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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

# JOTI JOURNAL OCTOBER - 2010

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## (ARTICLES & MISC.)



## PART-II
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Three accused persons kidnapped the boy and one of the accused persons communicated the demand of ransom to the grandfather of the boy – Prosecution has not proved which particular accused made or communicated the demand of ransom – Held, it is not always necessary to be proved that which particular accused made or communicated the demand of ransom

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# FROM THE PEN OF THE EDITOR

**J.P. Gupta**
**Director, JOTRI**

Esteemed Readers

This is the penultimate issue of JOTI Journal 2010, which is before you. Within a month or two, Year 2010, will submerge into the vast and endless ocean of the past.

As I have already mentioned in one of my earlier editorials that time and tide waits for none. We have to make the best use of the 24 hours that we get in a day. We cannot waste a single second or leave alone a minute. We have to do the right thing ourselves and not wait for others to act in ways we expect them to. Our endeavour should be towards reaching the aim or goal for which we are in service. In other words, our endeavor is to impart quick and qualitative justice so as to meet the just aspirations of citizens.

Today, Judiciary is being increasingly called upon to enforce the basic human rights of the poor and the deprived class and this new development is making judiciary a dynamic and important Institution of the State. Therefore, it is necessary to re-evaluate the functioning of the Judiciary and to bring out a qualitative change in the Justice Delivery System so as to tune it with the hopes and aspirations of the people. The Judiciary has to devise new methods, forge new tools and innovate new strategies for the purpose of taking social justice to the common man.

For achieving the said objective, we Judicial Officers, should be always enthusiastic to bring in some innovative ideas in our working within the legal parameters. Remember 'Amateurs built the ark. Professionals built the Titanic'. Duty and discipline do not completely mean adherence to contemporary practices but discovering better methods to advance the cause of justice. We have to focus totally on our work. Our life is a reflection of our thoughts, therefore, we should have positive thoughts and strong will power. We should have a 'can do', 'will do' attitude. If we have the same, we can do many amazing things and we can achieve what is termed 'the impossible'. The desire to constantly create, innovate, think-out-of the box, achieve the impossible against all forces and odds, and to come out triumphant time and again, will offer us a sense of happiness and satisfaction that is truly incomparable. Before starting with any plan or action, we should visualize clearly its successful outcome. If we visualize with concentration and faith, we will be amazed at the results.

In order to cope up with the pressure of the work and to meet the expectations of the common man, every judicial officer, being a functionary of Justice Delivery System, has to not only learn new laws and develop himself but also to equip himself with management skills, which will help him to sail through some of the most difficult situations. There is no denying the fact that a lot more need to be done to improve ourselves. We all can stretch ourselves to reach our maximum potential. In other words, becoming a special person requires extra effort; not remaining in the rut and branded as 'mediocre'. There needs to be a change in our attitude. We have to cultivate a habit of 'excellence'. Nothing less than that will bring success.

If all the above qualities are developed by the judicial officers, then certainly, they will become good judges and be able to face any adverse situation with confidence.

The Institute, in its Academic activities, has organised four weeks Induction Training Programme (First Phase) for 35 newly appointed Civil Judges of 2010 batch from 06.09.2010 to 01.10.2010. As these judicial officers are fresh in the profession, in-depth training, covering both substantive and procedural laws, has been imparted along with the basic concepts of court working.

As usual, Part I of the Journal contains Articles, Part II consists of various pronouncements passed by the Hon'ble Supreme Court as well as our own High Court. The Information Technology (Amendment) Act, 2008 is included in Part IV of the Journal.

Thank you.

Amongst all things, Knowledge is truly the best thing;
From its not being liable ever to be stolen,
from it not being purchasable and
from its being imperishable.

HITOPADESA

## TRANSFER OF HON'BLE SHRI JUSTICE A.K. MISHRA TO RAJASTHAN HIGH COURT

*Hon'ble Shri Justice Arun Kumar Mishra, who occupied the august office of the Judge of High Court of Madhya Pradesh for more than 10 years has been transferred to Rajasthan High Court.*

*Was born on 03.09.1955. Was graduated in Science and also obtained M.A. Degree. After obtaining Degree in Law, practiced from 1978 to 1999 in Constitutional, Civil, Industrial, Criminal and Service Matters in the High Court. Also worked as part time Lecturer in Law during 1986 to 1993, Member of Faculty of Law of Jiwaji University Gwalior from 1991 to 1996, Member of Academic Council of Government M.L.B. Arts and Commerce Autonomous College, Gwalior from 1996 to 1998. Was Chairman of Advocates Welfare Committee of Bar Council of India for M.P. from 1996 to 1999. Was elected as Vice-Chairman of Bar Council of India in 1997-1998 and Chairman of Bar Council from 15.5.1998 to 24.10.1999. Was member of various Committees of Bar Council of India. Was elevated as Additional Judge of High Court of Madhya Pradesh on 25.10.1999 and as Permanent Judge on 24.10.2001.*

*During His Lordship's tenure in the High Court of Madhya Pradesh, he rendered valuable services as Judge, Administrative Judge and Member of various Committees of High Court including High Court Training Committee and also Executive Chairman, M.P. State Legal Services Authority.*

*His Lordship was accorded farewell ovation on 09.09.2010 in the High Court of Madhya Pradesh, Jabalpur.*

***We on behalf of JOTI Journal wish His Lordship a very happy and successful tenure.***

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## APPOINTMENT OF ADDITIONAL JUDGES IN THE HIGH COURT OF MADHYA PRADESH

*Hon'ble Smt. Justice Vimla Jain and Hon'ble Shri Justice Mohammad Anwar Siddiqui have been administered oath of office by Hon'ble Shri Justice Syed Rafat Alam, Chief Justice, High Court of Madhya Pradesh on 13th September, 2010 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.*

*Hon'ble Smt. Justice Vimla Jain has been appointed as Additional Judge of High Court of Madhya Pradesh. Born on 11.06.1952 in Village Vidwas (Surkhi) District Sagar, M.P. Took primary education in her village and higher secondary education in Sagar. Obtained degrees of M.A., L.L.B. and B.Ed. from Vikram University, Ujjain. Joined Judicial Service as Civil Judge Class II at Indore on 12.08.1978. Was Promoted as Additional District Judge in the year 1991. Was granted Selection grade on 17.11.1997 and super time scale on 23.02.2005. Worked in different capacities as Additional District & Sessions Judge at Bhopal, Dewas and Shivpuri, Special Judge, Raisen, Additional Commissioner Gas Relief, Bhopal, District & Sessions Judge at Datia, Sehore and Tikamgarh and also as Principal Judge, Family Court, Gwalior. Was District and Sessions Judge, Rajgarh prior to elevation.*

*Has co-authored with her husband, Environmental Laws in India, M.P. Town Development Laws Manual and M.P. Educational Laws Manual. Published a number of articles in different periodicals.*

*Took oath as Additional Judge, High Court of Madhya Pradesh on 13.09.2010.*

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*Hon'ble Shri Justice Mohammad Anwar Siddiqui has been appointed as Additional Judge of High Court of Madhya Pradesh. Born on 01.07.1951. Joined the legal practice as an Advocate in the year 1974. Also worked as part-time law lecturer in Saifia College from 1975 to 1976. Was Head of the Department, Faculty of Law Ravindra College Bhopal for two years before joining Judicial Services. Joined Judicial Service as Civil Judge Class II on 07.08.1978 and was promoted as Additional District Judge on 09.08.1991. Was granted Selection Grade on 08.05.1999 and Super Time Scale on 01.04.2005. Worked in different capacities at different places i.e. Sehore, Bilaspur, Shujalpur, Beohari, Jawad, Basoda, Jagdalpur, Betul, Shajapur, Alirajpur, Gwalior, Chhatarpur, Tikamgarh Sehore and Mandla. Was Director, Public Prosecution, Bhopal prior to elevation.*

*Took oath as Additional Judge, High Court of Madhya Pradesh on 13.09.2010.*

***We on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.***

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## HON'BLE SHRI JUSTICE K.S. CHAUHAN & HON'BLE SHRI JUSTICE SHYAM SUNDER DWIVEDI DEMIT OFFICE

*Hon'ble Shri Justice Kedar Singh Chauhan demitted office on His Lordship's attaining superannuation. Was born on 06.05.1948. Joined Judicial Service as Civil Judge Class II on 21.6.1975 and was promoted as Additional District Judge on 27.6.1989. Worked in different capacities*

*as Additional Welfare Commissioner, Bhopal, District & Sessions Judge, Seoni, Registrar (Judicial) in the High Court of Madhya Pradesh and District & Sessions Judge, Jabalpur. Was District Judge (Vigilance) Jabalpur prior to elevation. Elevated as Additional Judge of High Court of Madhya Pradesh on 02.03.2007. Was accorded farewell ovation on 05.05.2010 in the High Court of Madhya Pradesh, Jabalpur.*

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*Hon'ble Shri Justice Shyam Sunder Dwivedi demitted office on His Lordship's attaining superannuation. Was born on 31.08.1948. Obtained Law Degree in 1969 and enrolled as Advocate in the same year and started his practice with his father at Mandsaur. Joined Judicial Service as Civil Judge Class II on 08.04.1970 and was promoted as Additional District Judge on 20.04.1987. Worked in different capacities as Additional Registrar, High Court of M.P., Jabalpur, District Judge (Vig.), Indore and Registrar (Vig.), High Court of M.P., Jabalpur. Was District & Sessions Judge, Indore prior to elevation. Elevated as Additional. Judge of M.P. High Court on 18.10.2005 and took oath as Permanent Judge on 2.2.2007. Was accorded farewell ovation on 30.08.2010 in the High Court of Madhya Pradesh, Bench Gwalior.*

***We on behalf of JOTI Journal wish Their Lordships a healthy, happy and prosperous life.***

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# PART - I

## प्रति प्रकरणों (दांडिक) (Cross-cases(criminal) के विचारण संबंधी विधि का विस्तार एवं प्रक्रिया एवं इस संदर्भ में उस दशा में प्रक्रिया क्या होना चाहिए जबकि एक आपराधिक प्रकरण मजिस्ट्रेट द्वारा विचारणीय है एवं दूसरा सत्र न्यायालय द्वारा

**न्यायिक अधिकारीगण**
**जिला झाबुआ**

दांडिक विचारण में प्रति प्रकरणों से तात्पर्य ऐसे मामलों से है जो एक ही घटना के आधार पर दोनों ही पक्षों के द्वारा एक दूसरे के विरूद्ध पेश किये गये हो। प्रायः इस प्रकार के प्रकरण एक ही दिन, एक ही समय, और एक ही स्थान पर उदभूत होते हैं। ऐसे मामलों में प्रायः दोनों पक्ष एक दूसरे के विरूद्ध थाने में रिपोर्ट करते है। दोनों ही पक्ष की रिपोर्ट पुलिस के द्वारा लिखी जाती है और अनुसंधान के बाद दोनों ही पक्षों के विरूद्ध पृथक–पृथक अभियोग पत्र पेश किये जाते है।

प्रायः इस प्रकार की स्थिति मारपीट, लड़ाई झगड़े के मामलों में देखने में आती है। लोग मारपीट या लड़ाई झगड़े के मामले में एक दूसरे के विरूद्ध रिपोर्ट करते हैं, क्योंकि ऐसे मामलों में प्रायः दोनों ही पक्षों के लोग घायल होते है।

कई बार ऐसा भी होता है कि मारपीट की घटना के एक पक्ष के द्वारा थाने में रिपोर्ट नहीं हो पाती है तो ऐसी अवस्था में दूसरे पक्ष के द्वारा परिवाद के आधार पर भी प्रति प्रकरण पेश हो सकता है।

प्रति प्रकरण के विचारण के लिए सर्वप्रथम यह देखना आवश्यक है कि दोनों प्रकरण प्रति प्रकरण की श्रेणी में आते है, अथवा नहीं? अर्थात् दोनों प्रकरण एक ही घटना से उद्भूत हुए है अथवा नहीं।

यदि दोनों ही प्रकरण एक ही घटना से उदभूत नहीं हो तो वे प्रति प्रकरण नहीं है। उदाहरण के लिए यदि किसी पक्ष के द्वारा पहले किसी स्थान पर मारपीट की जाती है और दूसरे पक्ष के द्वारा पहली घटना की प्रतिक्रिया के स्वरूप प्रथम पक्ष के घर पर या अन्य किसी स्थान पर जाकर पूर्व में हुई मारपीट के कारण लड़ाई झगड़ा किया जाता है तो दोनों मामले प्रति प्रकरण की श्रेणी में नहीं आते है, क्योंकि – घटना पृथक–पृथक स्थान पर पृथक–पृथक समय पर हुई है। दूसरी घटना पहली – घटना के प्रतिक्रिया के परिणामस्वरूप हुई है। अतः यदि दूसरी घटना प्रथम घटना की प्रतिक्रिया के परिणामस्वरूप हुई है तो ऐसे मामलें प्रति प्रकरण नहीं है।

प्रति प्रकरणों के विचारण के संबंध में विचारण के संबंध में वर्तमान में विधान की सुस्थापित विधि यह है कि दोनों ही प्रकरणों का विचारण एक ही न्यायालय के द्वारा किया जाएगा। यह आवश्यक नहीं है कि दोनों ही मामले एक ही दिन रखे जाएं। दोनों प्रति प्रकरण भिन्न–भिन्न तिथियों पर नियत किये जा सकते है, एक ही दिन नियत किये जा सकते है। परन्तु यह आवश्यक है कि दोनों प्रति प्रकरणों में एक ही दिन निर्णय दिया जाएगा। अर्थात् दोनों प्रति प्रकरणों का निर्णय एक ही तिथि पर करना आवश्यक है। भले ही उनका विचारण पृथक–पृथक तिथियों पर हुआ हो।

दोनों प्रति प्रकरणों में पृथक–पृथक साक्ष्य अभिलिखित की जाएगी। प्रति प्रकरण का निराकरण सिर्फ उस प्रकरण में पेश साक्ष्य के आधार पर होगा। प्रति प्रकरण के निराकरण में दूसरे प्रकरण में अभिलिखित साक्ष्य विचार में नहीं ली जा

सकती है। परन्तु यदि दूसरे प्रकरण में अभिलिखित की गई साक्ष्य विधि अनुसार प्रकरण में पेश की जाती है तो वह प्रकरण में साक्ष्य के रूप में ग्राह्य की जाएगी।

प्रति प्रकरणों में अभिलिखित पुलिस कथन दूसरे प्रति प्रकरण में साक्ष्य के रूप में ग्रहण नहीं किये जायेंगे। इस बाबद न्यायदृष्टांत *गजेन्द्रसिंह विरूद्ध उत्तर प्रदेश राज्य, ए.आई.आर, 1975 सुप्रीम कोर्ट 1703* उल्लेखनीय है। इसी प्रकार न्यायदृष्टांत *मिठ्ठूलाल विरूद्ध मध्यप्रदेश राज्य, ए.आई.आर., 1975 सुप्रीम कोर्ट 149* में यह प्रतिपादित है कि प्रति प्रकरण की दशा में एक प्रकरण की साक्ष्य दूसरे प्रकरण में विचार में नहीं ली जा सकती है।

