had reached his office or whether he had left his office at any time prior to 4.00 pm. No evidence was also led to bring on record the distance between the house of the appellant and his office. No witness also deposed in regard to the mode of his travelling. He had been seen going out of his house for his place of work by the prosecution witnesses. PW1 found him calling the name of his wife and the adopted daughter for opening of the main door. He went to the backside of the premises only when PW1 expressed his opinion that they might have been sleeping.

The time lag between the appellant's calling PW1 for the first time and the second time was a few minutes. The prosecution did not suggest nor any finding has been arrived at that the offence could have been committed during the said interval.

PW1 on seeing the deceased Mala lying on the bed gathered an impression that the matter was not normal. Further, PW1 in his evidence states that the accused shook the leg of the child 'Munni' stating that she was also not moving. It is the admitted case of the prosecution that the accused had asked PW1 to come and have a look PW1 himself was uncertain as to whether Mala and child Munni were already dead or not. The conduct of the appellant, so far his initial reaction to the occurrence is concerned, appears to be most natural as he suspected that something was wrong but was unsure thereabout at the same time. In any view of the matter, it does not give rise to an inference which is consistent with the hypothesis of guilt.

At this juncture, we may place on record that PW6, in his evidence, in no uncertain terms, admitted that the scraping of nails taken from the two deceased did not correspond to the scrapping of skin taken from the body of the appellant.

The prosecution, therefore, did not bring on record any material to show that the deceased had put up any resistance when the appellant had allegedly tried to commit the crime. Medical evidence brought on record also does not conclusively show that Mala Borthakur suffered a homicidal death as is evident from the autopsy report, which we have noticed hereinbefore.

PW1, in his cross-examination, admitted that reactions vary from person to person. Absence of any exhibition of sadness on the part of the appellant, according to PW1, was not the conduct of a normal human being. Manjuri Borthakur's evidence, however, is otherwise.

We may notice that this Court in *Rana Partap v. State of Haryana* reported in *(1983) 3 SCC 327* opined:

> "Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

[See also *Marwadi Kishor Parmanand and Another v. State of Gujarat, (1994) 4 SCC 549* and *State of U.P. v. Devendra Singh, (2004) 10 SCC 616.*

No hard and fast rule having any universal application with regard to the reaction of a person in a given circumstance can, thus, be laid down. One person may lose equilibrium and balance of mind, but, another may remain a silent spectator till he is able to reconcile himself and then react in his own way.

Thus, merely because the appellant did not cry or weep on witnessing the dead bodies of his wife and daughter, cannot be made the basis for *informing (sic inferring)* his guilt.

It is not the case of the prosecution that the deceased were last seen in the company of the appellant.

His conduct or reaction (or lack of it) by itself, thus, cannot be a ground for arriving at a conclusion that he is guilty of commission of crime. Formation of another opinion is also possible.

The prosecution made an attempt to show that the deaths of the victims were caused by administration of poison and/or strangulation. The bottle containing pesticide was found in the washbasin along with a glass inside the house. There is nothing on record to show that the appellant had purchased pesticide or brought it home. No fingerprint of the appellant was taken to show that it was he who had used the bottle or the glass for the said purpose. No incriminating evidence linking the appellant in regard to administration of poison pesticide has been brought on record.

The First Information Report might have been lodged by the appellant only when the police arrived at the scene of occurrence. The Investigating Officer came to the place of occurrence at about 4.45 pm. PW1 categorically stated that he had asked someone to inform the police. When he did not comply therewith, then only he did so. If, in the aforementioned situation, the appellant had not informed the officer-in-charge of the police station, no presumption of adverse inference could be raised against him. There was no delay on the part of the appellant in informing the police, particularly, when he had informed PW1 who, in turn, informed the police.

The learned Trial Judge has also relied upon the evidence of PW10, the owner of a Pan shop, who testified that the appellant had not visited the Pan shop on that day. His evidence, in our opinion, is not at all reliable. He admitted in his cross-examination that in the forenoon, his brother used to sit at the shop and, thus, his inference that the appellant used to take Pan regularly cannot be trustworthy.

We, therefore, are of the firm view that circumstantial evidence leading to the guilt of the appellant have not been established by the prosecution, the judgment of the conviction and sentence, therefore, cannot be sustained. They are set aside accordingly. We can only record our distress that even in a case of this nature, appellant had to remain in custody for a period of four years.

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471. CRIMINAL TRIAL:

The Indian Judicial System has not developed a set of legal principles and guidelines regarding sentencing like U.K. and U.S.A. – Whether the sentence should be deterrent, reformative or proportional depends upon facts and circumstances of the case – Some guiding factors enunciated.

State of Punjab v. Prem Sagar and others

Judgment dated 13.05.2008 passed by the Supreme Court in Criminal Appeal No. 872 of 2008, reported in (2008) 7 SCC 550

Held:

In our judicial system, we have not been able to develop legal principles as regards sentencing.

The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some Committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines.

What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.

Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality, would no doubt depend upon the facts and circumstance of each case.

While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public health must be dealt with severely. For the said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India.

There are certain offences which touch our social fabric. We must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences had been kept out of the purview thereof. While imposing sentences, the said principles should be borne in mind.

A sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice delivery system. The Parliament, however, in providing for a hearing on sentence, as would appear from Sub-section (2) of Section 235, Sub-section (2) of Section 248, Section 325 as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them.

Although a wide discretion has been conferred upon the court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant.

In *Dhananjoy Chatterjee alias Dhana v. State of W.B., (1994) 2 SCC 220,* this Court held:

> "15...Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime..."

Gentela Vijayavardhan Rao v. State of A.P., (1996) 6 SCC 241, following *Dhananjoy Chatterjee* (supra), states the principles of deterrence and retribution but the same cannot be categorized as right or wrong. So much depends upon the belief of the judges.

In a recent decision in *Shailesh Jasvantbhai v. State of Gujarat and others, (2006) 2 SCC 359,* this Court opined:

> "7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society stated that:* 'State of criminal law continues to be–as it should be–a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

Relying upon the decision of this Court in *Sevaka Perumal v. State of T.N., (1991) 3 SCC 471,* this Court furthermore held that it was the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

Recently, in *State of Karnataka v. Raju, (2007) 11 SCC 490,* it was opined that socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question. However, in India, the view always has been that the punishment must be proportionate to the crime. Applicability of the said principle in all situations, however, is open to question. Judicial discretion must be exercised objectively having regard to the facts and circumstances of each case.

We may also notice that in *Dalbir Singh v. State of Haryana, (2000) 5 SCC 82,* this Court opined:

> "13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence, to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence..... This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind.

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472. CRIMINAL TRIAL:

INDIAN PENAL CODE, 1860 – Sections 302, 363, 376 & 201

Question relating to imposition of death sentence – A balance sheet of aggravating and mitigating circumstances to be drawn up.

Mohan Anna Chavan v. State of Maharashtra

Judgment dated 16.05.2008 passed by the Supreme Court in Criminal Appeal No. 680 of 2007, reported in (2008) 7 SCC 561

Held:

In this case two young girls who had not even seen ten summers in life were the victims of the sexual assault and animal lust of the appellant-accused. They were not only raped but were murdered by the appellant-accused. This is not the first occasion when the appellant has been convicted for rape of minor girls. Earlier in Sessions Case No. 145 of 1990 (sic), the appellant was convicted by learned IIIrd Additional Sessions Judge, Thane by judgment dated

12-6-1989 for kidnapping a minor girl and committing rape on her. Strangely, in that case the trial court had sentenced him to imprisonment for two years on each count. Thereafter the accused was again convicted in Sessions Case No. 162 of 1989 for having raped a minor girl of less than nine years on 28-7-1989. He was convicted by learned IIIrd Additional Sessions Judge, Satara and sentenced to ten years' rigorous imprisonment. He was released after completion of said sentence and thereafter continued his degraded acts. Two girls; one was aged about five years and the other about ten years were raped which formed the subject-matter of consideration in this appeal.

The case at hand falls in the rarest of rare category. The past instances highlighted above, the depraved acts of the accused call for only one sentence that is death sentence.

In *Machhi Singh v. State of Punjab, (1983) 3 SCC 470* in para 38 the position was summed up regarding death sentence as follows: (SCC p. 489)

> '38. In this background the guidelines indicated in *Bachan Singh case* (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh v. State of Punjab, (1980) 2 SCC 684*
>
> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.'

The position was again reiterated in *Devender Pal Singh v. State of NCT of Delhi, (2002) 5 SCC 234:* (SCC p. 271, para 58)

'58. From *Bachan Singh case* (supra) and *Machhi Singh case (supra)* the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:

The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

(*Machhi Singh v. State of Punjab* (supra) SCC pp. 487-89, paras 32-37 & 40)'

What is culled out from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up."

This position is highlighted in *Union of India v. Devendra Nath Rai, (2006) 2 SCC 243.*

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473. ELECTRICITY ACT, 1910 – Sections 2 (c), 23 (2) & 24

(i) Connotation "sister concern", meaning of – It means a concern under the same group having separate entity and identity.

(ii) Electricity dues, recovery of – Dues cannot be recovered from a sister concern of a consumer/company having separate connection.

Uniscans and Sonics Ltd. v. M.P. Electricity Board and others
Reported in 2008 (3) MPHT 555

Held:

The term 'sister concern' came up for consideration before Hon'ble Supreme Court of India in the case of *A.P. Gas Power Corporation Ltd. v. A.P. State Regulatory Commission and another, (2004) 10 SCC 511.* It has been held: —

"The term 'sister concern' has been explained as 'a concern under the same group'. There is no further clarification or clue as to which are those concerns which may be considered under the same group. The expression 'sister concern' used in Para (4) of the Memorandum of Understanding certainly does not mean a concern which is owned or is a subsidiary of the participating industry. It would be a concern or unit different from the participating industry and not a part of it. May be, that the same group may manage two different independent units carrying on the same nature of activities. They may be addressed as sister concerns but would definitely have separate entity and identity of their own."

While considering the scope of aforesaid provision, the Apex Court in the case of *Isha Marbles v. Bihar State Electricity Board and another, (1995) 2 SCC 648,* has clearly held that the Electricity Board cannot seek the enforcement of contractual liability against the third party. The Apex Court has clearly held that Section 24 would come into play when –

"(a) the consumer neglects to pay any charge for energy, due from him to a licensee, or

(b) the consumer neglects to pay sums, other than a charge for energy, due from him to the licensee.

In these circumstances, the licensee may after giving the consumer a written notice of not less than seven clear days cut off the supply and continue to keep the supply cut off till the consumer shall have paid the sum or sums due. However, resort to Section 24 is not the only remedy available. The general remedy to file a suit will always be available to the Board."

In the present case, it is not the case of the respondents that the petitioner has not made payment of any charge, whatsoever, due from it. On the contrary, the defence is that the respondents are empowered to make recovery of the dues of the sister concerns from the petitioner. Thus, Section 24 obviously does not get attracted and the respondents are not found to be empowered to make recovery from the petitioner of the dues of its sister concerns.

(ii) Learned Senior Counsel made a feeble attempt by submitting that the corporate veil can be lifted to determine the ultimate liability of the petitioner for its sister concerns. For this purpose he relied upon the decisions of the Hon'ble Supreme Court rendered in the cases of *State of U.P. and others v. Renusagar Power Co. and others, (1988) 4 SCC 59, Secretary, H.S.E.B. v. Suresh and others, (1993) 3 SCC 601 and Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1.* This plea cannot be invoked at all for the reasons that, firstly, the necessary facts have not been pleaded at all for applying the theory of lifting the corporate veil. Secondly, the provisions of Electricity Act as well as M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961 do not empower the respondents to make recovery from any consumer of the dues of another consumer including that of sister concern. Thirdly, the agreement executed between the consumer and Electricity Board does not make a provision for realization from the consumer of dues outstanding in the name of its sister concern who itself happens to be a separate consumer.

It may be seen that M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961 has been enforced to provide for the expeditious recovery or certain sums due to the M.P. Electricity Board. Shri Jaiswal, learned Senior Counsel has failed to point out any provision in law relating to electricity which may be invoked for making recovery from the petitioner of the dues of its sister concern.

It is held that the respondents have no power to make recovery of the dues of the sister concerns from the petitioner.

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474. EVIDENCE ACT, 1872 – Section 3

Medical evidence – Opinion of doctor about the time of death – Not to be treated as sacrosanct – If the eye witnesses version is found to be truthful, the same can be believed in place of opinionative statement of the doctor.

Shivappa & others v. State of Karnataka

Reported in AIR 2008 SC 1860

Held:

The learned Sessions Judge, as also the learned counsel appearing on behalf of the appellant, have laid great stress thereupon as PW-12, Shantavva, sister-in-law of the deceased had deposed that food had been prepared at the time when the incident took place and the deceased had taken food at about 10.00 am.

Medical opinion is admissible in evidence like all other types of evidences. There is no hard and fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct.

The High Court, however, opined that in view of the evidence of the doctor that the death occurred within 24 hours of the time of the post-mortem, the variation between the medical evidence and the testimony of the eye witnesses is not such which would lead to a conclusion that the prosecution case was not correct. We agree with the said view.

In *Modi's Medical Jurisprudence,* p. 185, it is stated that so far as the food contents are concerned, they remain for long hours in the stomach and duration thereof depends upon various factors.

In *Main Pal & Anr. v. State of Haryana & Ors., 2004 AIR SCW 2140, para 11.* this Court held:

> "If the eyewitnesses' version, even though of the relatives, is found to be truthful and credible after deep scrutiny the opinionative evidence of the doctor cannot wipe out the effect of eyewitnesses' evidence. The opinion of the doctor cannot have any binding force and cannot be said to be the last word on what he deposes or meant for implicit acceptance. On the other hand, his evidence is liable to be sifted, analysed and tested, in the same manner as that of any other witness, keeping in view only the fact that he has some experience and training in the nature of the functions discharged by him."

Indisputably, a large number of factors are responsible for drawing an inference with regard to digestion of food. It may be difficult if not impossible to state exactly the time which would be taken for the purpose of digestion. Reliance, however, has been placed on *Shambhoo Missir & Anr. v. State of Bihar, AIR 1991 SC 315* wherein this Court keeping in view the fact situation obtaining in that case held :

> "The substance of the prosecution case is that the deceased Rajendra died as a result of the assault in question at about 3 p.m. on the very day of the incident. However, on the basis of the medical evidence, the defence has succeeded in establishing that he had died soon after he left his house at 8 a.m. Dr Shambhoo Sharan (PW 13) who performed

the post-mortem examination of the dead body, has stated both in his report as well as in his deposition, that there was 8 ounces of undigested food in the stomach of the deceased. If as alleged by the prosecution the death had occurred at 3 p.m., no such undigested food would have been found in the stomach at that hour when the food was taken by the deceased before 8 a.m. If this is so, then the whole case of the prosecution must crumble. For this will establish beyond doubt that Rajendra had died very soon after 8 a.m. and none of the so called eye-witnesses had seen the assault on Rajendra. The said fact will also demolish the entire version of the three dying declarations made by the deceased to various prosecution witnesses at three different places. The non-explanation by the prosecution of the undigested food therefore casts serious adverse reflections on the entire investigation in the present case. Unfortunately, the High Court has failed to deal with this very important aspect of the evidence on record which has been highlighted by the trial court. It also strengthens the defence version that the accused have been involved in the present case by the obliging witnesses and unfair investigation."

As is noticed from the factual matrix involved in the said case, the death occurred at 3.00 pm. Although the deceased had left his house at 8.00 a.m., it was found that he died soon after 8.00 a.m. Certain additional features as for example, no eye-witness having seen the assault on the deceased was also taken into consideration by the court. The dying declaration whereupon the High Court relied upon was also not found to be reliable. It was the cumulative effect of the said findings that a judgment of acquittal was recorded and not on the basis of the medical opinion with regard to the time of taking of food item alone. (Also see *Shambhu Missir & anr. vs State of Bihar (supra)* and *Bhimappa Jinnappa Naganur v. Sate of Karnataka, 1993 AIR SCW 1357* distinguished on the facts of the case.)

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***475. EVIDENCE ACT, 1872 – Section 3**

Appreciation of evidence of relative witness – Evidence of relatives cannot be discarded simply on the ground that they are interested witnesses – As according to case diary statements they were not the eye witnesses and in the court they have improved their version and became the eye witnesses of the incident – Their evidence is not reliable.

Ganga Prasad & ors. v. State of M.P.

Reported in I.L.R. (2008) M.P. 1774

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***476. EVIDENCE ACT, 1972 – Section 3**

Evidence – Sole testimony of Food Inspector – Corroboration of main witness by independent witness is a rule of prudence and not requirement of law – Testimony of Food Inspector cannot be rejected for want of corroboration by independent witness. AIR 2004 SC 1236 (Rel.)

Radhika Prasad Gupta v. State of M.P.

Reported in I.L.R. (2008) M.P. NOC 58

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477. EVIDENCE ACT, 1872 – Sections 3 & 118

Child witness – If he is competent and reliable his testimony is acceptable

Golla Yelugu Govindu v. State of A.P.

Reported in AIR 2008 SC 1842

Held:

Indian Evidence Act, 1872 (in short the "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, extreme old age, disease – whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in *Wheeler v. United States (159 U.S. 523).* The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See *Surya Narayana v. State of Karnataka, 2001 AIR SCW 81*].

In *Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341* it was held as follows:

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored".

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

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478. EVIDENCE ACT, 1872 – Section 9
CRIMINAL PROCEDURE CODE, 1973 – Section 162
The purpose of test identification is to get assurance that the progress of investigation is going on in the right direction – It also helps in testing the veracity of witnesses – It is not substantive evidence and is governed by Section 162 of the Code.
Md. Kalam alias Abdul Kalam v. State of Rajasthan
Reported in AIR 2008 SC 1813

Held:

As was observed by this Court in *Matru v. State of U.P., AIR 1971 SC 1050* identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. [See *Santokh Singh v. Izhar Hussain, AIR 1973 SC 2190*]. The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore,

the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. [See *Kanta Prashad v. Delhi Administration, AIR 1958 SC 350, Vaikuntam Chandrappa* and *others v. State of Andhra Pradesh, AIR 1960 SC 1340, Budhsen and another v. State of U.P., AIR 1970 SC 1321* and *Rameshwar Singh v. State of Jammu* and *Kashmir, AIR 1972 SC 102*].

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479. EVIDENCE ACT, 1872 – Section 45

Murder – Inconsistency between medical and ocular evidence – Not material unless it ruled out the possibility of the eye witnesses version to be true.

Ram Swaroop v. State of Rajasthan

Reported in AIR 2008 SC 1747

Held:

It is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference

Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eyewitness's version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice.

Similar view has also been expressed in *Manager v. State of Haryana, AIR 1979 SC 1194, State of U.P. v. Krishna Gopal* and *Anr., AIR 1988 SC 2154* and *Ram Dev* and *Anr. v. State of U.P., 1995 Supp. (1) SCC 547, State of U.P. v. Harban Sahai* and *Ors., (1998) 6 SCC 50* and *Ramanand Yadav v. Prabhu Nath Jha & Ors., 2003 AIR SCW 6731.*

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***480. EVIDENCE ACT, 1872 – Sections 118 & 157**
INDIAN PENAL CODE, 1860 – Section 376 (2) (f) r/w/s 511

(i) Evidence of a child witness cannot be rejected outrightly but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring – Court has to assess as to whether the statement of the victim before the Court is the voluntary expression of the victim and that she was not under the influence of others.

(ii) In this case evidence of six year old child witness (victim) found cogent, free from influence and credible – Also corroborated by her previous statement given to the mother immediately after occurrence – Conviction u/s 376 (2) (f) r/w/s 511 IPC and sentence of 5 years rigorous imprisonment and fine of Rs. 500/- with default stipulation held proper.

Mohd. Kalam v. State of Bihar

Judgment dated 13.06.2008 passed by the Supreme Court in Criminal Appeal No. 239 of 2002, reported in (2008) 7 SCC 257

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***481. EXCISE ACT, 1915 (M.P.) – Sections 34 (1) (A) & 49A (1) (A)**
Liquor seized from applicant – On chemical examination sample found unfit for human consumption – No evidence available regarding sealing of sample and sending the same for chemical examination –

Held, conviction u/s 49A (1) (A) set aside – However, liquor found from applicant – Applicant convicted under converted Section 34 (1) (A) – Revision partly allowed.

Murlidhar v. State of M.P.

Reported in I.L.R. (2008) M.P. 1814

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482. FOREIGNERS ACT, 1946 – Sections 3 & 14

Illegal entry and stay in India – In view of large number of infiltrators in India, there is need for imposing stricter sentence.

Habib Ibrahim v. State of Rajasthan

Judgment dated 13.06.2008 passed by the Supreme Court in Criminal Appeal No. 994 of 2008, reported in (2008) 6 SCC 772

Held:

Accused/appellant convicted for offence punishable u/s 3 r/w/s 14 of the Foreigners Act, 1946 and sentenced to 5 years rigorous imprisonment with fine of Rs. 25,000/- with default stipulation, was imposed. Prosecution evidence clearly establishes that the appellant did not have passport to stay in India. This fact is not disputed by the appellant. The only plea to justify his presence was that he had come to visit his wife and children.

Therefore Section 3 read with Section 14 of the Act has been rightly applied. The conviction therefore cannot be faulted. So far as the sentence is concerned, considering the large number of infiltrators that come to India without valid document, there is need for imposing stricter sentence. The reasons given by the appellant to justify his presence in India have hardly any substance. Appellant's feeble plea that he did not know that he is required to be in possession of valid document is without substance. Otherwise, he would not have obtained any transit visa for Nepal.

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483. HINDU LAW:

Characteristics of Mitakshara coparcenary property reiterated – It is different from joint family property.

Hardeo Rai v. Sakuntala Devi and others

Judgment dated 29.04.2008 passed by the Supreme Court in Civil Appeal No. 3040 of 2008, reported in (2008) 7 SCC 46

Held:

There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. It is, thus, necessary to determine the status of the appellant and his brothers.

We may at the outset notice the characteristics of a Mitakshara coparcenary from the decision of this Court in *SBI v. Ghamandi Ram, AIR 1969 SC 1330* wherein it has been laid down as under:

> "7. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I, pp 1-27). The incidents of co-parcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenery under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter."

The first appellate court did not arrive at a conclusion that the appellant was a member of a Mitakashra co-parcenary. The source of the property was not disclosed. The manner in which the properties were being possessed by the appellant *vis-a-vis*, the other co-owners had not been taken into consideration. It was not held that the parties were joint in kitchen or mess. No other documentary or oral evidence was brought on record to show that the parties were in joint possession of the properties.

One of the witnesses examined on behalf of the appellant admitted that the appellant had been in separate possession of the suit property. Appellant also in his deposition accepted that he and his other co-sharers were in separate possession of the property.

For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property.

The parties in such an event would not possess the property as "joint tenants" but as "tenants in common". The decision of this Court in *State Bank of India* (supra), therefore is not applicable to the present case.

Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

We have noticed the representation made by the appellant. If the representation to the respondents' father was incorrect, the appellant should have examined his brothers. He should have shown that such a representation was made under a mistaken belief. He did nothing of that sort.

In *M.V.S. Manikayala Rao v. M. Naraisimhaswami, AIR 1966 SC 470* this Court stated the law thus:-

> "It is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased."

Thus, even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition.

It does not appear that in *State Bank of India* (supra) binding precedent in *M.V.S. Manikayala Rao* (supra) was noticed.

However, in view of the admission made by the appellant himself that the parties had been in separate possession, for the purpose of grant of a decree of specific performance of an agreement, a presumption of partition can be drawn.

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484. HINDU MARRIAGE ACT, 1955 - Section 25

Permanent alimony and maintenance, grant of - S.25 of the Act empowers Courts to grant permanent alimony or maintenance at the time of passing all kinds of decrees such as restitution of conjugal rights u/s 9; judicial separation u/s 10; declaring marriage as null and void u/s 11; annulment of marriage as voidable u/s 12 and divorce u/s 13 - However, in case where application is dismissed, permanent alimony or maintenance cannot be granted.