एक पक्षकार प्रति प्रकरण के दस्तावेजों का उपयोग दूसरे प्रकरण में किस प्रकार कर सकता है, कुछ उदाहरण से स्पष्ट किया जा सकता है। यदि एक पक्ष ने एफ.आई.आर. लिखवायी हो जो दूसरे मुकदमे संलग्न है, और वह पक्षकार उस एफ.आई.आर. का उपयोग उस प्रकरण में करना चाहता है तो ऐसी अवस्था में उसे सर्वप्रथम उस एफ.आई.आर. की प्रमाणित प्राप्त करके उस प्रकरण में पेश करना चाहिए। तदुपरान्त उसे यह आवेदन देना चाहिए कि मूल एफ.आई.आर. प्रति प्रकरण में संलग्न है। दस्तावेज को साबित करने के लिए मूल प्रकरण की आवश्यकता पड़ेगी। इसलिए प्रति प्रकरण भी आज सुनवाई में साथ में रखा जाए। तदुपरान्त जब एफ.आई.आर. लिखने वाले पुलिस अधिकारी के बयान हो तब उस पुलिस अधिकारी से यह पूछा जाएगा कि उसने यह एफ.आई.आर. भी लिखी है। पुलिस अधिकारी के द्वारा उत्तर देने के बाद प्रति प्रकरण में संलग्न मूल एफ.आई.आर. पर संबंधित प्रदर्श डी–1 या अन्य अंकित किया जाएगा, और उस प्रकरण में पेश फोटो प्रति प्रदर्श डी–1–सी अंकित किया जाएगा। साथ में यह भी लिखा जाएगा कि मूल एफ.आई.आर. काउंटर प्रकरण में संलग्न है। इसी प्रकार की प्रक्रिया जब चिकित्सक के बयान होते है और एक ही चिकित्सक ने दोनों पक्षों का मेडिकल परीक्षण किया हो तो प्रक्रिया यह होगी कि प्रति प्रकरण में मूल एम.एल.सी. रिपोर्ट तथा मुलाहिजा ज्ञापन की प्रमाणित प्रति प्राप्त करके पेश करना पड़ेगी। संबंधित प्रकरण साक्ष्य में साथ में रखने के लिए आवेदन पेश करना पड़ेगा। जब चिकित्सक के बयान हो उस समय प्रतिपरीक्षण में चिकित्सक से यह पूछा जाएगा कि उसने इन–इन व्यक्तियों का भी मेडिकल परीक्षण किया था। चिकित्सक के द्वारा उत्तर देने के बाद दूसरे प्रकरण में संलग्न मूल प्रति पर प्रदर्श डी–1 या अन्य–सी अंकित किया जाएगा। इस प्रकार प्रति प्रकरण के दस्तावेज का उपयोग दूसरे प्रकरण में भी किया जा सकेगा और उन पर प्रदर्श अंकण किया जाएगा।

अभियुक्त अपनी प्रतिरक्षा के समय दं.प्र.सं. की धारा 233 (1) या 243 (1) के तहत प्रतिरक्षा के समर्थन में साक्ष्य पेश कर सकता है। धारा 233 (1) के उपबंधों के अनुसार कोई लिखित कथन भी पेश कर सकता है। प्रतिरक्षा साक्ष्य की अवस्था पर प्रति प्रकरण के दस्तावेज प्रतिरक्षा साक्षी के बयान करवाकर भी साबित किये जा सकते है।

यह उल्लेखनीय है कि कोई एक साक्षी उस प्रकरण में एक बार अभियोजन साक्षी के रूप में और दूसरी बार प्रतिरक्षा साक्षी के रूप में परीक्षित नहीं किया जाएगा। यदि पूर्व में साक्षी का बयान अभियोजन साक्षी के रूप में हो चुका हो तो बाद में उस गवाह को अभियुक्त अपनी प्रतिरक्षा में बुलाना चाहे तो ऐसे गवाह का बयान पूर्व में जो बयान हुआ था उसके आगे अभिलिखित किया जाएगा।

अभियोजन यह निवेदन कर सकता है कि प्रतिरक्षा साक्षी के संबंध में अभियोजन को प्रतिपरीक्षण का अवसर दिया जाए।

न्याय दृष्टांत *नत्थीलाल विरूद्ध उत्तरप्रदेश राज्य, 1990 एस.सी.सी. (क्रिमिनल) 638 {1990 सप्लीमेन्ट्री एस.सी.सी., 145}* में माननीय सर्वोच्च न्यायालय द्वारा प्रतिप्रकरणों के विचारण एवं निराकरण के संबंध में यह मत व्यक्त किया गया कि दोनों प्रतिप्रकरणों को एक ही न्यायाधीश द्वारा एक के बाद एक निराकृत किया जाना चाहिए। एक प्रकरण में साक्ष्य अभिलेखन पूर्ण होने पर उसे तर्क सुनना चाहिए और निर्णय को सुरक्षित रखते हुए दूसरे प्रकरण में साक्ष्य अभिलिखित होने के उपरांत अंतिम तर्क सुनना चाहिए और ऐसे दूसरे प्रकरण में भी निर्णय सुरक्षित रखकर दोनों प्रकरणों को दो पृथक–पृथक निर्णयों से निराकृत करना चाहिए। यह विधि भी प्रतिपादित की गई है कि प्रत्येक मामले को निराकृत करने में न्यायाधीश को उस विशिष्ट प्रकरण में प्रस्तुत साक्ष्य पर ही निर्भर रहना चाहिए और दूसरे प्रकरण की साक्ष्य को विचार में नहीं लिया जाना चाहिए और ना ही दूसरे प्रकरण में प्रस्तुत तर्क विचार में लेना चाहिए और प्रत्येक प्रकरण को उसके प्रतिप्रकरण में प्रस्तुत साक्ष्य और तर्क से किसी भी प्रकार से प्रभावित हुए बिना मात्र उस प्रकरण में प्रस्तुत साक्ष्य और तर्क के आधार पर निराकृत करना चाहिए *म.प. राज्य विरूद्ध मिश्रीलाल, ए.आई.आर. 2003 सु.को. 4089 = 2005 (1) जे.एल.जे. 153 (सुप्रीम कोर्ट) एवं सुधीर एवं अन्य विरूद्ध म.प्र. राज्य, ए.आई.आर. 2001 सु.को. 826* में माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत नत्थीलाल में प्रतिपादित न्याय सिद्धांत को अनुसरित किया गया है। इन दोनों न्यायदृष्टांतों में माननीय सुप्रीम कोर्ट ने प्रति प्रकरणों का विचारण किस प्रकार किया जाएगा उसे सारवान रूप से लिखा है।

न्यायदृष्टांत *कुलवंतसिंह विरूद्ध अमरजीतसिंह, ए.आई.आर. 2000 सुप्रीम कोर्ट 1212* में यह भी प्रतिपादित है कि क्रास अपीले भी साथ–साथ सुनी जाना चाहिए।

न्यायदृष्टांत *केवल कृष्ण विरूद्ध सूरजभान, ए.आई.आर. 1980 सुप्रीम कोर्ट 1780* में यह भी प्रतिपादित है कि प्रति प्रकरणों की सुनवाई एक ही न्यायालय के द्वारा की जाना चाहिए। इस मामलें में एक प्रकरण पुलिस रिपोर्ट के आधार पर था संस्थित और दूसरा प्रकरण परिवाद के आधार पर संस्थित किया गया था। ऐसी अवस्था में यह प्रतिपादित है कि दोनों मामले एक ही न्यायालय के द्वारा सुने जाना चाहिए।

न्यायदृष्टांत *हिमाचल प्रदेश राज्य विरूद्ध माधोराम, 1986 सी.आर.एल.जे. 65* (हिमाचल प्रदेश) में स्थिति यह थी कि प्रति प्रकरणों में से एक प्रकरण भारतीय दंड संहिता की धारा – 302 के तहत पेश हुआ था और दूसरा प्रकरण मजिस्ट्रेट के द्वारा विचारण योग्य था। मजिस्ट्रेट ने दं.प्र.सं. की धारा – 323 के तहत प्रकरण सत्र सुपुर्द किया ऐसे आदेश को विधिमान्य किया गया है और यह प्रतिपादित है कि सत्र न्यायालय को सुनवाई का क्षेत्राधिकार है। इस बाबद न्यायदृष्टांत *राजेन्द्रसिंह विरूद्ध मध्यप्रदेश राज्य, 1986 एम.पी.एल.जे. नोट 5* भी उल्लेखनीय है।

न्यायदृष्टांत *हाकिमसिंह विरूद्ध मध्यप्रदेश राज्य, 1994 जे.एल.जे. 595 (डी.बी.) में बनप्पा विरूद्ध एम्परर, ए.आई.आर. 1944 बोम्बे 146, उजागरसिंह विरूद्ध एम्परर, 1936 लाहौर 356, रन्छोड़ विरूद्ध राज्य, ए.आई.आर. 1954 सौराष्ट्र 27, राजेन्द्रसिंह विरूद्ध मध्यप्रदेश राज्य 1986 एम.पी.एल.जे., नोट 5* तथा *केवल कृष्ण (उपरोक्त)* का संदर्भ देकर प्रतिपादित किया गया है कि एक ही घटना से उदभूत मामले एक के बाद एक सुने जाना चाहिए। विरोधी निष्कर्ष के परिवर्जन के लिए यह आवश्यक है।

अतः प्रति प्रकरणों के संबंध में *1918 मैसूर लॉ जर्नल 29 गोरीअप्पा* के प्रकरण से लेकर *ए.आई.आर. 1930, मद्रास 190* में भी अर्थात 92 वर्षों से लगभग स्थिति चली आ रही है कि प्रति प्रकरणों का विचारण एक ही न्यायाधीश को करना चाहिए और एक ही न्यायाधीश को एक साथ निर्णय देना चाहिए। पूर्व में ऐसा करना उचित या वांछनीय माना जाता था। परन्तु तदुपरान्त न्याय दृष्टांतों *नत्थीलाल (उपरोक्त)* और *सुधीर (उपरोक्त)* के बाद माननीय सर्वोच्च न्यायालय द्वारा दिये गये निर्णय के द्वारा यह निर्णायज विधि हो गयी है। *केवल कृष्ण (उपरोक्त)* के मामले में यह कहा गया है कि यह वांछनीय है कि प्रति प्रकरणों का विचारण एक ही न्यायालय के द्वारा पृथक–पृथक किया जाए। परन्तु बाद में *नत्थीलाल (उपरोक्त)* और *सुधीर (उपरोक्त)* के प्रकरण से यह स्थिति हुई कि दोनों प्रति प्रकरणों का विचारण एक ही न्यायालय के द्वारा किया जाना चाहिए। यहां यह भी उल्लेखनीय है कि यदि मुख्य न्यायिक मजिस्ट्रेट द्वारा कोई प्रकरण दं.प्र.सं. की धारा 192 या 410 के अंतर्गत किसी अन्य मजिस्ट्रेट को जांच या विचारण हेतु सौपा जाता है तब यदि ऐसे अंतरित होने वाले प्रकरण का कोई प्रतिप्रकरण है तो उसे भी उस मजिस्ट्रेट के न्यायालय में अंतरित किया जाना चाहिए ताकि दोनों प्रकरणों का विचारण एवं निराकरण एक ही मजिस्ट्रेट द्वारा किया जाना सुनिश्चित हो सके।

इसी प्रकार यदि प्रतिप्रकरणों में से किसी एक प्रकरण को अभियोजन द्वारा दं.प्र.सं. की धारा 321 के प्रावधानों के अंतर्गत वापस लिये जाने हेतु आवेदन पत्र प्रस्तुत किया गया है एवं दूसरे प्रकरण को वापस लिये जाने की अनुमति नहीं चाही गई हो तब ऐसा एक प्रकरण वापस लिये जाने की अनुमति नहीं दी जानी चाहिए। यदि दोनों प्रतिप्रकरणों को वापस लिये जाने हेतु आवेदन पत्र प्रस्तुत किया जाता है तभी धारा 321 दं.प्र.सं. के प्रावधानों के अंतर्गत ऐसे प्रकरणों को वापस लेने की अनुमति दी जा सकती है।

विचारण के दौरान ऐसी नौबत आ सकती है कि दोनों प्रकरण निर्णय पूर्व बहस हेतु नियत हो और प्रति प्रकरण का एक या सब अभियुक्त भाग जाए या फरार हो जाए। यह भी संभव है कि वे फरार अभियुक्त लम्बे समय तक पकड़ में नहीं आये और एक प्रकरण के अभियुक्त जेल से अभिरक्षा में पेश होते रहे। ऐसी अवस्था में जो अभियुक्त निरोध में हो उनके मामलें में निर्णय दिया जा सकता है। यदि ऐसा नहीं किया गया तो अभिरक्षा में पेश होने वाले अभियुक्तों को सिर्फ इस कारण निरोध में रहना पड़ेगा कि प्रति प्रकरण का अभियुक्त फरार हो गया है।

न्यायदृष्टांत *बाबू विरूद्ध म.प्र. राज्य, 1988 (1) म.प्र. वि.नो. 128* में स्थिति यह थी कि सत्र प्रकरण में गवाही पूर्ण हो चुकी थी। दूसरा प्रकरण न्यायिक मजिस्ट्रेट के समक्ष लंबित था जिसमें साक्ष्य होना बाकी थी। इस मामलें में यह कहा गया है कि दोनों प्रकरण साथ–साथ नहीं चल सकते।

ऐसी स्थिति भी आ सकती है कि एक प्रकरण की सुनवाई पूर्ण हो चुकी हो और अभियुक्त निरोध में हो तथा प्रति प्रकरण का एक अभियुक्त जमानत पर हो और वह प्रकरण सत्र सुपुर्द होना शेष हो, या उसमें कुछ अभियुक्त उपस्थित हुए हो और कुछ फरार हो तो ऐसी अवस्था में भी निरोध अभियुक्तों के प्रकरण का निर्णय तब तक मुल्तवी करना उचित नहीं होगा जब तक कि जमानत वाले अभियुक्त का प्रकरण जो कि सत्र सुपुर्द हुआ है या सत्र सुपुर्द होने की प्रतीक्षा में हो की सुनवाई पूर्ण नहीं हो जाए। यदि ऐसा किया गया तो अभिरक्षा में जो अभियुक्त है उन पर प्रतिकूल असर पड़ेगा। संभवतः यही कारण है कि *केवलकृष्ण (उपरोक्त)* वाले मामले में माननीय सुप्रीम कोर्ट ने वांछनीय शब्द का उपयोग किया है और इस प्रक्रिया को बंधनकारक नहीं बताया है।