Shyamlal Meena v. Smt. Durgabai Meena

Reported in 2008 (3) MPHT 527

Held:

In the matter of *Chand Dhawan (Smt.) v. Jawaharlal Dhawan, (1993) 3 SCC 406*, Hon'ble Apex Court has held that "the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife as the case may be, dependent on the Court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. When by Court intervention under the Hindu

Marriage Act, effectation of disruption to the marital status has come by, at that junction, while passing the decree, it has the power to grant permanent alimony or maintenance, if that power is invoked at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events remains within the jurisdiction of that Court, to be altered or modified as future situations may warrant. Without the marital status being effected or disrupted by the Matrimonial Court, under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affection or disruption. The Matrimonial Court, a Court of special jurisdiction, is not meant to pronounce upon a claim of maintenance without having to go into the exercise of passing a decree, which implies that unless it goes onwards, moves or leads through, to affect or disrupt the marital status between the parties. By rejecting a claim, the Matrimonial Court does not make an appealable decree in terms of Section 28, but that neither affects nor disrupts the marriage. It certainly does not pass a decree in terms of Section 25 for its decision has not moved or done anything towards, or led through, to disturb the marriage, or to confer or take away any legal character or status. It was further observed by the Hon'ble Apex Court that without affectation or disruption of the marital status, a Hindu wife sustaining that status can live in separation from her husband and whether she is living in that state or not, her claim to maintenance stands preserved in codification under Section 18 (1) of the Hindu Adoptions and Maintenance Act. Relief to the wife may also be due under Section 125 of the Code of Criminal procedure. But this is a measure in the alternative to provide for destitute wives.

However, the Court is not at liberty to grant relief of maintenance simpliciter obtainable under one Act (Hindu Adoptions and Maintenance Act) in proceedings under the other (Hindu Marriage Act). Both the statutes *viz.*, the Hindu Marriage Act and the Hindu Adoptions and Maintenance Act codified as such are clear on their subjects and by liberality of interpretation inter-changeability cannot be permitted so as to destroy the distinction on the subject of maintenance. These two enactments keeping apart, the remaining two, i.e., Hindu Succession Act, 1956 and Hindu Minority and Guardianship Act, 1956 are a package of enactments, being part of the one socio-legal scheme applicable to Hindus. When distinctive claims are covered distinctly under two different statutes and agitable in the Courts conceived of thereunder, the plea that when a claim is otherwise valid, choosing of one forum or the other should be of no consequence, cannot be sustained. These are not mere procedural technicalities or irregularities, but are matters which go to the root of the jurisdiction.

By this judgment Hon'ble Apex Court over-ruled the decision given by Andhra Pradesh High Court. In another decision of this Court in the matter of *Badriprasad v. Smt. Urmila Mahobiya*, reported in *2001 (2) MPHT 14 = AIR 2001 MP 106*, it was held that permanent alimony to wife cannot be granted if a petition for divorce between the parties is dismissed.

In the matter of *Ramesh Chandra Rampratapji Daga v. Rameshwari Ramesh Chandra Daga,* reported in *AIR 2005 SC 422,* the Hon'ble Apex Court has observed that Section 25 of the Hindu Marriage Act is an enabling provision. It empowers the Court in a matrimonial case to consider facts and circumstances of the spouse applying and decide whether or not to grant permanent alimony or maintenance. It was also observed that when the legislature has used such wide expression as 'at the time of passing of any decree'. It encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and divorce under Section 13. It was also observed by the Hon'ble Apex Court that it is with the purpose of not rendering a financially dependant spouse destitute that Section 25 enables the Court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship.

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485. INDIAN PENAL CODE, 1860 – Section 300

Murder – Single injury shall not be deciding factor of the nature of offence – It depends on other attending circumstances.

Due to altercation with unarmed deceased, accused inflicting injury on the abdomen of the deceased with screw driver – Injury 12 cm deep damaging liver and spleen – Death caused almost instantaneously – Accused had intention to cause injuries sufficient to cause death.

Bavisetti Kameshwara Rao alias Babai v. State of A.P.
Reported in AIR 2008 SC 1854

Held:

When the screw driver was plunged into the vital part of the body of the deceased, it cut his liver and spleen. Therefore, this was a case where the act was done with intention of causing bodily injury and the body injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, covered by "Thirdly" of Section 300 of "Indian Penal Code". The act of the accused-appellant would, therefore, clearly come within the definition of "murder" under Section 300 of the "Indian Penal Code".

We cannot forget that when the deceased came up to the office of the accused, there was exchange of abuses and then, he was thrashed by the accused persons. There is hardly any cross-examination of the eye-witnesses to dispute the authorship of this particular injury. We have scanned the evidence very closely only to find that the authorship of the injury could not be disputed and nor the manner in which the single injury was inflicted. Therefore, under the circumstances, even if there was a single injury caused, it was with such a force and on such vital part of the body that it caused almost instantaneous death. The deceased, after he was injured went up to the police station and before he could be reached to the hospital, breathed his last.

It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of a single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was pre-meditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screw driver, the learned counsel urged that it was only the accidental use at the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screw driver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous. [See *State of Karnataka v. Vedanayagam, (1995) 1 SCC 326*]

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486. INDIAN PENAL CODE, 1860 – Section 300

Murder of a girl by strangulation – Circumstantial evidence – Accused had intimacy with the deceased – Evidence established that the accused had threatened to kill the deceased if marriage is not performed – They were found to be talking animatedly near place of incident on fateful day – Accused absconding and attempting to hide his identity after the day of incident – Offence of murder proved.

Kuchibotla Saran Kumar v. State of A.P.

Reported in AIR 2008 SC 1877

Held:

The learned counsel for the appellant has reiterated the arguments raised before the trial court. We now re-examine the evidence. The fact that the couple had proposed to marry is virtually admitted and is even otherwise proved on record by ample evidence. The fact that the marriage had been fixed for 23rd March, 2000 as also the fact that an advance payment for the booking of the marriage venue, that is the Green Park Hotel at Vishakapatnam had also been made, is proved on record. We also find that there is a clear cut motive for the murder as the parents of the deceased, as also several other witnesses who knew the couple have categorically deposed that the appellant had warned that incase the deceased would not marry him she would be killed as he would not tolerate her marriage to anyone else. In addition to this, it is clear from the evidence of PW 19 that he had recovered certain love letters from the accused written to the deceased by the accused and that these letters along with the admitted hand writing of the accused had been sent to the Forensic Science Laboratory which opined in its report Ex. P-70 that the writings were of the

same person. We also find that the conduct of the accused in absconding and attempting to hide his identity after the murder stands proved by the fact that he had registered in Hotel Shiva, Chennai and Hotel Sunder at Nellore under the assumed name of K.V. Reddy and these entries were also proved as being in the handwriting of the accused in the report Ex. P-70. It is significant that the accused had admitted during the course of statement under Section 313 of the Cr.P.C. that most of the items which had been sent to the Forensic Science Laboratory had been seized by the police at Vishakapatnam. It has been clearly revealed that the deceased and the accused had been seen together on the day of the murder talking animatedly in the premises of the College by several witnesses. We also find that the trial court and the High Court have discussed the evidence threadbare. We find no fault in the judgments of the courts below. The appeal is accordingly dismissed.

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***487. INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Sections 3, 9, 27 & 45
Accused entered into an altercation and quarreled with the deceased on account of intermeddling with the water pipe by him – Accused caught hold of the deceased and pushed him into an empty well – As a result, the deceased sustained head injury and went into coma – He was taken to the hospital but he was declared dead – After holding trial, the Sessions Court found the accused guilty for committing murder and sentenced him to imprisonment for life – Held, accused had no previous enmity with the deceased – The incident had occurred on spur of the moment and the act of the accused was not premeditated – He had also not used any weapon and it was during the scuffle between the two that accused had pushed the deceased into empty well – It is apparent from the facts that the accused did not intend to cause death of the deceased, yet it could well be inferred that the accused certainly had the knowledge that his act of pushing the deceased into an empty well was likely to cause the death of the deceased – Therefore, the act of accused would fall within the ambit and purview of S. 304 Part II IPC and not u/s 302 IPC.
Rajendra v. State of Madhya Pradesh
Reported in 2008 (3) MPHT 501 (DB) = I.L.R. (2008) M.P. 59

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***488. INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Sections 3, 9, 27 & 45
Accused was seen in the company of the deceased – Witnesses deposed that they had seen the accused and the deceased quarrelling on account of some money transaction and had thereafter learnt that the deceased had been stabbed by the accused – The accused was seen by the witnesses running away with a knife in his

hand and the deceased was lying on the ground and bleeding through a large number of injuries – The deceased had immediately after the incident divulged his name – Accused was properly identified in the test identification parade – Deceased sustained stab injuries by knife – Homicidal death was established by the prosecution evidence – Knife was recovered and seized from accused – As per the opinion of the doctor, injuries could have been caused by the seized knife – Accused's injuries were insignificant and were not on vital part – Held, all the aforementioned circumstances are pointing out the guilt and guilt alone of the accused – Conviction of the accused u/s 302 IPC held proper.

Vikas Bhandari v. State of Madhya Pradesh

Reported in 2008 (3) MPHT 517 (DB)

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489. INDIAN PENAL CODE, 1860 – Sections 302 & 201
EVIDENCE ACT, 1872 – Section 3
Murder – Circumstantial evidence, appreciation of

(i) **It was alleged that accused caused the death of his wife by strangulation – On behalf of the defence, it was argued that what has been proved is only the fact that the deceased died of asphyxia – Ante-mortem ligature marks and abrasions were found on deceased's neck – The neck muscles were congested – There were patchy haemorrhages found – Saliva trickling mark over cheek transversely was against gravity of hanging – There was absence of ligature material at the spot – Held, all the above circumstances clearly indicates that this is not a case of hanging but is a case of asphyxia due to strangulation i.e. of homicidal death.**

(ii) **Death took place inside the house of the accused – The accused was present inside the house when the death took place and he gave beating to deceased – Accused did not inform the police regarding incident – There was no possibility that any outsider had committed the offence – Accused failed to give any sort of explanation – Held, it was necessary for the accused to explain how the death took place – Such failure on his part or giving false explanation is an additional link in the chain of circumstances to make it complete.**

Sanjay Vishwakarma v. State of Madhya Pradesh

Reported in 2008 (3) MPHT 496 (DB)

Held:

We find that death was clearly homicidal in nature. It is apparent from post-mortem report that there were ante-mortem ligature marks and abrasions on the neck of deceased. Death was caused due to asphyxia is the opinion

recorded in the post-mortem report as there were ligature marks around the neck of deceased. When abrasions were also found as noticed in the post-mortem report itself, it passes comprehension how the panel of four doctors in spite of opining that death was caused due to asphyxia could not opine that it was due to strangulation. Dr. B.L. Gupta (P.W. 12) who was member of the team which performed autopsy has stated in Para 18 that all the signs of strangulation were found on the dead body. Report of Junior Forensic Specialist of Medico Legal Institute, dated 18th March, 97 of Gandhi Medical College, Bhopal indicates that deceased has died as a result of asphyxia caused by strangulation which is homicidal in nature. He has given the opinion on the basis of various facts. The deceased was having multiple abrasions over the neck and ligature marks and symptoms of asphyxia. The ligature marks were due to strangulation. Further reason mentioned by the expert was that deceased was never seen in hanging condition by any one. The neck muscles were congested (Ecchymosis) which is one of the important finding of strangulation rather than of hanging. There was presence of multiple abrasions on neck indicating sign of struggle. He has further mentioned patchy haemorrhages is a positive finding of slow asphyxia means strangulation rather than hanging in this particular case. Observation of saliva trickling mark over cheek transversely was against the gravity of hanging. There was absence of ligature material. Thus, it is apparent that asphyxia was caused due to strangulation. It was not a case of hanging. If it was a case of hanging, it was for the accused to explain the circumstances as per Section 106 of Evidence Act, which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

It is apparent that accused was in the house at the time of commission of offence and was in the room and gave beating to deceased as stated by Sandeep (P.W. 11) and his presence was also stated by Rajesh Kumar (P.W. 5). He was responsible to strangulate the deceased to death. Body was removed from the first floor, blood was coming out from the mouth as stated by Ramkishore P.W. 3). No report was lodged by the accused or any of his members, they wanted to screen the offence. It was only when parents of deceased and brother came, they suspected foul play as there was ligature marks and abrasions on the neck of deceased, at that time report was lodged at the police station. The conduct of the accused also indicates that he tried to screen the offence by not informing the police. Death was obviously homicidal in nature. Spot inspection report indicates that blood stains on the pillow were found from the bed of deceased. The circumstances unerringly point out that deceased was subjected to physical violence by the accused. Photographs of deceased also speaks as to presence of ligature marks and the abrasions on the neck. From the evidence adduced by the prosecution as well as by the conduct of the accused, it is apparent that he was culprit and commission of offence by him has been established beyond periphery of doubt.