यदि प्रति प्रकरणों में से एक प्रकरण सत्र न्यायालय द्वारा विचारण योग्य हो और दूसरा प्रकरण न्यायिक मजिस्ट्रेट के द्वारा विचारण योग्य हो तो ऐसी अवस्था में दोनों प्रकरणों का विचारण सत्र न्यायालय द्वारा किया जायेगा।

यदि दो प्रति प्रकरणों में से एक प्रति प्रकरण भारतीय दंड संहिता की धारा 307 तहत पुलिस के द्वारा पेश किया गया हो, और दूसरा प्रकरण भारतीय दंड संहिता की धारा 325 के तहत पेश हो तो दोनों ही प्रकरण एक ही सत्र न्यायालय द्वारा सुने जाएंगे। यदि आरोप पूर्व तर्क की अवस्था पर सत्र न्यायालय यह उपधारणा करता हो कि भारतीय दंड संहिता की धारा – 307 का आरोप विरचित करने के लिए पर्याप्त आधार नहीं है एवं उसमें भारतीय दंड संहिता की धारा 325 के तहत आरोप विरचित करना चाहिए। ऐसी अवस्था में सत्र न्यायालय दोनों ही प्रकरणों को मुख्य न्यायिक मजिस्ट्रेट को अथवा संबंधित न्यायिक मजिस्ट्रेट को दंड प्रक्रिया संहिता की धारा 228 (1) के तहत प्रति प्रेषित करेगा।

जब एक दांडिक मामला मजिस्ट्रेट के द्वारा और दूसरा सत्र न्यायालय के द्वारा विचारण योग्य हो तो दोनों मामलों का विचारण सत्र न्यायालय द्वारा किया जाएगा। इस बाबद न्यायदृष्टांत *सुधीर (उपरोक्त)* उल्लेखनीय है। इस न्यायदृष्टांत में *कृष्णा पन्नाड़िया विरूद्ध एम्परर, ए.आई.आर. 1930 मद्रास 190* का संदर्भ देकर यह लिखा गया है कि प्रति प्रकरणों की सुनवाई के लिए कोई स्पष्ट कानून नहीं है। इस खामी का उपचार विधायिका को करना चाहिए। मान्यता प्राप्त सामान्य नियम यह है कि ऐसे प्रकरण एक के बाद एक, एक ही न्यायाधीश के द्वारा सुने जाए और ऐसा न्यायाधीश दोनों मामलों में तब तक निर्णय नहीं देगा जब तक कि दोनों प्रकरणों की सुनवाई पूर्ण नहीं हो जाए। इस न्यायदृष्टांत में माननीय सर्वोच्च न्यायालय ने दं.प्र.सं. की धारा 26 के अंतर्गत सत्र न्यायालय को सभी अपराधों के विचारण की अधिकारिता होने के कारण धारा 228 (1) (क) दं.प्र.सं. में प्रयुक्त शब्द 'कर सकेगा' (may presume) का अर्थ यह होना व्यक्त किया है कि जब प्रकरण अनन्यतः सत्र न्यायालय द्वारा विचारणीय न हो तब सत्र न्यायालय के लिए यह आज्ञापक नहीं है कि प्रकरण मुख्य न्यायिक मजिस्ट्रेट को अंतरित करे। माननीय सर्वोच्च न्यायालय द्वारा यह विनिश्चित किया गया है कि जब एक प्रकरण अनन्यतः सत्र न्यायालय द्वारा विचारणीय हो और उसका प्रतिकरण अनन्यतः सत्र न्यायालय द्वारा विचारणीय न हो तो ऐसी दशा में दोनों प्रकरणों को सत्र न्यायालय द्वारा निराकृत किया जाना चाहिए।

दं.प्र.सं. की धारा 323 में भी यह उपबंध है कि यदि किसी मजिस्ट्रेट के समक्ष जांच या विचारण में मजिस्ट्रेट को यह प्रतीत होता हो कि मामला ऐसा है जिसका विचारण सत्र न्यायालय द्वारा किया जाना चाहिए तो मजिस्ट्रेट ऐसा प्रकरण सत्र सुपुर्द कर देगा। अतः दं.प्र.सं. की धारा 323 के तहत मजिस्ट्रेट को यह अतिरिक्त शक्ति प्राप्त है।

तदानुसार प्रतिप्रकरणों (दांडिक) के संबंध में सामान्य विधि यह है कि उनका विचारण एवं निराकरण एक ही न्यायालय द्वारा किया जाना चाहिए और यदि उनमें से एक प्रकरण अनन्यतः सत्र न्यायालय द्वारा विचारणीय हो एवं दूसरा प्रकरण मजिस्ट्रेट द्वारा विचारणीय हो तब दोनों प्रकरणों का विचारण और निराकरण सत्र न्यायालय द्वारा ही किया जाना चाहिए। किंतु यदि एक प्रकरण पहले ही निराकृत हो चुका हो या एक प्रकरण में अभियुक्त अनुपस्थित हो और दूसरे का आरोपी निरोध में रहने से या अन्यथा किसी कारण से उसका शीघ्र विचारण और निराकरण आवश्यक हों या एक प्रकरण अत्यंत प्रारंभिक अवस्था में हो और दूसरा निराकरण की अंतिम स्थिति में हो तब यह समीचीन होगा कि ऐसे दूसरे प्रकरण को प्रतिप्रकरण के साथ निराकरण करने तक रोकने के स्थान पर उसका प्रतिप्रकरण के पहले ही निराकरण कर दिया जाए।

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# SCOPE AND POWERS OF PERMANENT LOK ADALAT

**Judicial Officers**
**Districts Mandleshwar,**
**Narsinghpur and Shivpuri**

## Concept of Lok Adalat

In pursuance of Directive Principles of State Policy capsulized under Article 39-A of the Constitution of India, the Parliament has passed the Legal Services Authorities Act, 1987 (in short "the Act") to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organise Lok Adalats to secure that the operation of the legal system promotes justice on the basis of equal opportunities. The introduction of Lok Adalats added a new chapter to the justice dispensation system and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. This mechanism involves people who are directly or indirectly affected by dispute resolution. The evolution of this movement was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice. The system of Lok Adalat, which is an innovative mechanism for alternate dispute resolution, is most popular and effective amongst litigants, because of its innovative nature and inexpensive style. The advent of the Act gave a statutory status to Lok Adalats pursuant to the Constitutional mandate enshrined in Article 39–A of the Constitution of India.

## Composition of Lok Adalat

As the law relating to the composition of Lok Adalats revealed that mainly three type of Lok Adalats have been organized viz.

(i) Lok Adalat organized under Section 19 of the Act composition of which has been envisaged in the Lok Adalat Scheme, 1997 applicable to the State of M.P.;

(ii) Permanent and Continuous Lok Adalat organized as per Instructions of 1998 issued under the Lok Adalat Scheme, 1997; and

(iii) Permanent Lok Adalat established under Section 22-B of the Act, which is only for the cases relating to the public utility services.

### *(I) Lok Adalat organized under Section 19*

Chapter VI of the Act dealt with Lok Adalats wherein provision with regard to the organization of Lok Adalat is given in Section 19. Such Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before any Court or, any matter which is falling within the jurisdiction of and is not brought before any Court. The relevant portion of Section 19 of the Act reads as follows:

**Section 19.** (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organized for an area shall consist of such number of :-

(a) serving or retired judicial officers, and

(b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organizing such Lok Adalats.

(3) .....

(4) .....

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:-

(i) any case pending before, or

(ii) any matter which is falling within the jurisdiction of and is not brought before, any Court for which the Lok Adalat is organized.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under the law.

In the State of M.P., in exercise of the powers conferred by Clause (g) of Section 2 read with Clause (a) and (b) of Sub-section (2) of Section 7 of the Act, the M.P. State Legal Services Authority has made the scheme namely, 'Lok Adalat Scheme, 1997' (in short, "the Scheme") for organising Lok Adalat. Section 5 of the Scheme provides composition of the Lok Adalat at various levels namely- at the High Court level, at the District level and at the Taluk (Tahsil) level. The Scheme further provided for functioning of the Lok Adalat, holding of Lok Adalat, procedure for effecting compromise or settlement at Lok Adalat and its awards and orders. Such Lok Adalats shall have the same jurisdiction as of a Lok Adalat constituted under Section 19 of the Act.

### *(II) Organization of Permanent and Continuous Lok Adalats*

The M.P. State Legal Services Authority has also issued the instructions to organise "Permanent and Continuous Lok Adalats" under the Scheme which are known as the "Instructions of 1998" whereby, the M.P. State Legal Services

Authority has laid down the procedure for organising Permanent and Continuous Lok Adalats for the High Court and at every district headquarter. Such Lok Adalat shall have jurisdiction over a dispute, which is yet not instituted before a regular Court, to ascertain the controversy by perusing the pleadings, documents and other material on the record, however, without recording any evidence and pass an order or award on the basis of the settlement arrived at between the parties. Instructions for the District Legal Services Authorities needs to be quoted here which read as under;-

**Part-II For District Authorities**

1. (a) At every district headquarter atleast one Additional District Judge and also a Civil Judge Class I should be nominated to hold Lok Adalat on a permanent basis. Such Lok Adalat shall hold its sitting once in a month on non-working Saturday or Sunday, as the case may be.

   (b) Each Bench of the Lok Adalat at district level be constituted comprising two or three of the following:

   (i) Serving Judicial Officer,

   (ii) Any eminent person in the field of Law or a social worker.

   (iii) A Member of Legal Profession.

Such Bench or Benches of Lok Adalat shall be assisted by Class III and Class IV staff members of the Court of concerning Presiding Officer.

At district headquarter, Secretary of the district authority with the prior approval of the Chairman shall constitute Benches of Lok Adalat.

2. (i) A party desirous of his dispute to be decided by amicable settlement, before instituting the case in Court, shall file its case before Secretary of the concerned Committee. No Court fees shall be paid on such suit or petition.

   (ii) After presentation of the suit, it will be registered as a case for conciliation.

   (iii) After registration of the case, if opposite party is not present, then notices shall be issued to the opposite party/parties directing it/them to appear before the Bench of Lok Adalat, but no coercive processes shall be issued to compel the appearance of the parties. To ensure the service of notices, the same may be issued by registered post at the expenses of the District Authority/Taluka Committee as the case may be.

   (iv) On appearance of both the parties before the Lok Adalat, the bench of such Lok Adalat shall assist and advice and also give suggestions to the parties to settle the dispute amicably. The opposite party shall have the right to file written statement.

3. If any of such parties is not represented by a counsel, the Bench of Lok Adalat shall provide the assistance of the Legal Aid Officer to such party/parties to prepare and submit their case before the Bench of Lok Adalat and assist them and also the Bench of Lok Adalat in arriving at compromise between the parties.

4. The Bench of Lok Adalat will try to arrive at a amicable settlement between the parties within a reasonable time as far as possible within 3 months, from the date of appearance of the opposite party:

(i) The Bench of Lok Adalat shall pass such legal order or award on the basis of the settlement arrived at between the parties, as it may deem proper in the ends of justice.

(ii) The Bench shall have no right to record any evidence. But after perusing the pleadings, documents and other material available on the record the bench may ascertain the controversy between the parties.

(iii) After making all possible efforts by the parties and the bench, if the dispute could not be settled amicably, the bench shall advise the party/ petitioner to seek his remedy in the competent Court of law having jurisdiction.

5. Any order/award passed by Lok Adalat in pre-litigation and pending cases, its execution application shall be presented to the Court of District Judge and the District Judge shall have jurisdiction to make over the execution applications to the competent court having jurisdiction in the matter.

***(III) Establishment of Permanent Lok Adalat for cases in respect of public utility services***

In 2002, Parliament brought about certain amendments in the Act. The said amendment introduced new Chapter VI-A with the caption "PRE-LITIGATION CONCILIATION AND SETTLEMENT." Section 22-B of the Act envisages establishment of Permanent Lok Adalat at different places for considering the cases in respect of public utility services for which no dispute is pending before any Court. The public utility services are defined in Section 22-A of the Act which are as under;-

22A. .....

(b) "public utility services" means any:

(i) Transport service for the carriage of passengers or goods by air, road or water, or

(ii) postal, telegraph or telephone service, or

(iii) supply of power, light or water to the public by any establishment, or

(iv) system of public conservancy or sanitation, or

(v) service in hospital or dispensary, or

(vi) 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 of the Act provides for establishment of Permanent Lok Adalat for cases relating to public utility services. The same reads as below :-

*22B. Establishment of Permanent Lok Adalats.–*

(1) Notwithstanding anything contained in Section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

(2) Every Permanent Lok Adalat established for an area notified under sub–section (1) shall consist of :-

(a) a person, who is or has been, a District Judge or Additional District Judge or has held judicial office higher in rank than that of the District Judge, shall be the Chairman of the Permanent Lok Adalat; and

(b) two other persons having adequate experience in public utility service to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority,

appointed by the Central Authority or as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other person referred to in clause (b) shall be such as may be prescribed by the Central Government.

**Scope of Lok Adalat**

As it is evident from the aforesaid composition of Lok Adalats, that three type of Lok Adalats have been organized and the scope of these Lok Adalats can be understand from the extent of their jurisdiction and powers to take cognizance of cases.

*Scope of a Lok Adalat organized under Section 19 and a Permanent and Continuous Lok Adalat at district headquarter organized under the Instructions of 1998 :*

Sub-section (5) of Section 19 of the Act provides that a Lok Adalat (organised under this Section) shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before any Court or, any matter which is falling within the jurisdiction of and is not brought before any Court. Provided that such a Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law. In the State of M.P., a Lok Adalat organised under Section 5 of the Scheme shall have the same jurisdiction as of a Lok Adalat constituted under Section 19 of the Act.

Section 20 of the Act provides cognizance of cases by Lok Adalat. A Court before whom a case is pending and the parties thereof agree or one of the parties thereof makes an application to the Court, for referring the case to the Lok Adalat for settlement and if such Court is prima facie satisfied that there are chances of settlement, or the matter is an appropriate one to be taken cognizance by the Lok Adalat, the Court shall refer the case to the Lok Adalat. The Authority or Committee organizing the Lok Adalat under Section 19 of the Act may, on receipt of an application from any one of the parties to any matter which is not brought before any Court and needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat for determination.

As stated herein above, a Permanent and Continuous Lok Adalat at district headquarter organized under the Instructions of 1998 shall have jurisdiction over a dispute, which is yet not instituted before a regular Court. In other words, such Lok Adalat is competent to take cognizance of a dispute at pre-litigation stage.

A party desirous of his dispute to be decided by amicable settlement before instituting the case in Court, can file its case before Secretary of the concerned Authority or Committee and same will be registered as a case for conciliation. Thereafter, the notice shall be issued to the opposite party and on appearance of both the parties the Lok Adalat shall assist and advise and also give suggestions to the parties to settle the dispute amicably. Such a Lok Adalat can ascertain the controversy by perusing the pleadings, documents and other material on the record, and pass an order or award on the basis of the settlement arrived at between the parties. However, such a Lok Adalat shall have no power to record any evidence or to decide the case on merits and shall have no jurisdiction in respect of a case or matter relating to an offence not compoundable under the law.