When death has taken place in the house, it is necessary for the husband to explain the circumstances how the death took place as observed by the Apex

Court in *State of U.P. v. Dr. Ravindra Prakash Mittal, (1992) 3 SCC 300* and in *Shri Kishan v. State of Haryana, AIR 1994 SC 1597.* In the instant case, there was no possibility of any outsider having committed the offence, that also is a circumstance which militates against the accused as observed by the Apex Court in *Sheikh Abdul Hamid and another v. State of Madhya Pradesh, AIR 1998 SC 942.* When the offence takes place in the hose, the duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. In view of Section 1106 of Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed as observed by the Apex Court *in Trimukh Maroti Kirkan v. State of Maharashtra, JT 2006 SC 50, Collector of Customs, Madras and others v. D. Bhoormull, 1974 (3) SCR 833 and State of West Bengal v. Mir Mohammad Omar and others, (2000) 8 SCC 382. In State of Tamil Nadu v. Rajendran, (1999) 8 SCC 679, State of U.P. v. Dr. Ravindra Prakash Mittal, AIR 1992 SC 2045, State of Maharashtra v. Suresh, (2000) 1 SCC 471, Ganesh Lal v. State of Rajasthan, (2002) 1 SCC 731* and *Gulab Chand v. State of M.P., (1995) 3 SCC 574,* the Apex Court has also observed that in a case based on circumstantial evidence where no eye-witness account is available, the principle is that when an incriminating circumstance is put to the accused and the accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. When relations were strained, the accused husband must offer explanation as held in *Nika Ram v. State of Himachal Pradesh, 1973 (1) SCR 428.* Explanation should be given by accused in statement recorded under Section 313 CrPC as held in *Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106.*

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490. INDIAN PENAL CODE, 1860 – Sections 302 & 302/34
CRIMINAL PROCEDURE CODE, 1973 – Sections 354 (3) & 368
Imposition of death sentence, aggravating and mitigating circumstances of – Accused persons committed murder of two persons as they suspected them of practicing witchcraft resulting into death of accused persons' brother – Trial Court convicted the accused persons for committing murder and sentenced each of them to death – Held, although it was a case of brutal murder of two persons, yet considering the aggravating facts, it cannot be said that the murder involves exceptional depravity – However, the accused persons were aged 19 and 23 years, the death of the brother of the accused persons had taken place and the accused persons entertained aforesaid doubt – It is expected that the accused persons can be reformatted and rehabilitated – There was no past criminal history of the accused persons and it cannot be said that they would involve in commission of offence again – Conviction was affirmed and setting aside death sentence, accused persons were sentenced

to undergo life imprisonment and fine of Rs. 10,000/- each with default stipulation.

In Ref. v. Suresh and others

Reported in 2008 (3) MPHT 547 (DB)

Held:

In *Bachan Singh v. State of Punjab, (1980) 2 SCC 684,* in Paragraph No. 202 aggravating circumstances have been mentioned whereas in Paragraph No. 202 mitigating circumstances have been mentioned with respect to imposing of death sentence. Paragraph Nos. 202 and 206 are quoted below: —

> **"202.** Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia, 33 L Ed 2d 346 : 408 US 238 (198=72),* in general, and clauses 2 (a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

  (i) while such member or public servant was on duty; or

  (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a Police Officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code".

"206. Dr. Chitale has suggested these mitigating factors: –

Mitigating circumstances: – In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :–

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The state shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

In *Machhi Singh and others v. State of Punjab, AIR 1983 SC 957,* the Apex Court has laid down that the extreme penalty of death need not be inflicted except in rarest cases of extreme culpability. Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'. Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. A 'balance sheet' of aggravating and mitigating circumstances has to be drawn up and in doing so that mitigating circumstances have to be accorded full weightage and a just balance has to be stuck between the aggravating and the mitigating circumstances before the option is exercised, Reliance was placed on Bachan Singh's case.

In *Lehna v. State of Haryana, (2002) 3 SCC 76,* the Apex Court has referred *Bachan Singh* and *Machhi Singh's* decisions *(supra)*, the Apex Court has laid down thus: —

23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can

be awarded. The community may entertain such sentiment in the following circumstances: —

(1) When the murder is committed in an extremely brutal grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

The Apex Court in the facts and circumstances of the case set aside the death sentence.

In Prajeet Kumar Singh v. State of Bihar, JT 2008 (4) SC 257, the Apex Court has laid down that mental condition or state of mind of the accused is one of the factor that has to be taken into consideration on question of sentence. The Apex Court has laid down thus: —

"18. In *Machhi Singh,* a 3-Judge Bench following the decision in *Bachan Singh,* observed that in rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded.

The community may entertain such sentiment in the following circumstances: —

(I) When the murder is committed in an extremely brutal grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(II) When the murder is committed for a motive which evinces total depravity and meanness

(III) (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath (b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(IV) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(V) When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old or infirmity, (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination of trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

In *Sushil Murmu v. State of Jharkhand, AIR 2004 SC 394,* the Apex Court has laid down that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded.

In the light of the principles laid down by the Apex Court, when we consider the aggravating factors it cannot be said that the murder involves exceptional depravity, though it was a case of brutal murder of two persons, however, when we consider mitigating circumstances the accused were young; accused Mukesh was aged 19 years while accused Suresh was aged 23-24 years at the time of incident and they had entertained a doubt that by playing witchcraft death of their brother; Guddu was caused by the deceased persons, it is not disputed that the accused entertained aforesaid doubt, we also find that it is expected that the accused can be reformatted and rehabilitated, we do no find any probability that they

would commit such offence again. There was no past criminal history. It cannot be said that they would involve in commission of offence again.

Thus, the conviction of the appellants under Sections 302 and 302/34 of the IPC for commission of murder of Roop Singh and Shivpyari Bai is hereby affirmed. We set aside the death sentence and instead of death sentence each of the accused is sentenced to undergo rigorous life imprisonment and fine of Rs. 10,000/- (Rupees Ten thousand) each and in default of payment of fine to undergo RI for 3 years. Both the sentences to run concurrently.

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***491. INDIAN PENAL CODE, 1860 – Sections 304-A & 279**

Sentence for the offence of causing death by rash and negligent driving of automobile (motor vehicle) should be a deterrent – Driver must constantly inform himself that he cannot afford to have a single moment of laxity and inattentiveness when his leg is on the pedal of accelerator of the motor vehicle in locomotion – He must always keep in his mind the fear psyche that if he is convicted for the offence for causing death of a human being due to his callous driving of vehicle, he cannot escape from the jail sentence.

Six months simple imprisonment and Rs. 1000/- fine for the offence u/s 304-A and one month simple imprisonment and Rs. 500/- fine for offence u/s 279 cannot be said to be shocking.

B. Nagabhushanam v. State of Karnataka

Judgment dated 13.05.2008 passed by the Supreme Court in Criminal Appeal No. 874 of 2008, reported in (2008) 5 SCC 730

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492. INDIAN PENAL CODE, 1860 – Section 306

Abetment of suicide – Wife committed suicide after giving poison to her children – In suicide note she stated that her husband was sexual pervert and was impotent and was trying to defame her – She has also stated that she wants to take his life – His cruel and insulting behaviour cannot be taken to be an act of abetting suicide – Offence u/s 306 not established – Conviction improper.

Sohan Raj Sharma v. State of Haryana

Reported in AIR 2008 SC 2108

Held:

Section 306 IPC deals with abetment of suicide. The said provision reads as follows:

> "*306 Abetment of Suicide.* If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing it required before a person can be said to be abetting the commission of offence under Section 306 of IPC.

In *State of West Bengal v. Orilal Jaiswal, AIR 1994 SC 1418* this Court has observed that the courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. 'Abetted' in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence

In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased-wife with cruelty is not enough. [See *Mahinder Singh v. State of M.P., 1995 AIR SCW 4570*].

When the factual scenario is examined, it is clear that the accused has been described as a sexual pervert and that he had behaved like an animal and the deceased had tolerated the insulting manner in which he behaved. They were married in court. It was stated that the accused was impotent and he was trying to defame the deceased for having relationship with ladies.

The most significant part of the letter the deceased had written is as follows:

"I desired to kill you alongwith us but no, if you have any sense of shame you will die as a result of the sequence of events. But it do not make any difference for shameless person because these abuses will sound as correct if you realize your capacity. You have not spent even eight days in a period of eight years in peace with me. You yourself are responsible for death of these children. Flowers had been prayed for from the deities of your family regarding whom you disclosed "they are not mine they are with me from my friend. (girl friend) on, you, the condemned the day children will be born as a result of co- habitation of a woman with woman, a woman will stop giving birth to man like you."

Above being the factual scenario, it cannot be said that the ingredients of Section 306 IPC have been established. Therefore, the conviction as recorded cannot be maintained. The order of the High Court is set aside. The appellant be released forthwith unless required in connection with other case.

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493. INDIAN PENAL CODE, 1860 – Section 406

Criminal breach of trust by Company – Vicarious liability for offence – In absence of any statutory provision, Director or an employee of Company cannot be liable for an offence committed by Company itself.

S.K. Alagh v. State of U.P & ors.

Reported in AIR 2008 SC 1731

Held:

Criminal breach of trust. Demand draft drawn in the name of company for supply of goods and the company neither sent the goods nor returned money as alleged by the concerned.

As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. [See *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya, 2006 AIR SCW 4582*]

We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section

405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. [See *Maksud Saiyed v. State of Gujarat and Ors., 2007 (11) SCALE 318*].

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***494. INSURANCE ACT, 1939 – Section 64-VB**
MOTOR VEHICLES ACT, 1988 – Section 147
Section 64-VB of the Insurance Act mandates that before a contract of insurance comes into being, the premium should be received by the insurer in advance – A contract of insurance like any other contract, is a contract between the insured and the insurer – The amount of premium is required to be paid as a consideration for arriving at a concluded contract.
In today's world payment of cheque is ordinarily accepted as valid tender but the same would be subject to its encashment – A distinction, however, exists between the statutory liability of the insurance company *vis-à-vis* the third party in terms of Sections 147 and 149 of the Motor Vehicles Act and its liability in other cases but it is clear that if the contract of insurance had been cancelled and all concerned had been intimated thereabout, the insurance company would not be liable to satisfy the claim – In this case, there cannot be any doubt or dispute whatsoever that no privity of contract came into being between the appellant and the second respondent and as such the question of enforcing the purported contract of insurance while taking recourse to Section 147 of the Motor Vehicles Act did not arise.
National Insurance Company Limited v. Yellamma and another
Judgment dated 06.05.2008 passed by the Supreme Court in Civil Appeal No. 3317 of 2008, reported in (2008) 7 SCC 526

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495. LAND ACQUISITION ACT, 1894 – Section 23
M.P. TOWN IMPROVEMENT TRUST ACT, 1961 (Repealed by Act No. 22 of 1994)
Compensation, determination of – Large tract of land acquired – Held, valuation cannot be made at the rate of small piece of land – Development charges are also required to be deducted.
Shanti Devi Tiwari v. Town Improvement Trust, Rewa
Reported in 2008 (3) MPLJ 177 (DB)

Held:

In *P.S. Krishna and Co. Pvt. vs. LAO, Hyderabad, AIR 1992 SC 421,* it was observed that use on the date of acquisition is one of the material factors and on facts 1/5th deduction was made towards development. In *LAO Karnataka Housing Board v. P.N. Malappa, AIR 1997 SC 3661,* the Court held that potential value on the date of notification u/s 4 is relevant, not the subsequent user. In case of the acquisition of the developing land certain deduction has to be made depending upon the facts of each case. In *Basant Kumar vs. Union of India, (1996) 11 SCC 542,* 60% deduction towards development was held permissible on facts. In case the land is developed less deduction can be made as observed in *B. Sammano vs. LAO Vishakhapatnam, AIR 1992 SC 2298.* In case of acquisition of large piece of land certain deduction is required to be made, 1/3rd deduction was made in *Karan Singh vs. Union of India, (1998) 11 SCC 170.* In case of acquisition of large piece of land – 17.57 acres was acquired, grant of compensation per sq. ft. was held to be illegal, compensation should be awarded on per acre basis as held in *Indumati Chitle vs. Union of India, AIR 1996 SC 531.* If the situation of the land is relevant criteria if the land is situated near the road as it may fetch higher value higher compensation is permissible. Distance from the city is relevant consideration for arriving at the value of the land which a prudent buyer would have offered. Genuineness of the transaction is also relevant consideration. Time gap between sale transaction, situation, are relevant factors while determining the price/compensation for the land acquired. Similarly, acquisition of the plot whether it is small or large is relevant factor, nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filling, shape, level etc. are relevant consideration. Offer of two different price abutting road and the land which was low lying area was upheld by Apex Court, dealing with various aspects for determination of compensation elaborately in *Chimanlal Hargovinddas vs. LAO, Poona, AIR 1988 SC 1652.* In the *Deputy Director, Land Acquisition vs. Malla Atchinaidu and others, AIR 2007 SC 740,* considering the potential value of the land proximity of the area, deduction of 20% was made on facts instead of 35%. In *Sharadamma vs. Special Land Acquisition Officer and another, 2007 AIR SCW 1109,* the acquired land was surrounded by factories, there was industrial potential in land, it was situated adjoining national highway and railway line and near corporation limit, development had taken place in the nearby area, compensation at the rate of Rs. 20/- per square yard was awarded. In *P. Rajan vs. Kerala State Electricity Board, (1997) 9 SCC 330,* it was observed that determination of compensation per sq. ft. in the case of large tract of land would be confined only to highly developed commercial land. In *Land Acquisition Officer vs. Nookala Rajamallu, AIR 2004 SC 1031,* deduction at the rate of 53% was made from the value as the evidence indicated that acquired lands were agricultural lands.

As in the instant cases large tracts of the land has been acquired, the sale deeds were of small piece of land, thus, for large tract of land valuation could not have been made at the same rate and further deduction was required to be

made for the development as the amount/area was required to be deducted. It would be appropriate to deduct 40% amount from the valuation to be made towards development of the area in the facts and circumstances of the instant cases as that area would have been consumed for providing facilities such as road and the other amenities in the area in question.

Coming to the question of valuation per square ft., as the evidence discloses in the case of Surendra Singh the average value was at the rate of Rs. 5.50/- but that could not be the rate offered for the large tract of the land by a prudent buyer, it would be appropriate to assess the rate at Rs. 3.25 sq. ft. and after making 40% deduction for development the valuation per sq. ft. comes to Rs.1.95/- per sq. ft.

The question of award of solatium at the rate of 30% on the amount awarded is covered by the decision of the Apex Court, reference was made to larger bench in *Jabalpur Improvement Trust vs. Shakuntala Malhtotra and others, (2004) 10 SCC 186;* reference was made on 15th July, 2003, the question has been answered by the Apex Court relying upon the decision of the Apex Court in *Savitri Cairae v. U.P. Avas Evam Vikas Parishad and another, AIR 2003 SC 2725* in which the Apex Court has laid down that in the matter of award of additional compensation, enhanced rate of solatium can be claimed on the basis of the parity invoking Article 14.

Thus, the appellants-claimants are held entitled for solatium at the rate of 30% on the value determined, apart from the interest at the rate of 12% per annum from the date of notification till the taking over the possession and thereafter as provided in section 28 at the rate of 9% from the date of taking the possession till the compensation determined is paid. The claimants are held entitled to claim the compensation at the rate determined by this Court in the aforesaid manner. They are also entitled for interest and solatium at the aforesaid rate.

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496. LEGAL SERVICES AUTHORITIES ACT, 1987 – Chapter 6-A & Sections 22-A to 22-E
CIVIL PROCEDURE CODE, 1908 – Section 9
Scope, role and purpose of 'permanent Lok Adalat' as well as limitations to its adjudicatory powers provided u/s 22-C (8) in view of the exclusion of the jurisdiction of Civil Court explained.
Permanent Lok Adalat must not give an impression of adjudicatory authority from the very beginning to any of the disputants concerned.
United India Insurance Company Limited v. Ajay Sinha and another
Judgment dated 13.05.2008 passed by the Supreme Court in Civil Appeal No. 3537 of 2008, reported in (2008) 7 SCC 454

Held:

Section 22-A (a) of the Act defines "Permanent Lok Adalat" to mean a

Permanent Lok Adalat established under sub-section (1) of Section 22 B. "Public utility service" inter alia means insurance service, and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this Chapter. Section 22-B. provides for establishment of Permanent Lok Adalats. Section 22-C delineates the jurisdiction of Permanent Lok Adalat to take cognizance of cases filed before it, the relevant provisions whereof are as under :-

> *"22-C.- Cognizance of cases by Permanent Lok Adalat :-*
>
> 1. Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:
>
> Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:
>
> Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:
>
> Provided also that the Central Government, may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.
>
> (2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.
>
> (3) ... .
>
> (4) ... .
>
> (5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.
>
> (6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.
>
> (7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties

concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute."

The Permanent Lok Adalat, in terms of Section 22-D of the Act, while conducting conciliation proceedings or deciding a dispute on merit is not bound by the provisions of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 but guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice.

Section 22-E of the Act makes an Award of Permanent Lok Adalat to be final and binding on all the parties, which would be deemed to be a decree of a civil court. Jurisdiction of the civil court to call in question any Award made by the Permanent Lok Adalat is barred. It has the jurisdiction to transfer any Award to a Civil Court and such Civil Court is mandated to execute the order as if it were the decree by the court.

The term "conciliation" is not defined under the Act. It should, therefore, be considered from the perspective of Arbitration and Conciliation Act, 1996. In order to understand what Parliament meant by `Conciliation', we have necessarily to refer to the functions of a `Conciliator' as visualized by Part III of the 1996 Act. Section 67 describes the role of a conciliator. Sub-section (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Sub-section (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Sub-section (4) is important and permits the `conciliator' to make proposals for a settlement. This section is based on Article 7 of UNICTRAL Conciliation Rules.

Section 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels that there exists elements of settlement. He is also entitled to 'reformulate the terms' after receiving the observations of the parties. The above provisions in the 1996 Act make it clear that the 'Conciliator' under the said Act, apart from assisting the parties to arrive at a settlement, is also permitted to make "proposals for a settlement" and "formulate the terms of a possible settlement" or "reformulate the terms". This is indeed the UNCITRAL concept.

Section 89 of the Code of Civil Procedure inter alia was enacted to promote resolution of disputes through mutual settlement. Chapter VI-A of the Act seeks to achieve a different purpose. It not only speaks of conciliation qua conciliation but conciliation qua determination. Jurisdiction of Permanent Lok Adalat, although is limited but they are of wide amplitude. The two provisos appended to Section 22-C (1) of the Act curtail the jurisdiction of the Permanent Lok Adalat which are as under :-

> Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:
>
> Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Chapter VI-A stands independently. Whereas, the heading of the Chapter talks of pre-litigation, conciliation and settlement, Section 22-C (8) of the Act speaks of determination. It creates another adjudicatory authority, the decision of which by a legal fiction would be a decision of a civil court. It has the right to decide a case. The term 'decide' means to determine ; to form a definite opinion ; to render judgment. (See *Advanced Law Lexicon 3rd Edition 2005 at 1253*). Any award made by the Permanent Lok Adalat is executable as a decree. No appeal thereagainst shall lie. The decision of the Permanent Lok Adalat is final and binding on parties. Whereas on the one hand, keeping in view the Parliamentary intent, settlement of all disputes through negotiation, conciliation, medication, Lok Adalat and Judicial Settlement are required to be encouraged, it is equally well settled that where the jurisdiction of a court is sought to be taken away, the statutory provisions deserve strict construction. A balance is thus required to be struck. A court of law can be created under a statute. It must have the requisite infrastructure therefor. Independence and impartiality of Tribunal being a part of human right is required to be taken into consideration for construction of such a provision. When a court is created, the incumbents must be eligible to determine the lis.

An option is given to any party to a dispute. It may be a public utility service provider or a public utility service recipient. The service must have some relation with public utility. Ordinarily insurance service would not come within the public utility service. But having regard to the statutory scheme, it must be held to be included thereunder. It is one thing to say that an authority is created under a statute to bring about a settlement through Alternate Dispute Resolution mechanism but it is other thing to say that an adjudicatory power is conferred on it. Chapter VI-A, therefore, in our opinion, deserves a closure scrutiny. It a case of this nature, the level of scrutiny must also be high. [See *Anuj Garg & ors. vs. Hotel Association of India & Ors.,(2008) 3 SCC 1*]. Parliament has given

the authority to the Permanent Lok Adalat to decide the matter. It has an adjudicating role to play.

The validity of the said provision is not in question. But then construction of such a provision must be given in such a manner so as make it *prima facie* reasonable. With that end in view let us consider the meaning of the word "relating to an offence". We will assume that in a given case the dispute between the service provider and the service recipient may not have anything to do with the ultimate result of the criminal case but there are cases and cases.

In this case, as noticed above, the genuineness of the claim itself is in dispute. Where the parties have taken extreme positions, the same *prima facie* may not be the subject matter of conciliation which provides for a non binding settlement.

For the said purpose, the dispute under the criminal procedure and/or the nature thereof would also play an important role. Whereas Respondent states that the burglary has taken place, the appellant denies and disputes the same. In a criminal case, the accused shall be entitled to raise a contention that no offence has taken place. If the criminal court forms an opinion that an offence had taken place, which otherwise is a non-compoundable one, the term "relating to an offence" should be given wider meaning. The first proviso appended to section 22-B of the Act may not be of much relevance.

Section 22-C(1) read with Sections 22-C(2), 22-C(8) and 22-E of the Act, exclude the jurisdiction of the civil courts by providing that when an application is made by either party to the Permanent Lok Adalat to settle a dispute at the pre-litigation stage, the PLA shall do so, and the other party is precluded from approaching the civil court in such a case.

Section 22-C(1) contains certain Provisos which limit the jurisdiction of the PLA. Given the principle of statutory interpretation stated earlier, these Provisos, as a corollary, must be interpreted in an expansive manner.

What is important to note is that with respect of public utility services, the main purpose behind Section 22-C(8) seems to be that "most of the petty cases which ought not to go in the regular Courts would be settled in the pre-litigation stage itself."

Therefore, in the instant case, the terms "relating to" an "offence" appearing in Proviso 1 must be interpreted broadly, and as the determination before the Permanent Lok Adalat will involve the question as to whether or not an offence, which is non-compoundable in nature, has indeed been committed, this case falls outside the jurisdiction of the Permanent Lok Adalat.

We must guard against construction of a statute which would confer such a wide power in the Permanent Lok Adalat having regard to sub-section (8) of Section 22-C of the Act. The Permanent Lok Adalat must at the outset formulate the questions. We however, do not intend to lay down a law, as at present advised, that Permanent Lok Adalat would refuse to exercise its jurisdiction to entertain

such cases but emphasise that it must exercise its power with due care and caution. It must not G give an impression to any of the disputants that it from the very beginning has an adjudicatory role to play in relation to its jurisdiction without going into the statutory provisions and restrictions imposed thereunder.

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497. M.P. LOK PARISAR (BEDAKHALI) ADHINIYAM, 1974 – Section 2 (e) (ii) (As amended)

Whether 'public premises' as defined u/s 2 (e) of Madhya Pradesh Lok Parisar (Bedakhali) Adhiniyam, 1974 include premises belonging to a local authority? Held, Yes.