After making all possible efforts, if the dispute could not be settled amicably, the Lok Adalat shall advise the party to seek his remedy in the competent Court.

However, it is pertinent to note that the terms "jurisdiction to determine" does not connote as the competency to decide the case on merit. A Lok Adalat, whether it is organized under Section 19 of the Act and the Scheme or organized as Permanent and Continuous Lok Adalat under the Instructions of 1998, in any way, shall have no jurisdiction to decide any case whether pending in any Court or any matter not brought before any Court on merit.

In *State of Punjab v. Jalour Singh, AIR 2008 SC1209,* the Supreme Court has held that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the Court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a Court does. It discusses the subject-matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act neither contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

It is further held that Lok Adalats should resist their temptation to play the part of Judges and constantly strive to function as conciliators. The endeavour and effort of the Lok Adalats should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strength and weaknesses, advantages and disadvantages of their respective claims.

The Supreme Court in its recent decision rendered in *B.P. Moideen v. A.M. Kutty Hassan, (2009) 2 SCC 198* has, while considering the scope and purpose of Lok Adalat, held that when a case is referred to the Lok Adalat for settlement, two courses are open to it: (a) if a compromise or a settlement is arrived at between the parties to make an award, incorporating such compromise or settlement (which when signed by the parties and countersigned by the members of the Lok Adalat, has the force of decree); or (b) if there is no compromise or settlement, to return the record with a failure report to the Court. There can be no third hybrid order by the Lok Adalat containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such direction. In fact, there cannot be an "award" when there is no settlement. Nor can there be any "directions" by the Lok Adalat determining the rights/ obligations/ title of parties, when there is no settlement. The settlement should precede the award and not vice-versa.

The Supreme Court, by elucidating the role of Courts with reference to Lok Adalat, observed that Lok Adalat is an alternative dispute resolution mechanism. Having regard to Section 89 of the Code of Civil Procedure, it is the duty of court to ensure that parties have recourse to the alternative dispute resolution (for short "ADR") processes and to encourage litigants to settle their disputes in an amicable manner. But there should be no pressure, force, coercion or threat to the litigants to settle disputes against their wishes.

It is further observed that Section 20(5) of the Act statutorily recognises the right of a party whose case is not settled before the Lok Adalat to have his case continued before the Court and have a decision on merits.

*Scope of Permanent Lok Adalat established under Section 22-B of the Act for cases in respect of public utility services :*

The scope of the Lok Adalat established under Section 22-B of the Act is limited to the matters pertaining to the public utility services as it is meant for exercising the jurisdiction in respect of cases relating to any of the public utility services and it shall have power to determine the case on settlement arrived at between the parties by conducting conciliation or, if the parties fail to reach at an agreement of settlement, even deciding the dispute on merit. While conducting conciliation proceedings or deciding the dispute on merit, Permanent Lok Adalat shall be guided by the Principles of natural Justice, objectivity, fair play, equity and other principles of justice, as the procedure to be followed by it is ruled under Section 22-D.

The only restriction for Permanent Lok Adalat established under Section 22-B is that it shall not have jurisdiction to consider a dispute relating to an offence not compoundable under any law or any matter where the value of the property in dispute exceeds rupees 10 lakhs. The award of the Permanent Lok Adalat, whether made on merit or on settlement, shall be final and binding on parties and be deemed to be a decree of a Civil Court. It shall be executed as if it is a decree of a Civil Court having jurisdiction in respect of the dispute involved.

In order to understand the scope of the Permanent Lok Adalat introduced by Chapter VI-A, it is pertinent to reproduced the relevant provisions in this regard. Section 22-C provides for cognizance by Permanent Lok Adalat which reads as thus;-

**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 in the Official Gazette, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

(2) After an applicant in 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) Where an application is made to a Permanent Lok Adalat under Sub Section (1), it :-

(a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support or, in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application.

(b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings.

(c) shall communicate any document or statement received by it form any party to the application to the other party, to enable such other party to present reply thereto.

(4) When statement, additional statement and reply, if any, have been filed under Sub section (3) to the satisfaction of the Permanent Lok Adalat it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(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 co-operate 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 agreement on the settlement of dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms there of 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.

Section 22-C 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 Permanent Lok Adalat shall do so, and the other party is precluded from approaching the Civil Court in such a case.

It is evident from the above mentioned provisions that the Permanent Lok Adalat is competent only to take cognizance in the matter related to the public utility services and if such matter is not already sub-judice.

In *Dinesh Kumar v. Balbir Singh, AIR 2008 HP 59* the Himachal Pradesh High Court held that Permanent Lok Adalat, could only take cognizance of matter if it was not pending before any other Court. Where matter was pending before the Motor Accident Claims Tribunal, same could only be referred to Lok Adalat as per Section 20 of the Act and not to Permanent Lok Adalat.

It reveals from Section 22-C of the Act that the Permanent Lok Adalat established under Chapter VI-A of the Act has power to decide the dispute on merit if such dispute could not be resolved by mutual settlement. But, such adjudicatory powers should be exercised with due care and caution because it is a primary duty of Permanent Lok Adalat to conduct conciliation proceedings between the parties to bring an amicable settlement to the dispute.

The Apex Court in *United India Insurance Co. Ltd. v. Ajay Sinha, AIR 2008 SC 2398,* while dealing with the jurisdictional aspect of the Permanent Lok Adalat established under Section 22-B of the Act has observed that 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.

The Court has further observed that 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 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."

**Powers of Lok Adalat or Permanent Lok Adalat**

As it is revealed from the above mentioned legal position that all three type of Lok Adalats are constituted under different provisions under which their jurisdiction and power to take cognizance has been envisaged. Apart from the powers as to taking cognizance of the cases, a Lok Adalat shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of certain matters.

Section 22 of the Act provides for powers of Lok Adalat and Permanent Lok Adalat. Section 22-A of the Act, which defines Permanent Lok Adalat, makes Section 22 of the Act applicable to the Permanent Lok Adalat established for cases relating to the public utility services under Section 22-B of the Act. The powers of Lok Adalat or Permanenet Lok Adalat are as follows;

(1) The Lok Adalat or Permanent Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

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

(b) The discover and production of any document

(c) The reception of evidence on affidavits;

(d) the requisitioning of any public record or document or copy of such record or document from any Court or office; and

(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1) every Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Sections 193,219 and 228 of the Indian Penal

Code (45 of 1860) and every Lok Adalat shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

For the purpose of holding any determination, the permanent Lok Adalat shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of summoning and enforcing of attendance and examining of witnesses, discovery or production of documents reception of evidence on affidavits, requisitioning of public records and documents and such other matter as the Government may prescribe. Permanent Lok Adalat can specify its own procedure for deciding the dispute coming before it and the proceeding shall be deemed to be judicial proceeding. But these powers does not confer the authority to a Lok Adalat organized under Section 19 of the Act of which composition has been envisaged in the Scheme and a Permanent and Continuous Lok Adalat organized as per Instructions of 1998 issued under the Scheme to decide any case by recording evidence of the parties on merits.

**Conclusion**

The scope and powers of a Lok Adalat organized under Section 19 of the Act of which composition has been envisaged in the Scheme (applicable to the State of M.P.) and a Permanent and Continuous Lok Adalat organized as per Instructions of 1998 issued under the Scheme (applicable to the State of M.P.) are same as both shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute. The Permanent and Continuous Lok Adalat shall have power to ascertain the controversy by perusing the pleadings, documents and other material on the record, however, without recording any evidence, and pass an order or award on the basis of the settlement arrived at between the parties. However, a Lok Adalat, whether it is organized under Section 19 of the Act and the Scheme or organized as Permanent and Continuous Lok Adalat under the Instructions of 1998 shall have no power to decide any case on merits.

Where as a Permanent Lok Adalat established under Section 22-B of the Act which is only for the cases relating to the public utility services can decide the case on merit if parties fail to reach an agreement to settle the dispute amicably. But, such adjudicatory powers should be exercised with due care and caution because it is a primary duty of Permanent Lok Adalat to conduct conciliation procedings between the parties to bring an amicable settlement to the dispute.

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# ASSESSMENT OF COMPENSATION UNDER SECTION 163-A OR SECTION 166 OF THE MOTOR VEHICLES ACT, 1988 IN CASE OF DEATH OF A CHILD

**Judicial Officers**
**Districts Dewas and Ujjain**

The Indian Motor Vehicles Act, 1914 was the first enactment relating to motor vehicles. Before 1914, in India a claim for damage owing to injuries suffered by reason of negligence on the part of the driver of a motor vehicle used to be governed only by the Law of Torts. The Motor Vehicles Act, 1939 which replaced the 1914 Act, consolidated and amended the law relating to motor vehicles in India. The Motor Vehicles Accidents Claims Tribunals purporting to be providing for speedy trial were established for the first time in the year 1956 to deal with such claims. The Law Commission submitted its report in 1987 and in view of the recommendations of the Law Commission, the present 'Motor Vehicles Act, 1988' (in short "the Act") was enacted. However, having regard to the number of representations received from various quarters, a Review Committee was constituted by the Government of India in the year 1990 to examine the Act. In terms of recommendations of the Review Committee, as also the recommendations of Transport Development Council, the Act was amended. Section 163-A was inserted the by Act No. 54 of 1994 which came into force from 14th November, 1995.

Before dwelling upon the matter regarding claim of a child victim, we must appreciate the basic distinction between the provisions of Sections 163-A and 166 of the Act. A perusal of Section 163-A shows that the compensation under this provision is to be determined as provided in the Second Schedule of the Act. A multiplier system was introduced according to which the amount of compensation is required to be calculated having regard to the age of the victims and his annual income. A note is appended to the Second Schedule in terms that the amount of compensation so arrived at in the case of fatal accident, is to be reduced by one-third, in consideration of the expenses which the victim would have incurred towards maintaining himself, had he been alive. The Schedule also provide that the amount of compensation shall not be less than Rs. 50,000/-. It also provides for grant of compensation under several heads: namely (a) general damages in case of death, (b) general damages in case of injuries and disabilities, (c) disability in non-fatal accidents and (d) notional income for compensation to those who had no income prior to accident at Rs. 15,000/- per annum. However, this benefit can be availed of by the claimant only by restricting his claim on the basis of income at a slab of Rs. 40,000/- per annum which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no fault liability to a certain limit.

The Apex Court, in the case of *Deepal Girish Bhai v. United Insurance Co. Ltd. Baroda, AIR 2004 SC 2107* has held that:

"The scheme envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set off against a higher compensation unlike Section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs. 40,000/- or less is covered thereunder whereas Section 140 and 166 cater to all sections of society."

"It may be true that Section 163-B provides for an option to a claimant to either go for a claim under Section 140 or Section 163-A of the Act, as the case may be, but the same was inserted *'ex-abundanti cautela'* so as to remove any misconception in the mind of the parties to the *lis* having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that Section 166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims either under Section 163-A or Section 166 does not arise. If the submission of the learned counsel is accepted the same would lead to an incongruity."

The Supreme Court further emphasized the distinction between two provisions i.e. Sections 163-A and 166 of the Act in following terms in the case of *Mg. Dir., Banglore Metropolitan Tpt. Corporation v. Sarojamma, AIR 2008 SC 3244:*

"As the Schedule II provides for a structured formula, ordinarily, the same has to be adhered to. The structured formula itself stipulates reduction of income of the deceased by one-third in consideration of the expenses which he would have incurred towards maintaining himself, had he been alive. Whereas in determining an application for grant of compensation under Section 166 of the Act, the Tribunal may be entitled to find out actual loss of damages suffered by the claimants, the formula having not envisaged such a contingency, we are of the opinion that ordinarily one-third should be deducted from the income of deceased and not

the half thereof."

In case of *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala, AIR 2001 SC 1832,* it has stated that the object underlining the said amendment is to pay compensation without there being any long drawn litigation on a predetermined formula, which is known as structured formula basis which itself is based on relevant criteria for determining compensation and the procedure of paying compensation after determining the fault is done away. Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever increasing motor vehicle accidents in a fast moving society.

In case of *Oriental Insurance Co. Ltd. v. Shaju Joseph and others, 2009 ACJ 2254,* the difference between Sections 163A and 166 has been observed as follows:

| | Section 163-A | Section 166 |
|---|---|---|
| 1. | The victims are not required to prove negligence under this section. | The victims are compulsorily required to prove negligence. |
| 2. | Claim under this Section is based on 'no fault liability'. | Claim under this section is based on 'tortious liability' |
| 3. | Only evidence regarding the factum of accident and vehicle involved in the accident, age of the motor accident victim, income of the claimant, etc. need to be proved. A long drawn-out trail is not contemplated | Evidence regarding negligence, various other aspects regarding claim for compensation, etc. are to be established by the claimant by a long-drawn-out trail. |
| 4. | Only general damages limited by Schedule can be awarded. | Special damages can also be Claimed. |
| 5. | Income at the time of accident is taken into consideration. | Not only income at the time of accident but also future prospects certain to take shape may be taken into consideration. |
| 6. | In an application under Section 163-A, in case of fatal accident, amount is fixed and in case of negligence, multiplier is fixed on the basis of age group as stated in Schedule II a part of section. | It is the Tribunal, which has to adjudicate and come to the conclusion as to which multiplier will be applicable. |
| 7. | The age of the victim alone is relevant to arrive at the number of multiplier. | There are number of factors which the Tribunal have to taken into consideration. For example – who are the dependants, either heirs or parents and their age. |

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|---|---|
| 8. Age of heirs and parents is not taken into consideration while deciding the multiplier under Section 163-A. | The age of heirs and age of parents has to be considered in deciding the multiplier in application under Section 166 when accident victim is unmarried. |
| 9. If claimant is not an earning person, Section 163-A provides for a minimum notional income. | The Tribunal is required to adjudicate and decide the minimum income may be on presumptions. |
| 10. On furnishing the data as to the age of the victim, Schedule provides a ready reckoner to calculate the award amount under Section 163-A. | Such Schedule is not available for claims under Section 166, but, Second Schedule shall be taken only for guidance. |

Thus, it is clear that both of these provisions are based on two different mode of assessing the compensation. A choice has been conferred upon the claimant to opt for any of them. The provision of Section 163-A is based on structural formula as provided in Schedule II of the Act. It is also to be kept in mind that the provision of Section 163-A has overriding effect on other provisions of the Act.