Meena Agrawal (Smt.) v. Chief Minicipal Officer, Municipal Council, Shivpuri and others

Reported in 2008 (3) MPLJ 153 (FB)

Held:

Learned Single Bench has referred this dispute before the larger Bench on account of difference of interpretation of provisions of section 2 (e) of M.P. Lok Parisar (Bedakhali) Adhiniyam by the Division Bench judgments in the case of *Hariom Verma and another vs. State of M.P. and others, 1992 (2) Vidhi Bhasvar 184* and in the case of *R.P. Sharma vs. Competent Authority, MP No. 474/92* decided *on 23.06.1997* reported in *1992 (2) MPWN 74.*

Short question involved in these cases is whether the premises belonging to local authority will fall within the meaning of "public premises" as defined under section 2 (e) of the Madhya Pradesh Lok Parisar (Bedakhali) Adhiniyam, 1974 (hereinafter referred to as "Adhiniyam") and Adhiniyam is applicable to premises belonging to local authority.

In the case of *Hariom Verma* (supra), it is held that Adhiniyam is not applicable to property belonging to Municipality, whereas in another decision in the case of *R.P. Sharma* (supra), it is held that the definition under section 2 (e) of the Adhiniyam encompasses properties of municipal council i.e. local authority, therefore, Adhiniyam is applicable to the properties of the municipal council and municipal council can evict the unauthorized occupants under the provisions of the Adhiniyam.

We are of the view that the properties owned and controlled by local authority will fall within the ambit of public premises under section 2 (e) (ii) of Adhiniyam, and we hold that *Hariom Verma* (supra), has not laid down the correct law, and law laid down in the case of *R.P. Sharma* (supra), is the correct law. We answer the reference as under :

"That the public premises as defined under section 2 (e) of the Adhiniyam includes the premises belonging to local authority created by Central or State Act, or under the control of State Government or the local authority."

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***498. M.P. UCHCHATAR NYAYIK SEWA (BHARTI TATHA SWA SHARTEN) NIYAM, 1994 – Second Proviso to Rule 5 (1)**

M.P. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Sharten) Niyam, 1994 Second Proviso to Rule 5 (1) provides that recruitment to the posts of District Judges (Entry Level) shall be made on the basis of the vacancies available till the attainment of the required percentage – The Proviso declared ultra vires under Articles 14, 16, 133 & 235 of the Constitution holding that it altogether prevents the consideration of Civil Judges (Senior Division) on the basis of merit-cum-seniority for promotion to the posts of District Judges (Entry Level) till the attainment of the required percentage.

Y.D. Shukla and others v. High Court of Judicature of M.P. at Jabalpur and another

Reported in 2008 (4) MPHT 27 (DB)

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499. MOTOR VEHICLES ACT, 1988 – Section 147

Pillion rider on two wheeler is not a third party, not covered by statutory policy issued u/s 147 – Risk of a pillion rider would be covered only in case the requisite amount of additional premium is paid under the contract of insurance as also required for owner's risk.

Oriental Insurance Company Limited v. Sudhakaran K.V. and others

Judgment dated 16.05.2008 passed by the Supreme Court in Civil Appeal No. 3634 of 2008, reported in (2008) 7 SCC 428

Held:

In terms of Section 147 of the Act only in regard to reimbursement of the claim to a third party, a contract of insurance must be, taken by the owners of the vehicle. It is imperative in nature. When, however, an owner of a vehicle intends to cover himself from other risks; it is permissible to enter into a contract of insurance in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof.

Indisputably, a distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle.

The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third-party risk.

We have noticed the terms of the contract of insurance. It was entered into for the purpose of covering the third-party risk and not the risk of the owner or pillion-rider. An exception in the contract of insurance has been made i.e. by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle.

The contract of insurance did not cover the owner of the vehicle, certainly not the pillion-rider. The deceased was travelling as a passenger, *stricto sensu* may not be as a gratuitous passenger as in a given case she may not (sic) be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby.

The law which emerges from the said decisions, is: (i) the liability of the insurance company in a case of this nature is not extended to a pillion-rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion-rider; (iii) the pillion rider in a two-wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle.

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***500. MOTOR VEHICLES ACT, 1988 – Sections 163-A & 166**

(i) It is now a well-settled principle of law that in a case where third party is involved, the liability of the insurance company would be unlimited – Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

(ii) The provisions of S. 163-A cannot be said to have any application in regard to an accident wherein the owner of the motor vehicle himself is involved – The liability u/s 163-A of the Act is on owner of the vehicle and a person cannot be both a claimant and also a recipient – The heirs of Janak Raj (owner) could not have maintained a claim in terms of S. 163-A of the Act – For the said purpose, the contract of the insurance could be taken recourse to – According to the terms of contract of insurance, the liability of the Insurance Company was confined to Rs. 1,00,000/- (Rupees one lakh only) – It was liable to the said extent and not any sum exceeding the said amount.

Oriental Insurance Company Limited v. Rajni Devi and others
Judgment dated 22.04.2008 passed by the Supreme Court in Civil Appeal No. 2892 of 2008, reported in (2008) 5 SCC 736

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***501. MOTOR VEHICLES ACT, 1988 – Sections 163-A & 166**

Assessment of permanent disability as per the provisions of the Workman's Compensation Act, 1923 is to be made for a claim petition filed u/s 163-A not under Section 166.

Rajesh Kumar alias Raju v. Yudhvir Singh and another

Judgment dated 13.05.2008 passed by the Supreme Court in Civil Appeal No. 3538 of 2008, reported in (2008) 7 SCC 305

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

Computation of compensation in case of a contributory negligence – Relevant fact – Who was more responsible for the accident and who had the last opportunity to avoid the accident has to be seen.

Andhra Pradesh State RoadTransport Corporation and another v. K. Hemlatha and others

Judgment dated 16.05.2008 passed by the Supreme Court in Civil Appeal No. 3623 of 2008, reported in (2008) 6 SCC 767

Held:

In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

To determine the question as to who contributed to the happening of the accident, it becomes relevant to ascertain who was driving his vehicle negligently and rashly and in case both were so doing who were more responsible for the accident and who of the two had the last opportunity to avoid the accident. In case the damages are to be apportioned, it must also be found that the plaintiff's fault was one of the causes of the damage and once that condition is fulfilled the damages have to be apportioned according to the apportioned share of the responsibility. If the negligence on the plaintiff's part has also contributed to damage this cannot be ignored in assessing the damages. He can be found guilty of contributory negligence if he ought to have foreseen that if he did not act as a reasonable, reasoned man, he might himself be hit and he must take into account the possibility of others being careless.

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*503 MOTOR VEHICLES ACT, 1988 – Sections 166 & 173

There were several ditches on the road – Accident was caused due to bad road condition – The truck went in a big ditch – Consequently, steering of the truck pierced the chest and abdomen of the driver – He died on account of the injuries sustained by him in the accident – The Tribunal observed that negligence of the driver has not been pleaded which was necessary to be established – Consequently, under no fault liability, the Tribunal awarded Rs. 50,000/- alongwith interest @ 9% p.a. – Held, the claim petition could not be dismissed merely because negligence of the driver was not pleaded – Further held, it is apparent that driver was also negligent to the extent of 50% as he was not able to locate big ditch properly – Deceased, aged 32 years was earning Rs. 4,500/- p.m. – After 1/3rd deduction towards self expenditure, loss of monthly income comes to Rs. 3,000/- – Making 50% deduction due to his negligence, monthly loss of dependency comes to Rs. 1,500/- and annual income comes to Rs. 18,000/- – Multiplier of 17 would be applicable considering the age of the deceased and as the widow and daughter are also claimant besides the parents – Total compensation Rs. 3,46,000/- including Rs. 40,000/- under the customary heads awarded with interest @ 7% p.a from the date of filing of claim petition till realization.

Champa Pandey and others v. Hardayal Singh and another

Reported in 2008 (3) MPLJ 182 (DB)

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*504. N.D.P.S. ACT, 1985 – Section 37 (1) (b)

CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439

Grant of bail without specifically considering the limitations u/s 37 (1) (b) – Held, invalid and unsustainable in law as per the specific provisions – Apart from the grant of opportunity to the public prosecutor, the other twin conditions which relate for relevance are; one, the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and two that he is not likely to commit any offence while on bail – The conditions are cumulative and not alternative.

N.R. Mon v. Mohd. Nasimuddin

Judgment dated 16.05.2008 passed by the Supreme Court in Criminal Appeal No. 1167 of 2001, reported in (2008) 6 SCC 721

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***505. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 9 & 138**

'Holder in due course' – Cheque drawn in favour of person who is dead – Complaint on behalf of his legal heirs maintainable. 1996 CrLJ 3153, 2004 (1) 422 (Ker), AIR 1964 Puj 497 (Ref.)

Ramprasad v. Smt. Sudhaben

Reported in I.L.R. (2008) M.P. NOC 60

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***506. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 20, 118(a), 138 & 139**

CRIMINAL PROCEDURE CODE, 1973 – Sections 243 (2) & 293

CONSTITUTION OF INDIA – Article 21

(i) Rights of a holder in due course of a cheque and statutory presumptions there of under Sections 20, 118 (a) and 139 are subject to the human and fundamental rights of an accused to defend himself as a part of fair trial.

(ii) Signature on the cheque admitted – Defence that cheque was signed in the year 1999 as a security on hand loan of Rs. 50,000/- which was paid back but instead of returning the cheque, same was misused by entering a huge amount in the year 2004 – Application for referring the deposited cheque for determining the age of its signature for examination by Director of Forensic Science Laboratory u/s 243 (2) (wrongly mentioned Section 293) – Rejection of bonafide application – Held, improper.

T. Nagappa v. Y.R. Muralidhar

Judgment dated 24.04.2008 passed by the Supreme Court in Criminal Appeal No. 707 of 2008, reported in (2008) 5 SCC 633

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507. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 118(a)

Initial burden is on defendant to show that existence of consideration was improbable or doubtful or illegal – Mere denial of consideration is not sufficient – If this burden is discharged onus shifts on plaintiff (complainant).

Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm and others

Judgment dated 16.05.2008 passed by the Supreme Court in Civil Appeal No. 5597 of 2001, reported in (2008) 7 SCC 655

Held:

Section 118 of the Negotiable Instruments Act deals with presumptions as to negotiable instruments. One of such presumptions appearing in Section 118(a), with which we would be concerned in this appeal is reproduced as under:

"118. *Presumptions as to negotiable instruments.*— * * *

... (a) *of consideration:* that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration; * * *"

Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. In this connection, reference may be made to a decision of this Court in *Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35.* In para 12 of the said decision, this Court observed as under: (SCC pp. 50-51)

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen

with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

From the above decision of this Court, it is pellucid that if the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. It is also discernible from the above decision that if the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour.

In view of the decision of this Court in *Bharat Barrel & Drum Mfg. Co. case* (supra) and also in view of the findings arrived at by the courts below, we are of the view that since the initial burden on the respondents to show that the pronote being Ext. A-21 was not supported by any consideration was not discharged by them, the High Court was not justified in not decreeing the suit of the appellant in respect of the amount covered by the pronote, Ext. A-21.

It is an admitted position that the finding as to the execution of the pronotes had become final. Also, we are of the view that the respondents had not discharged the initial burden of proving the non-existence of consideration either by direct evidence or by preponderance of probabilities. The mere denial, if there be any, by the respondents that no consideration had passed would not have been sufficient and something probable had to be brought on record to prove the non-existence of consideration. In this view of the matter, we are, therefore, of the view that once the execution of the pronote has been proved, the appellant would be entitled to the benefit of the presumption under Section 118(a) of the Negotiable Instruments Act because the respondents had failed to discharge the initial burden.

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***508. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 Proviso (b) An amount of Rs. 8,00,000/- was due on the accused – Against the said amount, two cheques amounting to Rs. 2,00,000/- each were drawn by him in favour of the complainant – One of the cheques was dishonoured – Instead of demanding the amount of the said cheque**

of Rs. 2,00,000/- at the most along with incidental charges, a demand of whole of the amount due i.e. Rs. 8,00,000/- was made – The notice indicated that in case of non-payment of the whole amount, action under the Act will be taken – Held, the notice cannot be said to be valid – The criminal proceedings pending against the accused u/s 138 of the Act quashed.