The principles governing the assessment of compensation in the matter of a child victim have been elaborately discussed by the Supreme Court in the case of *Lata Wadhwa v. State of Bihar, AIR 2001 SC 3218* which reads as thus:

> "So far as the award of compensation in case of children are concerned, Shri Justice Chandrachud, has divided them into two groups, first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years. In case of children between the age group of 5 to 10 years, a uniform sum of Rs. 50,000/- has been held to be payable by way of compensation, to which the conventional figure of Rs. 25,000/- has been added and as such to the heirs of the 14 children, a consolidated sum of Rs. 75,000/- each, has been awarded. So far as the children in the age group of 10 to 15 years, there are 10 such children, who died on the fateful day and having found their contribution to the family at Rs. 12,000/- per annum, 11 multiplier has been applied, particularly, depending upon the age of the father and then the conventional compensation of Rs. 25,000/- has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, have been granted compensation to the tune of Rs. 1,57,000/- each. In case of the death of an infant, there may have been no actual pecuniary benefit

derived by its parents during the child's lifetime. But this will not necessarily bar the parents' claim and prospective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived....."

"At the same time, it must be held that a mere speculative possibility of benefit is not sufficient. Question whether there exists a reasonable expectation of pecuniary advantage is always a mixed question of fact and law."

"In case of a bright and healthy body, his performances in the school, it would be easier for the authority to arrive at the compensation amount, which may be different from another sickly, unhealthy, rickety child and bad student."

"Having regard to the environment from which these children were brought, their parents being reasonably well placed officials of the Tata Iron and Steel Company, and on considering the submission of Mr. Nariman, we would direct that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs. 1.5 lakhs, to which the conventional figure of Rs. 50,000/- should be added and thus the total amount in each case would be Rs. 2.00 lakhs. So far as the children between the age group of 10 to 15 years, they are all students of Class VI to Class X and are children of employees of TISCO. The TISCO itself has a tradition that every employee can get one of his child employed in the company. Having regard to these facts, in their case, the contribution of Rs. 12,000/- per annum appear to us to be on the lower side and in our considered opinion, the contribution should be Rs. 24,000/- and instead of 11 multiplier, the appropriate multiplier would be 15. Therefore, the compensation, so calculated on the aforesaid basis should be worked out to Rs. 3.60 lakhs, to which an additional sum of Rs. 50,000/- has to be added, thus making the total amount payable at Rs. 4.10 lakhs for each of the claimants of the aforesaid deceased children."

Applying the principles laid down by the Apex Court in *Lata Wadhwa* (supra) the Supreme Court in case of *M.S. Grewal v. Deep Chand Sood, AIR 2001 SC 3660* approved the compensation of Rs. 5 lakhs each for each student died in a

mishap in a picnic party belonging to the group of upper middle class families in the age group of 10 to 15 years studying in standards from 4th to 6th.

In *Manju Devi and Anr. v. Musafir Paswan and Anr., 2005 (1) T.A.C. 609 (SC),* following the ratio of *U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors., (1996) 4 SCC 362* the Supreme Court held that there should be no departure from the multiplier method on the ground that payment being made is just compensation. It has been held that the multiplier method must be accepted method for determining and ensuring payment of just compensation as it is the method which brings uniformity and certainty to the award made all over the country. As set out in the Second Schedule to the Motor Vehicles Act, 1988, for a boy of 13 years of age, a multiplier of 15 would have to be applied; and he being a non-earning person, a sum of Rs. 15,000 p.a. must be taken as the income."

In case of *Kaushlya Devi v. Karan Arora and Ors., AIR 2007 SC 1912* the Supreme Court confirmed the awarded amount of Rs. 1.00 lac with interest in case of death of a child aged about 14 years at the instance of claimants by dismissing the appeal. In this case factually the driver of the vehicle was minor who was not authorised to drive any vehicle. The deceased himself was negligent. Inspite of the same, the Supreme Court affirmed the awarded amount given by the Tribunal.

In case of *New India Assurance Co. Ltd. v. Satender and Ors., AIR 2007 SC 324,* the Supreme Court arrived at a figure of Rs. 1,80,000/- with interest @ 7.5% from the date of petition till the payment in the appeal of the insurance company. Factually the age of the deceased was 9 years. The claim petition was made under Section 166 of the Act. Against this background, the Supreme Court observed that the determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In the cases, where parents are claimants, the relevant factor would be age of parents. In case of death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parents' claim and prospective loss will find a valid claim provided the parents establish that they had a reasonable expectation of pecuniary benefit if the child had been alive.

In addition to awarding compensation for pecuniary losses, compensation with regards to the future prospects of a child has been considered by the

Supreme Court in its recent decision of *R. K. Malik and another v. Kiran Pal and others, AIR 2009 SC 2506* wherein it is held that:

> "It is well settled legal principle that in addition to awarding compensation for pecuniary losses, compensation must also be granted with regard to the future prospects of the children. It is incumbent upon the Courts to consider the said aspect while awarding compensation. Reliance in this regard may be placed on the decisions rendered by this Court in *General Manager, Kerala S. R. T. C. v. Susamma Thomas, (1994) 2 SCC 176; Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179; and Lata Wadhwa case* (supra)."
>
> "While considering such claims, child's performance in school, the reputation of the school etc. might be taken into consideration. In the present case, records shows that the children were good in studies and studying in a reasonably good school. Naturally, their future prospect would be presumed to be good and bright. Since they were children, there is no yardstick to measure the loss of future prospects of these children. But as already noted, they were performing well in studies, natural consequence supposed to be a bright future. In the case of *Lata Wadhwa* (supra) and *M. S. Grewal* (supra), the Supreme Court recognised such future prospect as basis and factor to be considered. Therefore, denying compensation towards future prospects seems to be unjustified."

While dealing with an issue relating to non-pecuniary damages which includes immeasurable elements as to the loss of human life, loss of company, companionship, happiness, pain and suffering, loss of expectation of life etc., the Supreme Court in *R.K. Malik* (supra) has laid down certain principles as to provide a method of quantification of such non-pecuniary compensation in case of death of a Child. The relevant portions of the judgment rendered in *R.K. Malik* (supra) is reproduced here as under:

> "Loss of a child, life or a limb can never be eliminated or ameliorated completely. To put it simply–pecuniary damages cannot replace a human life or limb lost. Therefore, in addition to the pecuniary losses, the law recognizes that payment should also be made for non-pecuniary losses on account of loss of happiness, pain, suffering and expectancy of life etc. The Act provides for payment of "just

compensation" vide Sections 166 and 168. It is left to the Courts to decide what would be "just compensation" in facts of a case."

"The Supreme Court in the case of *R. D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551,* at page 556, has observed as follows in para 9 :

> "9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant : (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

"It is extremely difficult to quantify the non pecuniary compensation as it is to a great extent based upon the sentiments and emotions. But, the same could not be a ground for non-payment of any amount whatsoever by stating that it is difficult to quantify and pinpoint the exact amount payable with mathematical accuracy. Human life cannot be measured only in terms of loss of earning or monetary losses alone. There are emotional attachments involved and loss of a child can have a devastating effect on the family which can be easily visualized and understood.

Perhaps, the only mechanism known to law in this kind of situation is to compensate a person who has suffered non-pecuniary loss or damage as a consequence of the wrong done to him by way of damages/monetary compensation. Undoubtedly, when a victim of a wrong suffers injuries he is entitled to compensation including compensation for the prospective life, pain and suffering, happiness etc., which is sometimes described as compensation paid for "loss of expectation of life". This head of compensation need not be restricted to a case where the injured person himself initiates action but is equally admissible if his dependent brings about the action."

"That being the position, the crucial problem arises with regard to the quantification of such compensation. The injury inflicted by deprivation of the life of a child is extremely difficult to quantify. In view of the uncertainties and contingencies of human life, what would be an appropriate figure, an adequate solatium is difficult to specify. The Courts have therefore used the expression "standard compensation" and "conventional amount/sum" to get over the difficulty that arises in quantifying a figure as the same ensures consistency and uniformity in awarding compensations."

"While quantifying and arriving at a figure for "loss of expectation of life", the Courts have to keep in mind that this figure is not to be calculated for the prospective loss or further pecuniary benefits that has been awarded under another head i.e. pecuniary loss. The compensation payable under this head is for loss of life and not loss of future pecuniary prospects. Under this head, compensation, is paid for termination of life, which results in constant pain and suffering. This pain and suffering does not depend upon the financial position of the victim or the claimant but rather on the capacity and the ability of the deceased to provide happiness to the claimant. This compensation is paid for loss of prospective happiness which the claimant/victim would have enjoyed had the child not been died at the tender age."

In the case of *R.K.Malik* (supra), the amount of Rs. 75,000/- awarded by the High Court for non-pecuniary damages has been held just, fair and reasonable by the Apex Court in the following words:

> "...we may notice here that as far as non-pecuniary damages are concerned, the Tribunal does not award any compensation under the head of non-pecuniary damages. However, in appeal the High Court has elaborately discussed this aspect of the matter and has awarded non-pecuniary damages of Rs.75,000/- Needless to say, pecuniary damages seek to compensate those losses which can be translated into money terms like loss of earnings, actual and prospective earning and other out of pocket expenses. In contrast, non-pecuniary damages include such immeasurable elements as pain and suffering and loss of amenity and enjoyment of life. In this context, it becomes duty of the Court to award just compensation for non-pecuniary loss. As already noted it is difficult to quantify the non-pecuniary compensation, nevertheless, the endeavour of the Court must be to provide a just, fair and reasonable amount as compensation keeping in view all relevant facts and circumstances into consideration. We have noticed that the High Court in present case has enhanced the compensation in this category by Rs. 75,000/- in all connected appeals. We do not find any infirmity in that regard."

Though, it is difficult to quantify the non-pecuniary damages, nevertheless, the endeavour of the Tribunal/ Court must be to provide a just, fair and reasonable amount under this head, it becomes duty of the Tribunal/ Court to determine just compensation for non-pecuniary loss. Looking to the observation made in *R.K. Malik* (supra) an amount of Rs. 75000/- may be considered as a standard amount to determine compensation for non-pecuniary loss in case of death of a child.

The view expressed by the Supreme Court in the cases of *Lata Wadhwa* (supra), *M.S. Grewal* (supra) and *R.K. Malik* (supra) has made it clear as to what should be the criteria for deciding just and fair compensation in the matter of claim of a child victim under Section 166 of the Act. But where the petition is under Section 163-A of the Act, the Tribunal has to decide the claim on the basis of structural formula as laid down in the scheme in Schedule II of the Act. As held in Case of *Deepal Girish Bhai* (supra) and *Mg. Dir. Banglore* (supra).

The question arises what should be the mode of applying multiplier and deductions in the matter of compensation of child victim. In case of child victim up to the age of 15 years the multiplier of 15 has been recommended in Second Schedule of the Act. No specific multiplier has been prescribed for a victim who

is less than 15 years of age. Therefore, the multiplier of 15 will remain for a child victim. So far as the deduction is concerned, in the case of *Sarla Verma and others vs. Delhi Transport Corporation and another, AIR 2009 SC 3104.*, it has been held that if the number of dependents on victim was 2 or 3, the deduction should be 1/3, if 4 to 6, it should be 1/4 and if it was more than 6 it should be 1/5. The view expressed by the Supreme Court in case of *Sarla Verma* (supra) appears regarding victims who were actually earning some thing for their families and family members were actually deriving pecuniary benefits. Thus, this authority has no application to the cases of child victims.

## CONCLUSION

From the aforesaid discussion, the position emerges as follows:

I – In case of death of a child, if claim under Section 163-A is filed, it would be based on 'no fault liability'. The factum of accident, vehicle involved in the accident, age and income of the deceased at the time of accident are required to be considered. If the deceased is not an earning person, notional income prescribed in the Second Schedule, i.e. Rs. 15,000/- p.a. should be considered as the income of the deceased. The age of the deceased alone is relevant to arrive at the number of multiplier and age of heirs and parents is not taken into consideration. Up to the age of 15 years of the deceased, the multiplier is of 15. The Schedule provides a ready reckoner to calculate the compensation amount and only general damages limited by the Schedule can be awarded.

II – In case of death of child, if claim under Section 166 is filed, it would be based on 'tortious liability'. Negligence on the part of the driver of the vehicle in accident is to be established by the claimant by a long-drawn-out trial. Not only income at the time of accident of the deceased but also future prospects certain to take shape may be taken into consideration. Family status, and background of family are important factors. If the deceased was the only child, then this fact would also be considered. The age of heirs, if any, and age of parents has to be considered in deciding the multiplier and age of parents is also important factor. The Second Schedule of the Act can be taken only for guidance. It is the Tribunal which has to adjudicate and come to the conclusion as to which multiplier will be applicable. Funeral Expenses as well as loss of estate, if proved, must be awarded. That apart, non-pecuniary damages which include immeasurable elements as to the loss of human life, loss of company, companionship, happiness, love and affection, pain and suffering, loss of expectation of life, etc. should also be awarded and in this regard, an amount of Rs. 75,000/- can be taken as a standard amount to determine compensation for non-pecuniary losses.

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# विधिक समस्याएं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्याएं 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 विलंब की संभावना 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 रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

**समस्या :** **क्या मजिस्ट्रेट परक्राम्य लिखत अधिनियम, 1881 की धारा–138 के अधीन दण्डनीय अपराध का संज्ञान परिवाद के साथ प्रस्तुत शपथ पत्र पर ले सकता है अथवा द.प्र.सं. की धारा 200 के अधीन परिवादी के न्यायालय में कथन होना आवश्यक है ?**

**समाधान :** इस समस्या के समाधान हेतु परक्राम्य लिखत अधिनियम, 1881 की धारा–145 (1) सुसंगत है जो निम्नवत् है–

> **Evidence on affidavit.** – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding under the said Code.

स्पष्ट है कि परिवादी की ओर से प्रस्तुत शपथपत्र किसी भी जांच विचारण या अन्य कार्यवाही में साक्ष्य में पठनीय है। विचारण पूर्व की समस्त कार्यवाही जिसमें संज्ञान लेना सम्मिलित है, जांच के अधीन आती है। इस दृष्टि से परिवादी की ओर से धारा–138 परक्राम्य लिखत अधिनियम के अधीन परिवाद के समर्थन में प्रस्तुत शपथ पत्र पर मजिस्ट्रेट धारा–138 के अधीन दण्डनीय अपराध का संज्ञान ले सकता है तथा इस हेतु परिवादी की धारा–200 द.प्र.सं. के अधीन न्यायालय में परीक्षा किए जाने की कोई आवश्यकता नहीं है।

**इस बिंदु पर** *महेन्द्र कुमार वि. आर्मस्ट्रांग 2005 (2) एम. पी. एल. जे. 419 (एकलपीठ निर्णय दिनांक 24.02.2005), जितेन्द्र सिंह कुशवाहा वि. भजनलाल राय, 2010* ***(II)*** *एम. पी. जे. आर. 159 (एकलपीठ निर्णय दिनांक 5.11.2008) एवं अभिलाषा अग्निहोत्री वि. दिलीप, आई.एल.आर. 2009 एम. पी. 1836 (एकलपीठ निर्णय दिनांक 25.02.2009)* के न्याय दृष्टांतों में माननीय म.प्र. उच्च न्यायालय द्वारा यह स्पष्टतः प्रतिपादित किया है कि परक्राम्य लिखत अधिनियम की धारा–138 के अधीन दण्डनीय अपराध का संज्ञान परिवाद के समर्थन में प्रस्तुत शपथपत्र पर लिया जा सकता है। इस हेतु द.प्र.सं. की धारा 200 के अधीन कथन अभिलिखित करने की कोई विधिक आवश्यकता नहीं है।

यद्यपि *वंशीलाल वि. अब्दुल मुन्नार 2010* ***(1) MPHT*** *40* (एकलपीठ निर्णय दिनांक 15.09.2009) में यह प्रतिपादित किया गया है कि परक्राम्य लिखत अधिनियम की धारा 145 (1) मजिस्ट्रेट को परिवादी के धारा–200 द.प्र.सं. के अधीन कथन अभिलिखित करने के दायित्व से उन्मुक्त नहीं करती है। परंतु इस न्यायदृष्टांत में *महेन्द्र कुमार, जितेन्द्र सिंह कुशवाहा* एवं *अभिलाषा अग्निहोत्री* के पूर्व उल्लिखित न्याय दृष्टांतों में प्रतिपादित विधि को विवेचित नहीं किया गया है। चूंकि *वली मोहम्मद वि. बतूलबाई 2003 सी.आर.एल. जे. 2755* के न्यायदृष्टांत में मध्यप्रदेश उच्च न्यायालय की पूर्णपीठ ने यह प्रतिपादित किया है कि यदि समानपीठ के विनिश्चयों में विरोध हो तथा पश्चातवर्ती विनिश्चय में पूर्वतन विनिश्चय में प्रतिपादित विधि की विवेचना न की गई हो तो पूर्वतन न्यायदृष्टांत में प्रतिपादित विधि आबद्धकर होगी। अतएव **महेन्द्र कुमार, जितेन्द्र सिंह कुशवाहा एवं अभिलाषा अग्निहोत्री** के पूर्व उल्लिखित न्याय दृष्टांतों में प्रतिपादित विधि आबद्धकर प्रभाव रखती है।

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**समस्याः** **दण्ड प्रक्रिया संहिता की धारा 320 में 2008 के संशोधन के पश्चात् भारतीय दण्ड संहिता की धारा–324 की शमनीयता की वर्तमान प्रास्थिति क्या है?**

**समाधानः** दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2008 की धारा–23 द्वारा दण्ड प्रक्रिया संहिता, 1973 की धारा 320 (2) के अधीन न्यायालय की अनुमति से शमनीय अपराधों का निर्धारण करने वाली सारणी को नवीन सारणी से प्रतिस्थापित किया गया है तथा यह संशोधन दिनांक 31 दिसंबर 2009 से प्रवृत्त हो गया है। इस सारणी में भारतीय दण्ड संहिता की धारा 324 के अधीन दण्डनीय अपराध को शमनीय अपराध के रूप में सम्मिलित नहीं किया गया है जबकि मूल सारणी (जो कि दिनांक 30 दिसंबर 2009 तक विद्यमान एवं प्रवृत्त थी) में यह अपराध न्यायालय की अनुज्ञा से शमनीय था । इस संबंध में कोई संदेह नहीं है कि दिनांक 31 दिसंबर 2009 एवं उसके उपरांत घटित भा. दं. सं. की धारा –324 के अधीन दण्डनीय अपराध शमनीय नही हैं। किंचित संदेह उस अपराध की शमनीयता के संबंध में उत्पन्न हो सकता है जो इस तिथि के पूर्व अर्थात् दिनांक 30 दिसंबर 2009 अथवा उसके पूर्व घटित हुए हैं। इस संबंध में उच्चतम *न्यायालय द्वारा मोहम्मद अब्दुल सूफान लश्कर वि. स्टेट ऑफ आसाम, 2008 ए. आई. आर. एस. सी. डब्ल्यू. 5755 एवं हीराभाई झावेरभाई वि. स्टेट ऑफ गुजरात 2010 ए. आई. आर. एस. सी. डब्ल्यू. 3136* के न्यायदृष्टांतों में यह प्रतिपादित किया है कि यदि भा. दं. सं. की धारा 324 के अधीन दण्डनीय अपराध घटित होने की तिथि पर शमनीय था तो वह संशोधन से प्रभावित नहीं होगा। दूसरे शब्दों में दिनांक 30 दिसंबर 2009 एवं उसके पूर्व घटित भा. दं. वि. की धारा 324 के अधीन दण्डनीय अपराध न्यायालय की अनुज्ञा से उक्त संशोधन के प्रवृत्त होने के उपरांत भी शमन योग्य होंगे।

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

## PART - II

# NOTES ON IMPORTANT JUDGMENTS

**253. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 Appointment of arbitrator – Considerations thereof – Examination of the agreement under Section 11 (6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties – The examination cannot extend to examine the agreement to ascertain the rights and obligations regarding performance of such contract between the parties – Legal position explained.**

**Indowind Energy Limited v. Wescare (India) Limited and another**

**Judgment dated 27.04.2010 passed by the Supreme Court in Civil Appeal No. 3874 of 2010, reported in (2010) 5 SCC 306**

Held :

The scope of examination of the agreement under section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. This Court in *SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618* and in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267* has held that when an application is filed under Section 11, the Chief Justice or his Designate is required to decide only two issues, that is whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction under Section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application under Section 11 of the Act. Any wider examination in such a summary proceeding will not be warranted.

In so far as the issue of existence of arbitration agreement between the parties, the learned Chief Justice or his Designate is required to decide the issue finally and it is not permissible in a proceeding under Section 11 to merely hold that a party is prima facie a party to the arbitration agreement and that a party is prima facie bound by it. It is not as if the Chief Justice or his Designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his Designate under Section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. This is categorically laid down by the Constitution Bench

in *SBP* (supra). Therefore the prima facie finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act.

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***254. CIVIL PRACTICE**

**INDIAN SUCCESSION ACT, 1925 – Sections 372 and 387**

**(i) Ex Parte Proceedings – When Improper – Held, if the date has been fixed by the Board Reader on having Presiding Officer on leave; such date connot be treated as a date fixed for hearing – Until and unless the case is fixed for hearing, the Court should not direct to proceed ex parte. (Relied on** *Laxmi Bai v. Keshrimal Jain, 1995 MPLJ 105 (DB)*

**(ii) Order granting Succession Certificate was without due procedure as proceedings were defective in substance – Order granting Succession Certificate set aside – Matter remitted back for decision after giving opportunity of hearing to both parties.**

**(iii) Alternative remedy of filing a civil suit – When warranted – Held, once the procedure of grant of certificate was found defective in substance, as envisaged u/s 383 of the Act and if the case falls in any of the category as specified therein, the parties cannot be refused to entertain the application for revocation on the pretext of having remedy to file a civil suit.**

**Shakuntala Mittal (Smt.) v. Shyamlal**

**Judgment dated 17.05.2010 passed by the High Court in Criminal Revision No. 104 of 2009, reported in ILR (2010) M.P. 1826**

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**255. CIVIL PROCEDURE CODE, 1908 – Sections 2 (11), 11 and Order 22 Rules 3 and 5**

**EVIDENCE ACT, 1872 – Section 68**

**INDIAN SUCCESSION ACT, 1925 – Section 63 (2)**

**(i) Whether the term 'Legal Representative' as defined in S. 2 (11) of CPC is synonymous to term 'Legal heir'? Held, No (Law Explained)**

**(ii) Order of substitution of Legal Representative under O. 22 R. 5 – Scope of – Such an order is only for the purposes of the suit itself – The LRs are impleaded only for the purpose of prosecuting the case – Substitution does not make any person the heir to the deceased.**

**(iii) Whether order of substitution of Legal Representative operates as** *res Judicata* **in the subsequent suit? Held, No.**

## Than Singh v. Majboot Singh and others

**Judgment dated 29.04.2010 passed by the High Court in S. A. No. 209 of 2001, reported in 2010 (3) MPLJ 379**

Held:

The term "legal representative" is defined in clause (11) of section 2 of the Code of Civil Procedure. Perusal of this definition makes it clear that the term 'legal representative' is not synonymous to 'legal heir'. Order 22, Rule 3 read with Rule 11 of the Code of Civil Procedure empowered this Court in case of death of appellant to substitute for him his legal representative. It was merely for the purpose of empowering the Court to proceed with the appeal and nothing more. This Court while deciding the application under Order 22, Rule 3 read with Rule 11, Civil Procedure Code was not required to decide the heirship of the deceased. The decision as to who was the legal representative was limited for the purpose of carrying on the appeal and cannot have the effect of conferring any right to heirship or to property. I am fortified in my this view by this Court's decision in the case of the *Kalyanmal Mills Ltd. vs. Wali Mohammad, 1965 MPLJ 452 = AIR 1965 MP 72,* wherein it is observed :

> "The effect of an order passed under Order 22, Rule 5 would not be to confer on the intermeddler any right or title or interest, if there be none. Such an order is only for the purposes of the suit itself. The right of the intermeddler has to be adjudicated upon independently of such order."

Thus, the legal representative are impleaded in the proceedings only for the purpose of prosecuting the case and the right as legal heir is to be established in an independent proceeding and accordingly an order of substitution under Order 22 of Civil Procedure Code does not operate as res Judicata in a subsequent suit. I may successfully refer her the Full Bench Decision of Punjab and Haryana High Court in the case of *Mohinder Kaur vs. Piara Singh AIR 1981 Punjab and Haryana 130* (FB), Wherein it has been observed: -

> "9. We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to answer an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the person claiming to the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead

some sort of evidence in support of the claim of being legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party. "

This Court also in the case of *Raghunathsingh v. Gangabai, 1961MPLJ 398* has observed as under :-

"It is a well established principle that the mere fact of the substitution of any claimant does not in any manner finally make him the heir to the deceased litigant or fetter the other party to the litigation from questioning his claim in an appropriate proceeding. The legal representative brought on record is for the limited purpose of conducting the litigation. It is, therefore, left open to Raghunath Singh if he considers fit, to get the dispute between him and Bhuwansingh in regard to the succession to the estate of Gangabai, cleared in separate litigation."

At this juncture, it is useful to quote the following passage from the Division Bench decision of Madras High Court in the case of *Subramania Pillai v. Masterly, AIR 1976 Madras 303*:-

"It is not always a legal requisite that, inevitably, only the heirs, all of them or any of them, should figure as legal representative. The procedural law requiring representation will stand satisfied if there is substantial representation in the sense that all that could be done in defence was done by someone interested in the issue in the suit."

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***256. CIVIL PROCEDURE CODE, 1908 – Sections 11, 115 and Order 7 Rule 11**

**(i) Res Judicata – In earlier suit by Trust, question of title, execution of gift deed was directly in issue and Courts decided the said issue against the Trust – In the present suit, plaintiffs are claiming title through Trust without impleading Trust – Held, if issues now cannot be raised by the Trust then any person claiming under Trust now cannot file suit – Suit barred by principles of res judiciata – Suit dismissed – Petition allowed.**

**(ii) If on the given facts the suit appears to be barred under some law that is on application of principles of res Judiciata then the Court would be entitled to dismiss the suit applying the provisions contained under Order 7 Rule 11(c).**

**Shyama Prasad Datta & ors. v. Arun Kumar Vasudeo & ors**
**Judgment dated 06.04.2010 passed by the High Court in Writ Petition No. 4222 of 2010, reported in ILR (2010) M.P. 1588 (DB)**

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**257. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 (2)**
**Impleadment of parties – Discretion of the Court – Held, Order 1 Rule 10(2) is an exception to general rule in regard to impleadment of parties that plaintiff may choose defendants and he cannot be compelled to sue a person against whom he seeks no relief – Discretion of the Court to add a person as party is limited to persons found to be necessary party or proper party.**
**'Necessary party' and 'proper party', connotation there of – Mere likelihood of a third party to secure a right/interest in suit property after the suit is decided against the plaintiff in a suit for specific performance of contract does not make such party a necessary or proper party – Legal position explained.**

**Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others**
**Judgment dated 06.07.2010 passed by the Supreme Court in Civil Appeal No. 4900 of 2010, reported in (2010) 7 SCC 417**

Held:

The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties.

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

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**258. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**

**(i) Proviso of Order 6 Rule 17, applicability of – The proviso comes into play only after the commencement of trial – Before commencement of trial the proviso has no applicability.**

**(ii) Whether change in the nature of the suit is always a ground to disallow amendment in pleadings? Held, No (*Raghu Thilak D. John v. Rayappan, (2001) 2 SCC 472* relied on)**

**(iii) Amendment in pleading –Test for – The litmus paper test for allowing the amendment is whether the amendment is necessary for complete and correct adjudication of the controversy involved between the parties.**

## Jaspreet Kaur and another v. Ram Krishna and others

**Judgment dated 19.05.2010 passed by the High Court in Writ Petition No. 4731 of 2009, reported in 2010 (3) MPLJ 387 (DB)**

Held :

The Apex Court in the case of *Vidyabai and others v. Padmalatha and another, 2009 (3) MPLJ (SC) 122 = (2009) 2 SCC 409* it is held that the Court has jurisdiction to allow an amendment unless it is satisfied that in spite of due diligence the party could not have sought leave to amend before commencement of the trial. Aforesaid law has been pronounced in the light of Rule 17 of Order 6, Civil Procedure Code.

Prior to substitution, there was no proviso to Rule 17. Dealing with the said proviso, it has been observed by the Supreme Court of India that the same has been couched in mandatory form and the Court's jurisdiction to allow an application for amendment is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. In the case of *Vidyabai* (supra), affidavits containing chief examination were produced by way of evidence and the case was fixed for cross-examination on the said affidavits. In the case in hand, no such affidavit was produced up to the

time, the application for amendment was submitted Proviso to Rule 17 would come into play only after commencement of trial. Effect of the proviso is that if an application for amendment is submitted after commencement of trial, the litigant seeking amendment must establish that the application for amendment could not have been moved earlier in spite of due diligence. Analogically, if the trial is not commenced, proviso to Rule 17 will not come into play and the same in such a situation would have no applicability. This being so, the petitioners do not derive any benefit from *Vidyabai's* decision.

It is further contended that the nature of the suit would be changed by the proposed amendment. On perusal, it is found that no change in the nature of the suit would be caused by the proposed amendment. Otherwise also, change in nature is not necessarily always a ground to disallow amendment in view of the law laid down by the Supreme Court of India in the case of *Ragu Thilak D. John vs. S. Rayappan, (2001) 2 SCC 472.*

It may be seen that that the proviso to Rule 17, Civil Procedure Code being inapplicable, the litmus paper test for allowing amendment is whether the amendment is necessary for complete and correct adjudication of the controversy involved between the parties. We may profitably refer to the Supreme Court decision in the case of *Rajesh Kumar Aggarwal v. K.K. Modi and ors., 2006 (3) MPLJ (SC) 215 = AIR 2006 SC 1647* for this purpose, wherein it is held :-

> "16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> 17. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleadings. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.
>
> 18. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit. "

In any case, allowing of amendment will not cause prejudice or loss to the defendants. Petitioner would definitely have opportunity to meet out the same on merits. We may refer here to the decision of the Supreme Court of India in the case of *Puran Ram v. Bhaguram and another, 2008 (3) MPLJ (SC) 273 = (2008) 4 SCC 102,* wherein it has been observed in para 18 as under:-

> "18. We may now take into consideration as to whether the High Court in the exercise of its power under Article 227 of the Constitution, was justified in rejecting the application for amendment of the plaint, which, in the discretion of the trial Court, was allowed. We are of the view that the High Court ought not to have interfered with the order of the trial Court when the order of the trial Court was passed on the sound consideration of law and facts and when it cannot be said that the order of the trial Court was either without jurisdiction or perverse or arbitrary."