Mahendralal Shivhare v. State of M.P. and another

Reported in 2008 (3) MPLJ 102

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***509. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 141**

If an offence of dishonour of cheque u/s 138 is committed by a Company, then as per S. 141 of the NI Act, every person who at the time of the offence, was committed by the Company was incharge of and was responsible to the Company for the conduct of the Company would be deemed to be guilty of the offence and would be liable to be prosecuted against.

Specific averment as per S.141 in a complaint is an essential requirement – Merely being a Director of Company is not sufficient to make the person liable u/s 141 but Managing Director and Joint Director would become liable – Similarly, signatory of a cheque is also responsible as he will be covered u/s 141 (2).

Paresh P. Rajda v. State of Maharashtra and another

Judgment dated 16.05.2008 passed by the Supreme Court in Criminal Appeal No. 921 of 2008, reported in (2008) 7 SCC 442

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510. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 142

Dishonour of cheque – Period of limitation, counting of – Two demand notices were issued – First notice issued on receipt of oral information and thereafter on written information being received regarding dishonour of cheque, second notice was issued – Held, period of limitation will be counted on the basis of first notice and not on the basis of second.

M/s Arora Distilleries Private Ltd. v. M/s Vijay Associates and another

Reported in 2008 (3) MPHT 281

Held:

Upon perusal of the aforesaid notice dated 5-1-93, it appears that the same has been issued by the petitioner upon receiving an information (unwritten) from his bank. After receiving such information, the petitioner, opted to issue notice under Section 138 of the Act to the respondents. Once he opted this, in my considered view, subsequently he cannot take this defence that as the notice has been given before receiving the information in writing, hence the same is

not valid. If the notice was not given by him upon that oral information, of course, there was no obligation upon him as observed herein above, but once he has opted to issue notice without waiting the written information and only upon receiving the oral or unwritten information he has issued the notice, he has estopped from saying that his first notice ought not to be considered as a valid notice and the limitation ought not to be counted from the date of issuance of the first notice.

Thus after a deep consideration, it is observed that (1) it is not obligatory upon the payee to issue notice of demand under Section 138 of the Act, before receiving of information in writing from the bank with regard to dishonour of the cheque, and (2) however, if even on an unwritten or oral information the payee opts to issue legal notice of demand under Section 138 of the Act, then subsequently he becomes estopped from taking defence that, as the written information was received subsequently, he was not obliged to issue notice, hence, prior to receiving written information, the limitation ought not to be counted from the first notice. As observed by the Apex Court in the case of *Sadanandan Bhadran v. Madhavan Sunil Kumar, AIR 1998 SC 3043,* limitation will be counted on the basis of the first notice and not on the basis of the second notice.

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***511. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

Cause of action – Complainant presented cheques which were dishonoured – Issued notice to the applicant – Did not file the complaint but presented the cheques once again – Issued second notice to the applicant – Filed complaint thereafter – Held, if dishonour of cheque has once snowballed into a cause of action, it is not permissible for a payee to create another cause of action with same cheque – It was first notice of demand that gave rise to cause of action – No application for condonation of delay filed – It would not be possible to convict applicant for the offence – Proceedings quashed. AIR 1998 SC 3043, (2004) 13 SCC 498, (2005) 4 SCC 417. (Ref.)

Nishant v. Prakash Chand

Reported in I.L.R. (2008) M.P. 57

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***512. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Sections 13 (2) & 16 (1) (a) (ii)**

(i) Report of Public Analyst – Report of Public Analyst sent by U.P.C. – Applicant has not denied receipt of the same – Not exercised his right for getting part of sample analysed by Central Laboratory – Applicant has not been prejudiced in any way. 1999 (1) MPLJ 613, 2002 (4) MPLJ 523, 2005 (3) MPLJ 458, 2005 (4) MPLJ 276 (Rel.)

(ii) Delay in prosecution – Sample of milk collected on 25.04.1987 – Complaint filed on 15.03.1988 – Nothing on record to show that

another part of sample became unfit for analysis – No question to quash complaint – Revision dismissed. 1999 (1) MPLJ 669 (Rel.).

Gyasi Lal Napit v. State of M.P.

Reported in I.L.R. (2008) M.P. 54

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*513. PREVENTION OF FOOD ADULTERATION RULES, 1955 – Appendix B Item No. A.16.16

Pickles in Oil – Percentage of oil – Layer of oil not less than 0.5 cm above contents or percentage of oil shall not be less than 10 percent – Samples of pickle taken by Food Inspector – Report of public analyst mentioned that percentage of oil was less than 10 percent – Report silent about layer of oil above contents – Trial Court held that prosecution cannot continue as report is incomplete – Revisional Court remanded the matter – Held, word 'and' is ordinarily conjunctive while 'or' is disjunctive – 'Or' cannot be read as 'and' to mean that if sample fails to meet either of requirements, then it would be taken to be adulterated – Report appears to be incomplete – If prosecution does not prove all requirements to constitute an offence, then prosecution would certainly be abuse of process of law – Order of Trial Magistrate restored – Revision allowed.

Bansal Stores v. State of M.P.

Reported in I.L.R. (2008) M.P. 1830

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*514. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 3 (1) (xii) & 3 (2) (v)

(i) Offence u/s 3 (1) (xii) of Act of 1989 – When a woman belonging to SC/ST if sexually exploited by such a person, who is not in a position to dominate her will and without such position that a woman is not expected to have otherwise agreed for such act – This offence is not made out if the rape is committed by using criminal force.

(ii) Offence u/s 3 (2) (v) of the Act – Offence is not made out if the concerning offence under I.P.C. punishable with imprisonment for a term of 10 years or more against a person or property, on the ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belonging to such member.

Mahesh Jatav v. Sate of M.P.

Reported in I.L.R. (2008) M.P. 1834

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515. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995 – Rule 7

(i) Rule 7 of SC and ST (P.A) Rules, 1995, nature of – It is mandatory.

(ii) Non-compliance of Rule 7 of the Rules of 1995, effect of – Non-compliance will not vitiate the entire trial – However, it vitiates the trial relating to offences under the SC and ST (P.A) Act, unless and until the offences under the Indian Penal Code has nexus with the offences under the Atrocities Act.

(iii) Raising of objection regarding non-compliance of Rule 7 of the Rules of 1995, stage of – Such objection may be taken for the first time before the Appellate Court, but while doing so, the accused will have to satisfy the Appellate Court that due to non-compliance grave prejudice is caused to him which has resulted into miscarriage of justice – Unless the accused satisfies the Appellate Court that there was miscarriage of justice, he will not get any benefit of the provision.

(iv) Non-compliance of Rule 7 of the Rules of 1995 – Re-investigation, direction for – If the objection is raised at the earliest opportunity, the Court may direct for re-investigation but not at a belated stage of proceedings.

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

Reported in 2008 (4) MPHT 66

Held:

The position regarding non-compliance of Rule 7 of the Atrocities Act is now clear and settled : –

(I) That, the provisions of Rule 7 of the Rules are mandatory in nature;

(II) That, non-compliance of Rule 7 of the Rules will not vitiate the entire trial but vitiate the trial relating to the offences under the Atrocities Act, unless and until the offence under the Indian Penal Code has nexus with the offences under the Atrocities Act;

(III) That, the objection regarding non-compliance of the provision of Rule 7 of the Rules can be taken for the first time before the Appellate Court, but while doing so, the accused will have to satisfy the Appellate Court that due to non-compliance of the said provision, grave prejudice is caused to him which has resulted into miscarriage of justice and unless the accused is satisfies the Appellate Court that there was miscarriage of justice, he will not get any benefit of the said provision;

(IV) If the objection is raised at the earliest opportunity, the Court if satisfied, can direct for reinvestigation and to file charge-sheet, but not at a belated stage of the proceedings.

(V) In view of the decision in the case of *Gangula Ashok and another v. State of A.P., (2000) 2 SCC 504,* the committal proceedings before the Special Court are mandatory in view of Section 193 of CrPC. But, those cases which were filed directly before the Special Court without committal proceedings in view of the decision of the Full Bench of this Court in *Anand Swaroop Tiwari v. Ram Ratan Jatav and others, 1996 MPLJ 141* case prevailing at that time, the proceedings cannot be quashed due to procedural lapse as mentioned unless occasioned failure of justice as lays down by the *Apex Court in State of M.P. v. Bhooraji and others, 2002 (1) MPHT 1 (SC) = (2001) 7 SCC 679* case.

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***516. SERVICE LAW:**

M.P. CIVIL SERVICES (GENERAL CONDITIONS OF SERVICE) RULES, 1961 – Rule 12 (2) (c) (As amended w.e.f. 2nd April, 1998)

(i) Seniority of an officer in service is to be determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 & 16 of the Constitution.

(ii) Under the service jurisprudence without deciding the equivalence of post held by a person came on transfer and a deputationist cannot be treated to be the holder of the equivalent post for the purposes of conferring seniority by counting his past services which he has rendered in the parent department. It is not necessary that in every case where a person is absorbed by way of his transfer from one department to another department then his past services are to be counted necessarily. The past services have to be counted only subject to equivalence of post and before conferring seniority there has to be an application of mind with reference to the equivalence of post. Merely because the pay has been equal of an incumbent in the parent department and absorption in the same pay scale that by itself is not the determinative factor for the purpose of equivalence of post and what further has to be considered is the nature of duties, the minimum qualification, responsibilities and powers exercised by an officer holding a post; the extent of territorial or other charge held or responsibilities discharged and the salary for the post.

Hemchandra Pandey (Dr.) and others v. State of M.P. and others
Reported in 2008 (3) MPLJ 6

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517. SPECIFIC RELIEF ACT, 1963 – Sections 34 & 38
Suit for prohibitory injunction relating to immovable property – Scope – Under what circumstances suit for declaration of title is must – Law explained.

Anathula Sudhakar v. P. Buchi Reddy (Dead) by L.Rs. & Ors.
Reported in AIR 2008 SC 2033

Held:

The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

(11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

(11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

(11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title,

merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

There is some confusion as to in what circumstances the question of title will be directly and substantially in issue, and in what circumstances the question of title will be collaterally and incidentally in issue, in a suit for injunction simpliciter. In *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari, AIR 1965 Mad. 355,* the Madras High Court considered an appeal arising from a suit for possession and injunction. The defendant contended that the

and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

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519. SPECIFIC RELIEF ACT, 1963 – Sections 39 & 40

Damages in lieu of the decree of mandatory injunction, award of – conditions precedent are :

(i) injury to plaintiff's right is small

(ii) injury is one capable of being estimated in money

(iii) injury is one which is capable of being compensated by a small money payment, and

(iv) the case is one in which it would be oppressive to the defendant to grant an injunction.

Gyanchand and another v. Mohanlal and others

Reported in 2008 (3) MPLJ 231

Held:

In *Taherakhatoon v. Salambin Mohammad, (1992) 2 SCC 635,* in similar facts and circumstances, the Supreme Court held that awarding the damages to the plaintiff would be the appropriate relief. In that case, the plaintiff filed suit for possession of an area measuring 24' x 11' and mandatory injunction for directing removal of construction consisting of two rooms. The plaintiff of that case purchased the land including the disputed portion by registered sale deed dated 14.1.1966 and on 13.12.1967 the defendant purchased from the same vendor some neighbouring land and according to plaintiff of that case, on 30.12.1967 defendant of that case illegally occupied the disputed area and also constructed two rooms thereon but plaintiff did not raise any objection till seven years after the trespass and unlawful construction and a notice was issued on

14.6.1974 and thereafter filed the suit on 14.2.1975. In that situation the Supreme Court in para 22 of the judgment directed defendant to pay the value of the land as on 19.9.1987, the date on which the High Court passed the judgment in favour of the respondent/defendant and for that limited purpose the case was remitted to the trial Court.

Five decades earlier the Division Bench of this Court in *Tilokchand Nathmal and another v. Dhundiraj Madhavarao and others, 1956 NLJ 764 = AIR 1957 Nagpur 2,* Shri Hidayatullah, C.J., as His Lordship then was, held that if defendant is required to pull down the present wall and build another wall leaving a space of three inches that space would not be of any use of the plaintiff. On the other hand plaintiff's wall would get support from newly constructed wall of the defendant and, therefore, the Court refused to grant the discretionary relief of mandatory injunction asked for by plaintiff and directed to pay compensation to the plaintiff.