We may also successfully refer here the Apex Court decision in the case of *Sampath Kumar vs. Ayyakannu and another, (2002) 7 SCC 559,* wherein it has been observed: -

> "Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment"

Amendment with regard to alleged Will is also to elaborate the earlier pleadings, whereby the validity of the alleged Will was disputed. Thus, no wrong has been committed by the learned trial Judge in allowing the amendment. We may also refer profitably to the Supreme Court's decision in the case of *Baldev Singh v. Manohar Singh, 2006 (4) MPLJ (SC) 1 = (2006) 6 SCC 498* for this purpose. This being so, extra ordinary power under Article 227 of the Constitution of India cannot be legally invoked in the present case.

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***259. CIVIL PROCEDURE CODE, 1908 – Order 14 Rule 1 (3)**

**(i) Summoning of witnesses – When plaintiff made serious efforts for bringing his witnesses to the Court, and witness expresses his unwillingness – Plaintiff is left with no choice except to prefer an application for seeking assistance of Court machinery to enforce and secure the attendance of her own witness.**

**(ii) Summoning of witnesses – Reasons – When a party prays for summoning of a witness to the Court, then he has to assign sufficient and adequate reasons for seeking assistance – Inability of plaintiff to keep her witness present for cross-examination is justified reason for summoning witness.**

**Gopal Das Renwal v. Smt. Deepika Jain**

**Judgment dated 18.01.2010 passed by the High Court in Writ Petition No. 2337 of 2009, reported in ILR (2010) M.P. 1072 (DB)**

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**260. CIVIL PROCEDURE CODE 1908 – Order 22 Rule 10**
**TRANSFER OF PROPERTY ACT, 1882 – Section 52**

**Application for impleadment by assignee of decretal property in execution proceeding – The property was assigned during the "pendency of execution proceeding" and after attaining the decree finality – Sale was effected without seeking leave of the Court as required by Section 52 of the Transfer of Property Act – Held, as the assignment was not during the "Pendency of suit" as per Order 22 Rule 10 of CPC and was without the leave of the Court as per the requirement of Section 52 of Transfer of Property Act, the application for impleadment was not maintainable.**

**Mahfooz Ahmed and another v. Smt. Neelmani and another**

**Judgment dated 26.03.2010 passed by the High Court in Miscellaneous Appeal No. 531 of 2010, reported in 2010 (4) MPHT 44**

Held :

Unless an assignment, creation or devolution of any interest is during pendency of suit, no right accrues under Order 22 Rule 10. In the case at hand, the suit having been decreed and allowed to attain finality as no appeal is preferred, the judgment-debtor passing over the title during execution proceedings, in the considered opinion, will not amount to assignment or creation of any interest during the pendency of a suit.

There is another aspect of the matter. Admittedly, no leave from Court is sought by parties before purchasing the property as contemplated under Section 52 of the Transfer of Property Act.

In *Dhurandhar Prasad Singh v. Jai Prakash University and others, (2001) 6 SCC 534,* it was observed by Their Lordship's : –

> "7. Under Rule 10, Order 22 of the Code, When there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against person upon whom such interest has devolved and this entitles, the person who has acquired an interest in subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite* or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaitiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karab-ud-Din, (1898) ILR 25 Cal.179,* he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath v. Rookea Begum, (1851-59) 7 Moo Ind App 323,* a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings."

In *Bibi Zubaida Khatoon v. Nabi Hassan Saheb and another* and one other case, *(2004) 1 SCC 191,* in the context of the fact that no leave was sought from the Court as envisaged under Section 52 of Transfer of Property Act, it was observed by Their Lordships : –

> "9. It is not disputed that the present petitioner purchased the property during pendency of the suit and without seeking leave of the Court as required by Section 52 of the Transfer of Property Act. The petitioner being a transferee *pendente lite* without leave of the Court cannot, as of right, seek impleadment as a party in the suits which are long pending since 1983. It is true that when the application for joinder based on transfer *pendente lite* is made, the transferee should ordinarily be joined as party to enable him to protect his interest. But in instant case, the Trial Court has assigned

cogent reasons for rejecting such joinder stating that the suit is long pending since 1983 and *prima facie* the action of the alienation does not appear to be *bona fide*. The Trial Court saw an attempt on the part of the petitioner to complicate and delay the pending suits.

10. The decisions cited and relied on behalf of the appellant turned on the facts of each of those cases. They are distinguishable. There is no absolute rule that the transferee *pendente lite* without leave of the Court should in all cases be allowed to joint and contest the pending suits. The decision relied on behalf of the contesting respondents of this Court in the case of *Savinder Singh v. Dalip Singh, (1996) 5 SCC 539* fully supports them in their contentions. After quoting Section 52 of the Transfer Property Act, the relevant observations are thus : –

"Section 52 of the Transfer of Property Act envisages that : –

*'During the pendency in any Court having authority within the limits of India .....of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.'*

It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of *lis pendens* by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

In view of above and the facts of present case wherein admittedly no leave was sought before transfer of land in question, no right accrue in favour of the appellant under Order 22 Rule 10 of CPC.

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***261. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 9**

**Dispute between the parties with regard to demarcation of boundaries – Local inspection by revenue officer would be helpful.**

**Rajesh Mathur v. Hemant Singh**

**Judgment dated 04.05.2010, by M.P. High Court in W.P. No. 5135 of 2009, reported in 2010 (II) MPJR SN 26**

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***262. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 9**

**SPECIFIC RELIEF ACT, 1963 – Section 38**

**Commission to make spot inspection – Suit for injunction to restrain the defendants from opening doors, windows, drains, etc. towards plaintiff's Plot – Dispute as to the demarcation of the boundries of the suit property – It would be appropriate to the Court to appoint competent commissioner to make spot inspection before deciding the matter – Case was remanded with the direction that Competent Revenue Officer of Municipality be appointed for that. (*Durga Prasad v. Praveen Foujdar and others, 1975 MPLJ 801 (DB), Shreepat v. Rajendra Prasad & ors., 2000 (6) Supreme 389* and *Haryana Waqf Board v. Shanti Sarup and others, (2008) 8 SCC 671* relied on)**

**Prembai and others v. Ghanshyam and others**

**Judgment dated 07.05.2010 passed by the High Court in S. A. No. 524 of 2002, reported in 2010 (3) MPLJ 345**

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**263. CIVIL SERVICES (MEDICAL ATTENDANCE) RULES, 1958 (M.P.) – Rules 2 (d) (ii) and 4**

**(i) Wholly dependent – Husband of the petitioner was receiving meager pension –The husband of the petitioner has to be treated wholly dependent for the purpose of reimbursement of medical bills – Therefore, petitioner is entitled for reimbursement in respect of treatment availed by her husband.**

**(ii) Husband of the petitioner was treated at All India Institute of Medical Sciences, New Delhi without prior permission – Held, State Government cannot deny reimbursement of medical bills on the ground that prior permission has not been obtained – Writ petition allowed – Respondents directed to reimburse the amount with interest @ 8% p.a.**

**Padma Sharma (Smt.) v. State of M.P. & ors.**

**Judgment dated 11.02.2010 passed by the High Court in Writ Petition No. 6228 of 2006, reported in ILR (2010) M.P. 1089**

Held :

In the present case the petitioner a lady serving on the post of Upper Division Teacher is claiming reimbursement in respect of treatment availed by her husband at the All India Institute of Medical Sciences, New Delhi, who was pensioner and, therefore, keeping in view the judgment delivered by the Apex Court, it can be safely gathered especially in light of the fact that the husband of the petitioner was receiving meagre pension that he was wholly dependent upon his wife. This Court while deciding almost similar matter in the case of *Vishwanath Prasad Khare (Dr.) v. State of Madhya Pradesh & others, 2009 (III) MPJR SN 8* has approved medical claims of the pensioner who has availed medical treatment even without permission of the State Government. This Court while deciding the aforesaid case, has held as under:

> "The petitioner was immediate need of open heart surgery and he has rushed immediately to *Bhopal Memorial Hospital & Research Centre, Bhopal.* A Division Bench of Punjab and Haryana High Court in the case of *Shakuntala v. State of Haryana* reported in *2004(1) SLR 563* has allowed the claim of Medical Reimbursement wherein the medical treatment was not availed from the approved hospital. It has been observed that saving the life of a sufferer should be the paramount consideration. Similarly the Apex Court in the case of *Suman Rakheja v. State of Haryana and another, 2006 SCC (L & S) 890* has held that in case of emergency where a government servant has been rushed to a hospital though it is a private hospital, the employee/widow is entitled to get refund of 100 percent medical expenses at the AIIMs rate. In the present case the rate fixed by State Government for open heart surgery is Rs.2.5 lacs and the bills submitted by the petitioner is less than half of the rates prescribed by the State Government for such surgery. Moreover, the certificate issued by the Bhopal Memorial Hospital & Research Centre, Bhopal has not been disputed by the State Government. Resultantly, the present writ petition is allowed, respondents are directed to reimburse the amount of Rs.1,07,254/- of medical expenses within a period of three months positively from the date of receipt of certified copy of this order."

Keeping in view the total facts and circumstances of the case and also the judgment delivered by the Apex Court, this Court is of the considered opinion that the husband of the petitioner has to be treated wholly dependent for purpose of reimbursement of medical bills amounting to Rs.67,940/- and, therefore, the respondents are directed to reimburse the medical bills of the petitioner within a period of 60 days from the date of receipt of certified copy of this Court. In the

present case, the petitioner is also a pensioner and as the respondents have delayed the payment of medical bills, they are directed to pay interest also at the rate of 8% per annum from the date of filing of this petition.

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**264. CONSTITUTION OF INDIA – Articles 20 (3) and 21**
**CRIMINAL PROCEDURE CODE, 1973 – Sections 53, 53-A and 54**
**EVIDENCE ACT, 1872 – Section 45 –** *Law relating to Polygraph Test, Brain Fingerprinting Test or Narco Test*
**Protection against self-incrimination – Available even at the stage of investigation not only to an accused but also to a suspect or a witness of crime – Therefore, subjecting a person to Polygraph Test or Brain Fingerprinting Test or Narco Test involuntarily amounts to testimonial compulsion as well as forcible interference with person's mental process – It violates the provisions of Article 20 (3) and right of privacy under Article 21 of the Constitution.**
**The aforesaid tests do not fall within the scope of Sections 53, 53-A and 54 of Cr.P.C., which permit examination of accused by medical practitioner.**
**However, aforesaid tests may be administered after recording consent before Judicial Magistrate but any information or material discovered as a result of the said tests can only be admitted in accordance with Section 27 of the Evidence Act.**

## Smt. Selvi & Ors. v. State of Karnataka

**Judgment dated 05.05.2010 passed by the Supreme Court in Criminal Appeal No. 1267 of 2004, reported in AIR 2010 SC 1974 (3-Judge Bench)**

Held:

The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

In our considered opinion, the compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as

voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence.

We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of 'ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the

Evidence Act, 1872. The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

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**265. CONSUMER PROTECTION ACT, 1986 – Sections 2 (1)(g) & (o) Deficiency in service – Test to determine the extent of fault, imperfection, nature and manner of performance etc. – No single test is determinative – It must depend on the facts of the particular case, having regard to the nature of service to be provided.**

**Managing Director, Maharashtra State Financial Corporation and others v. Sanjay Shankarsa Mamarde**

**Judgment dated 09.07.2010 passed by the Supreme Court in Civil Appeal No. 7189 of 2002, reported in (2010) 7 SCC 489**

Held:

Clause (o) of Section 2 (1) of the Act defines "service" to mean:-

> "2.(1)(o) 'service' means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

The use of the words 'any' and 'potential' in the context these have been used in clause (o) indicates that the width of the clause is very wide and extends to any or all actual or potential users. The legislature has expanded the meaning of the word further by extending it to every such facilities as are available to a consumer in connection with banking, financing etc. Undoubtedly, when the bank or financial institutions advance loans, they do render 'service' within the meaning of the clause. In that behalf, there is no dispute.

"Deficiency" under clause (g) of Section 2 of the Act means:-

> "2. (1) (g) 'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;"

It is manifest from the language employed in the clause that its scope is also very wide but no single test as decisive in the determination of the extent of fault, imperfection, nature and manner of performance etc. required to be maintained can be laid down. It must depend on the facts of the particular case, having regard to the nature of the "service" to be provided.

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**266. CRIMINAL PROCEDURE CODE, 1973 – Sections 24, 91, 94, 154, 156, 161, 162, 170, 172, 173, 207, 208 and 243**
**EVIDENCE ACT, 1872 – Sections 8, 9 and 45**
**CONSTITUTION OF INDIA – Article 21**
**BAR COUNCIL OF INDIA RULES – Rule 16**

**(i) Cryptic telephonic message not giving the particulars of the offence or accused are bereft of any details made to the police could not be treated as FIR, as their object is only to get the police to the scene of offence and not to register the FIR.**

(ii) **Where the signature of a witness is taken on the statement recorded u/s 161 in contravention of Section 162 (1) Cr.P.C., the evidence of such witnesses does not become inadmissible**

(iii) **An expert is only an expert if he follows well-accepted guidelines to arrive at a conclusion and supports the same with logical reasoning, which is the requirement of law as laid down in the Evidence Act – In absence of the weapon of offence and test firing, no opinion can be rendered on account of differences in the marks on the two fired bullet/cartridge cases.**

(iv) **Role of Public Prosecutor and a Judge in a criminal trial – The role of Public Prosecutor is to ensure fair play in proceedings and to bring before the Court all relevant facts in order for determination of truth and justice for all parties including the victims – The criminal Courts must also ensure that Prosecutor is doing his duties to the utmost level of efficiency and fair play – Scope of disclosure to ensure administration of justice by the prosecutor explained.**

(v) **Where alleged accused person refused to submit for Test Identification Parade before the Magistrate without any justified and credible reason, his identification by showing himself or his photograph by the police (Investigating Agency) to the witnesses is permissible to ensure his identity and involvement in the incident – Even where there is no previous Test Identification Parade, the Court may appreciate the dock identification as being above board and more than conclusive.**

## Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)

**Judgment dated 19.04.2010 passed by the Supreme Court in Criminal Appeal No. 179 of 2007, reported in (2010) 6 SCC 1**

Held:

**(i)** The information about the commission of a cognizable offence given "in person at the Police Station" and the information about a cognizable offence given "on telephone" have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a First Information Report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose of lodging a First Information Report. Identifying the said objective difference between the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a First Information Report under the Code.