Allahabad High Court had also an occasion to consider similar situation in the case of *Ram Shankar v. Mahatma Gandhi Higher Secondary School, Jonihan and another, AIR 1979 Allahabad 184* and held that where the encroached area on which construction is made by the defendant is a very small area and the plaintiff can be compensated by way of damages, instead of granting relief of mandatory injunction damages could be awarded.

Before passing the direction to give damages instead of granting decree of mandatory injunction following conditions should exist:

(i) Injury to plaintiff's right is small;

(ii) is one capable of being estimated in money;

(iii) is one which is capable of being compensated by a small money payment;

(iv) and the case is one in which it would be oppressive to the defendant to grant an injunction.

On going through the decree as well as encroached area which is mentioned in the plaint map which is now a part of the decree of trial Court, it is gathered that the total area encroached is only 5.46 sq.metre, the width on the northern side is only 22 cm and on the southern side it is 52 cm. The total length of encroached area is 14.75 metre. Looking to the width and the length of the encroached area which has been encroached by the defendants, I am of the view that instead of restoring the decree of mandatory injunction under section 39 of Specific Relief Act, 1963 (in short 'the Act of 1963'), passed by learned trial Court in order to serve the justice, it would be appropriate to award damages under section 40 of the Act of 1963 to the plaintiffs in lieu of the decree of mandatory injunction to dismantle the encroached area.

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520. SUCCESSION ACT, 1925 – Section 278
LIMITATION ACT, 1963 – Article 137
Article 137 of the Limitation Act would be applicable for the grant of Letters of Administration.
Kunvarjeet Singh Khandpur v. Kirandeep Kaur and others
Reported in AIR 2008 SC 2058

Held:

Any application to Civil Court made under any Act is covered by Article 137 of Limitation Act. The application for Letter of Administration is made in terms of Section 264 of Succession Act, 1925 to the District Judge. Section 2 (bb) of the 1925 Act defines the District Judge to be Judge of Principal Civil Court. Article 137 is clearly applicable to the petition for grant of Letters of Administration. Proceedings for grant of probate or Letters of Administration applicant merely seeks recognition from the Court to perform a duty. Because of the nature of the proceedings it is a continuing right.

AIR 1983 Bom 268, AIR 1991 Mad 214, (2004) 112 DLT 877, Partly Overruled.

Article 137 is clearly applicable to the petition for grant of Letters of Administration. As such when on withdrawal of probate proceedings an application for grant of Letters of Administration was filed by the appellants and the application therefor was filed within 3 years of date of the withdrawal, the application cannot be dismissed on ground of limitation.

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521. TRANSFER OF PROPERTY ACT, 1882 – Sections 58 & 60
Suit for redemption of mortgage, possession and for declaration that sale deed is void – It was alleged that defendants got the sale deed executed fraudulently and thereafter on objection being taken, an agreement was executed to the effect that suit land has been mortgaged and whenever plaintiffs will pay Rs. 1,000/-, defendants will leave the possession – Thereafter plaintiffs tried to get back the land but could not succeed and ultimately filed the suit – Held, it is clear from the agreement that the sale deed was never intended to be acted upon – Considering the price, it cannot be held that proper price was paid as per the market value of the property – Further held, the sale deed is document of sham transaction of ostensible sale and transaction in question was one of the mortgage in essence and substance.
Gendalal (since dead) through L.Rs. Sajjanbai etc. and another v. Pannalal (since dead) through L.Rs. Lilabai etc. and another
Reported in 2008 (3) MPHT 521

Held:

In the case of *Gangabai v. Smt. Chhabubai, AIR 1982 SC 20,* it was held that sub-section (1) of Section 92 of the Evidence Act is not attracted when the

case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatsoever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as a sale, but that some other agreement altogether, nor recorded in the document, was entered into between the parties and the decision in the case of *Tyagraja Mudaliyar v. Vedathanni, AIR 1936 PC 70* was also considered by the Apex Court. In the case of *Smt. Indira Kaur v Sheo Lal Kapoor, AIR 1988 SC 1074* it was held that sale deed and contemporaneous agreement to resale property for same sum executed between parties. The transaction in question was mortgage. The Supreme Court also considered the increasing tendency of entering into such transaction in order to deprive the debtor of his right of redemption within the prescribed period of limitation and it was held that the transaction in question was one of mortgage in essence and substance though it was clothed in the garb of a transaction of ostensible sale.

In the case of *Gulab Chand (dead) by LRs v. Babulal (dead) by LRs., 1998 (1) JLJ 1* Hon'ble Apex Court has held that three documents, i.e., sale agreement to repurchase executed on same day, transaction is mortgage. Separate transaction may form a single transaction. No hard and fast rule can be laid down. It was further held that relationship of landlord and tenant not established, only transaction of mortgage created between the parties. It was further held that suit for eviction is not maintainable and the Court should judge the real intention and purpose in the facts of each case in the context of the intention of the parties and language in which it is couched.

In the case of *Ramlal v. Phagua, AIR 2006 SC 623,* the Supreme Court has held that in addition to sale deed, agreement also entered into between parties simultaneously for execution of re-conveyance deed in favour of vendor. Admission to that effect given by buyer. Mere mutation of name of buyer on alleged failure of repayment of amount, would not confer any right, title or interest in her favour in absence of real transaction of property and subsequent purchasers would also get no right, tile or interest in property.

In the case of *Mandas v. Manbai, 1972 JLJ 632,* Division Bench of this Court has held that if there was stipulation between the parties that the contract would not be enforced or that it would not be acted upon ab initio, oral evidence in support of such a plea may be given. It was further held that oral evidence is admissible to show that an agreement was only a sham or nominal transaction and was not intended to be acted upon. If the plea is that the sale was merely fictitious, such plea is not barred by the proviso to Section 58 (c) of the Transfer of Property Act and when sale deed is fictitious, no right accrues under such sale deed.

In the case of *Draupadi Bai (Smt.) v. Nathu Singh, 2004 (1) JLJ 427,* Single Bench has also held that when sale deed executed as security for loan, deed of

reconveyance also executed by purchaser, seller also remained in possession and paid the loan with interest the intention of the parties was that the sale deed was not to be acted upon. Another decision in the case of *Smt. Munnibai and others v. Barelal Lodhi and others, 2007 (4) MPHT 194=2007 (III) MPJR 65,* was cited in which the Single Bench of the High Court of M.P. held that oral evidence is admissible to establish that the sale deed was sham transaction and was got executed to ensure repayment of loan.

Admittedly, in this case sale deed was executed on 31.3.1960 and around after 11 months on 15.2.1961 an agreement (Exh. P-1) was also executed by the appellants, in which it was declared that the aforesaid land was obtained on rent and a sum of Rs. 1,000/- was paid as security of loan and they will also pay the profit of 2 Ghadi Bigha and will retain the possession till the amount shall not be paid in lump sum and on receiving Rs. 1,000/-, will leave the possession and they will also execute the mortgage deed at Sardarpur. Both the Courts below have concurrently held that this document was executed by appellants/ defendants, which is also finding of fact and there is no material to hold that it is a perverse finding. From the language of both documents it is clear that the sale deed Exh. D-1 was a sham document and subsequently it was declared in so many words that it was intended to create security for loan transaction and was not intended to operate as a sale deed. When both the Courts below have concurrently held that the agreement (Exh. P-1) was validly executed, then as held by the Supreme Court in case of *Smt. Indira Kaur* (supra), the transaction in question was one of mortgage in essence and substance though it was clothed in garb of a transaction of ostensible sale. Again in the case of *Gulab Chand* (supra), Supreme Court has held that three documents, i.e., sale deed, rent note and agreement to repurchase executed on same day, transaction is mortgage.

It is held that the document Exh. D-1 sale deed is document of sham transaction of ostensible sale and transaction in question was one of the mortgage in essence and substance. It is further held that from the document Exh. P-1 it is clear that the sale deed was never intended to be acted upon and reading together bother the documents, true nature of transaction has to be ascertained. Considering the price and the age of the respondents/plaintiffs, it cannot be held that proper price was paid as per the market value of the property and on consideration of the two documents read together would constitute mortgage, as Exh. P-1 was executed by the defendants and there was no evidence on record that it was based on any fraud. Thus, the aforesaid substantial questions of law are answered accordingly. It is held that amount of Rs. 1000/- which was paid, was of loan amount and the amount was given as security for that amount.

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NOTE : Asterisk (*) denotes short notes.

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING AMENDMENT IN THE COMMISSIONER OF OATHS RULES, 1976

No. A-3023 (III-1-27-75).– In Exercise of the powers conferred by Section 122 read with Section 139 of the Code of Civil Procedure, 1908 (No. V of 1908), the High Court of Madhya Pradesh after previous publication and approval of the State Government makes the following further amendment in the Commissioner of Oaths Rules 1976. namely :–

AMENDMENTS

(1) In the said rules, in rule 9, for the words and figure "Rs. 5.00" the words and figure "Rs. 15.00" shall be substituted.

(2) This amendment shall come into force from the date of final publication of this notification in the official Gazette.

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार,
गौरीशंकर दुबे,
एडीशनल रजिस्ट्रार

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NOTIFICATION REGARDING ENFORCEMENT OF MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

Notification No. F. 3-74-2008-XXVI-2 dated the 22nd August, 2008. – *[Published in M.P. Rajpatra (Asadharan) dated the 23-8-2008 Page 1037]* In exercise of the powers conferred by sub-section (2) of Section 1 of the **Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (56 of 2007),** the State Government hereby, appoints the 23rd August, 2008 as the date on which the said Act shall come into force.

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NOTIFICATION REGARDING AMENDMENT IN THE MADHYA PRADESH LOWER JUDICIAL SERVICE (RECRUITMENT AND CONDITIONS OF SERVICE)RULES, 1994

Notification F-No. 3 (B) 40-88 XXI-B (One) dated the 23rd August, 2008. – *[Published in M.P. Rajpatra (Asadharan) dated the 23-8-2008 Page 1042-1042 (1)]* In exercise of the powers conferred by Article 234 read with the proviso to Article 309 of the Consitution of India, the Governor of Madhya Pradesh in consultation with the High Court of Madhya Pradesh and State Public Service Commission, hereby, makes the following amendment in the **Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994,** namely :–

AMENDMENT

1. In the side rules, for sub-rule (1) and (2) of rule 5, the following sub-rules shall be substituted, namely :–

"(1) All appointments to category (i) of Rule 3 (1) shall be made by the Governor by direct recruitment in accordance with the recommendations of the High Court on selection.

Candidates shall be selected on the basis of written examination conducted by the High Court and viva voce thereafter and the procedure and curriculum of holding examination for the selection of the candidates shall be prescribed by the High Court.

(2) Examination shall be conducted by the High Court every year as far as possible and on the basis of availability of vacancies for selection of candidates."

2. for rule 8, 9 and 10, the following rules shall be substituted, namely :–

"8. Disqualification. – Any attempt on the part of the candidate to obtain support for his candidature by any means may be treated as a disqualification for his selection to the examination.

9. Finality of High Court's decision about the eligibility of a candidate. – The decision of the High Court as to the eligibility or otherwise of a candidate for admission to the examination shall be final.

10. List of the candidates recommended by the High Court. – (1) The High Court shall forward to the Government a list arranged in order of merit of the candidates selected for recruitment by the High Court. The list shall be published for general information.

(2) Subject to the provisions of these rules and the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 the candidates will be considered for appointment to the available vacancies, in the order in which their names appear in the list."

3. for clause (c) and (d) or rule 11, the following clauses shall be substituted namely :–

"(c) It shall be competent for High Court at any time during or at the end of the period of probation in the case of Civil Judge (Entry Level) to recommend termination of his service and in the case of senior Civil Judge to revert him on account of unsuitability for the post;

(d) On successful completion of probation, the probationer shall, if there is permanent post available be confirmed on the service or post to which he has been appointed and if no permanent post is available a certificate shall be issued by the High Court to the effect that he would have been confirmed, but for the non-availability of the permanent post and as soon as permanent post becomes available, he will be confirmed, if the High Court decides that he has successfully completed the period of probation and he is suitable to hold the post."

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