It has also been held in a number of judgments by this Court that merely because the information given on phone was prior in time would not mean that the same would be treated as the First Information Report, as understood under the Code. This view has been reiterated in *Ramesh Baburao Devaskar and Ors. v. State of Maharashtra, (2007) 13 SCC 501,* that a cryptic message given on telephone by somebody who does not disclose his identity may not satisfy the requirement of Section 154 of the Code of Criminal Procedure.

In *Tapinder Singh v. State of Punjab, (1970) 2 SCC 113* this Court in identical circumstances observed thus:

> "The telephone message was received by Hari Singh, ASI Police Station, City Kotwali at 5.35 p.m. on September 8, 1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as first information report. The mere fact that this information was the first in point of time does not by itself clothe it with the character of first information report."

Similar views have been expressed in *State of U.P. v. P.A. Madhu, (1984) 4 SCC 83, Damodar v. State of Rajasthan, (2004) 12 SCC 336 and Ramsinh Bavaji Jadeja v. State of Gujarat, (1994) 2 SCC 685.*

But in *CBI v. Tapan Kumar Singh, (2003) 6 SCC 175* detailed information was given on telephone including the offence and the whereabouts of the accused. In the peculiar circumstances of the case, telephonic message was treated as FIR. Similarly, in *State of U. P. v. Bhagwant Kishore Joshi, AIR 1964 SC 221* it was noted in para 8 (at page 224) that the information received by the officer was not vague, but contained precise particulars of the acts of misappropriation committed by the accused and, therefore, the said information could be treated as FIR.

**(ii)** It was argued and highlighted that since PW-2 Shyan Munshi has been confronted with his signed statement i.e. Ex.PW-2/A and B, the whole evidence goes in light of *Zahiruddin v. Emperor, AIR 1947 PC 75.* Apart from the above decision, reliance has further been placed on *Supdt. and Remembrancer of Legal Affairs v. Ram Ajudhya Singh, AIR 1965 Cal 348* (AIR Para 9) and *Mehr Vajsi Deva v. State of Gujarat, AIR 1965 Guj 143* (AIR pp. 148-49, Paras 9 & 10). We have carefully perused those decisions. We are satisfied that nothing turns on this argument since the said decisions only provide that where a statement made/given by a witness under Section 161 of the Code and signed by the

same is hit by the bar prescribed under Section 162 of the Code, but nowhere do they say that the evidence deposed to in Court by the said witness becomes admissible.

As a matter of fact, similar argument of the defence counsel was rejected in *Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392.*

**(iii)** It is well settled that while giving reports after Ballistic examination, the bullets, cartridge case and the cartridges recovered and weapon of offence recovered are carefully examined and test firing is done at the FSL by the said weapon of offence and then only a specific opinion is given. In this case first CFSL report given by the Ballistic Expert, Shri Rup Singh after examining two .22" bullet empties and marks thereon was that "it appears that the two cartridge cases have been fired by two different weapons."

The stand of the defence that to opine the two cartridge cases are from the same weapon or not the pistol is not required and the pistol is only required when the opinion is sought whether they are from that particular weapon or not cannot be accepted. It is well settled that when pressure is built inside the cartridge case, which results in the pushing out of the bullet from the barrel, there is difference in the marks to the extent that it may be either clear or unclear and flattened or deepened thus no opinion can be rendered on account of this dissimilarity in the absence of the weapon of offence and test firing.

The moment Rup Singh uses the word "appear" his opinion unsupported by reasons becomes inconclusive and stands discredited for the purpose of placing reliance on. The opinion of Rup Singh was at query No. 7 as to "please examine and opine whether ejector, trigger, chamber, magazine or other tool marks are present on the live bullet and the bullet empties contained in parcel Nos. 6 & 5 respectively." Though Shri Rup Singh has given opinion qua query No. 5 that the two .22" cartridge cases appears to have been fired from two different .22" caliber standard firearms but his opinion is completely silent on the marks i.e. ejector, trigger, chamber, magazine or other tool marks on the bullet empties.

The opinion of Rup Singh is both inconclusive and unsupported by any reasoning whatsoever and, therefore, cannot appeal to the judicial mind of this Court. Such a vague opinion of the expert can neither be relied upon nor can be any basis to come to a conclusion that there were two persons who had fired two different shots.

Another FSL, Jaipur, Rajasthan report given by the Ballistic Expert, Shri Prem Sagar Manocha, PW 95 was also inconclusive as in the report he has also stated that no definite opinion could be given on two .22" cartridge cases in order to link with the fire arm unless the suspected fire arms available for examination.

The argument that the weapon of offence is not required to determine whether the two bullets have been fired from the same gun is based on the wrong premise that the two empties would necessarily consist of features which would enable an expert in determining the said fact. For instance, as in the case of a handwriting expert who has to give an opinion about two different sets of near identical questioned documents and as to whether the same belong to different persons, if the argument of the accused has to be accepted then the expert should be able to give such an opinion without having in his possession the specimen handwriting and the admitted handwriting of the accused. It is stated that such an approach would render the opinion as that of a layman and not an expert. Similar would be case of a finger print expert who undertakes the process of discovering two different sets of finger print which are in question, without having the specimen or the admitted finger print of the accused in question. In other words, an expert is only an expert if he follows the well accepted guidelines to arrive at a conclusion and supports the same with logical reasoning which is a requirement of law as laid down in the Indian Evidence Act.

**(iv)** It is thus important for us to address the role of a prosecutor, disclosure requirements if placed by the prosecutor and the role of a judge in a criminal trial.

A Public Prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a prosecutor in *Shiv Kumar v. Hukam Chand, (1999) 7 SCC 467* as follows: (SCC p. 472, para 13)

> "13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge, A private counsel, if allowed frees hand to

conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

This Court has also held that the prosecutor does not represent the investigation agencies, but the State. This Court in *Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602* held: (SCC pp. 630-31, para 23)

> "23. ... A public prosecutor is an important officer of the State Govt. and is appointed by the State under the CrPC. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation".

Therefore, a public prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the prosecutor to be lax in any of his duties as against the accused.

Code of Criminal Procedure imposes a statutory obligation on the Public Prosecutor to disclose certain evidence of the defence by supply of copies of police report and other documents to the accused u/s 207 Cr.P.C. and by supply of copies of statements and documents to the accused in other cases triable by Court of Session u/s 208 Cr.P.C.

Rule 16 of the Chapter II, Part VI of the Bar Council of India Rules under the Advocates Act, 1961 is as under :–

> "16. An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accused shall be scrupulously avoided."

It is clear that the Criminal Procedure Code and the Bar Council of India Rules provide a wide duty of disclosure. But this duty is limited to evidence on which the prosecutor proposes to place reliance during the trial.

The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 has a material bearing on this subject and makes an interesting reading. This provision not only require or mandate that the Court without delay and free of cost should furnish to the accused copies of the police report, first information report, statement, confessional statement of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173 (6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under Sub Section 5 of Section 173. In contradistinction to the provisions of Section 173, where the Legislature has used the expression 'documents on which the prosecution relies' are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173 (5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170 (2) of the Code.

The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the Court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the Court under Section 91 of the Code to summon documents signifies and provides precepts which

will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bonafidely and has bearing on the case of the prosecution and in the opinion of the public prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

It is also important to note the active role which is to be played by a Court in a criminal trial. The Court must ensure that the prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in *Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158* in paras 43 to 49 has noted the daunting task of a Court in a criminal trial while noting most pertinent provisions of the law.

**(v)** Refusal to submit to Test Identification Parade before Magistrate without citing any credible reason is totally unjustified and an adverse inference ought to be drawn in this regard. Only after refusal of T.I. Parade the accused persons/ photographs may be shown to the witnesses to verify the identity of alleged offender involved in the incident and no adverse inference on this count can be taken against the prosecution.

Photo identification or TIP before the Magistrate, are all aides in investigation and do not form substantive evidence. Substantive evidence is the evidence of the witness in the court on oath, which can never be rendered inadmissible on this count.

In support of his argument the senior counsel for Manu Sharma relies on the judgment of *Kartar Singh v. State of Punjab, (1994) 3 SCC 569 at page 711* wherein while dealing with Section 22 TADA the Court observed that photo TIP is bad in law. It is useful to mention that the said judgment has been distinguished in *Umar Abdul Sakoor Sorathia v. Narcotic Control Bureau, (2000) 1 SCC 138* where a Photo Identification has been held to be valid. The relevant extract of the said judgment is as follows: (SCC p. 143, paras 10-12)

> "10. The next circumstance highlighted by the learned counsel for the respondent is that a photo of the appellant was shown to Mr. Albert Mkhatshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.

11. It was contended that identification by photo is inadmissible in evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice, which inhibits the admissibility of such evidence. However, learned counsel invited our attention to the observations of the Constitution Bench in *Kartar Singh v. State of Punjab* (supra) which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that context: (SCC p. 711, para 361)

> '361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act.'

12. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time. It must be borne in mind that the appellant is not a proclaimed offender and we are not considering the eventuality in which he would be so proclaimed. So the observations made in *Kartar Singh* (supra) in a different context is of no avail to the appellant."

Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in Court. The logic behind TIP, which will include photo identification lies in the fact

that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not born out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation. Even where there is no previous TIP, the Court may appreciate the dock identification as being above board and more than conclusive. It is dock identification which is a substantive piece of evidence. Therefore even where no TIP is conducted no prejudice can be caused to the case of the Prosecution.

See also the case of *Munshi Singh Gautam v. State of M.P., (2005) 9 SCC 631.*

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**267. CRIMINAL PROCEDURE CODE, 1973 – Sections 95 and 96**

**Issuance of forfeiture notification – Essential considerations there for – The Government must form the opinion to the effect that the newspaper, book or document contains any matter, the publication of which is an offence under certain provisions of Indian Penal Code mentioned in Section 95 Cr.P.C. and the Government must state the grounds of its opinion – Mere citation of the words of the section is not sufficient – Legal aspects to be kept in mind while examining the validity of such notification laid down.**

## State of Maharashtra and others v. Sangharaj Damodar Rupawate and others

**Judgment dated 09.07.2010 passed by the Supreme Court in Civil Appeal No. 5205 of 2010 reported in (2010) 7 SCC 398**

Held :

**Facts of the Case:**

The Maharashtra Government u/s 95 (1) Cr.P.C. issued a Notification (20.12.2006), which indicates that in the opinion of the Government, the circulation of the book, entitled 'Shivaji – Hindu King in Islamic India', containing scurrilous and derogatory references to Shivaji, had resulted in causing enmity between various communities and the circulation of the said book was likely to result in breach of peace and public tranquility. For publication of the said book an FIR for offences under Sections 153 and 153-A r/w/s 34 IPC had been registered against the author. In a petition filed under Section 96 Cr.P.C. read with Article 226 of the Constitution of India – The High Court set aside and quashed the said notification – The State, then filed the appeal by Special Leave before Hon'ble the Supreme Court. The Supreme Court dismissed the appeal of the State and held as under:

Section 95 of the Code is an enabling provision, which, in the circumstances enumerated in the Section, empowers the State Government to declare that copy of a newspaper, book or document be forfeited to the Government. It is evident that the provision deals with any newspaper, book or document which is printed. The power to issue a declaration of forfeiture under the provision postulates compliance with twin essential conditions, viz., (i) the Government must form the opinion to the effect that such newspaper, book or document contains any matter, the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the IPC, and (ii) the Government must state the grounds of its opinion. Therefore, it is mandatory that a declaration by the State Government in the form of notification, to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government, must state the grounds on which the State Government has formed a particular opinion. A mere citation of the words of the Section is not sufficient. Section 96 of the Code entitles any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture is made under Section 95 of the Code, to move the High Court for setting aside the declaration on the ground that it does not contain any such matter as is referred to in sub-section (1) of Section 95.

Undoubtedly, the power to forfeit a newspaper, book or document is a drastic power inasmuch as it not only has a direct impact upon the due exercise of a cherished right of freedom of speech and expression as envisaged in Article 19(1)(a) of the Constitution, it also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to be found, again impinging upon the right of privacy. Therefore, the provision has to be construed strictly and exercise of power under it has to be in the manner and according to the procedure laid down therein.

The following legal aspects can be kept in mind while examining the validity of such a notification:

(i) The statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of forfeiture. Therefore, the grounds of Government's opinion must be stated in the notification issued under Section 95 of the Code and while testing the validity of the notification the Court has to confine the inquiry to the grounds so disclosed;

(ii) Grounds of opinion must mean conclusion of facts on which opinion is based. Grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which Government may choose. A mere repetition of an opinion or reproduction of the Section will not answer the requirement of a valid notification. However, at the same time, it is not necessary that the notification must bear a verbatim record of the forfeited material or give a detail gist thereof;

(iii) The validity of the order of forfeiture would depend on the merits of the grounds. The High Court would set aside the order of forfeiture if there are no grounds of opinion because if there are no grounds of opinion it cannot be satisfied that the grounds given by the Government justify the order. However, it is not the duty of the High Court to find for itself whether the book contained any such matter whatsoever;

(iv) The State cannot extract stray sentences of portions of the book and come to a finding that the said book as a whole ought to be forfeited;

(v) The intention of the author has to be gathered from the language, contents and import of the offending material. If the allegations made in the offending article are based on folklore, tradition or history something in extenuation could perhaps be said for the author;

(vi) If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under Section 153-A of the IPC that the writing contains a truthful account of past events or is otherwise supported by good authority. Adherence to the strict path of history is not by itself a complete defence to a charge under Section 153-A of the IPC;

(vii) Section 95(1) of the Code postulates that the ingredients of the offences stated in the notification should "appear" to the Government to be present. It does not require that it should be "proved" to the satisfaction of the Government that all requirements of punishing sections, including mens rea, were fully established;

(viii) The onus to dislodge and rebut the prima facie opinion of the Government that the offending publication comes within the ambit of the relevant offence, including its requirement of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof;

(ix) The effect of the words used in the offending material must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also be relevant for judging the probable consequences of the writing.

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**268. CRIMINAL PROCEDURE CODE, 1973 – Section 125**
**FAMILY COURTS ACT, 1984 – Section 19 (4)**

**(i) Order of interim maintenance – Not interlocutory order because it affects the right of a person drastically and substantially – Hence, no bar of Section 397 (2) of Cr.P.C. is applicable.**

**(ii) Order passed by the Family Court under Section 125 of Cr.P.C.– Criminal revision – In High Court – Can be preferred under Section 19 (4) of the Family Courts Act.**

**Aakansha Shrivastava v. Virendra Shrivastava and another**
**Judgment dated 15.04.2010, passed by M.P. High Court in W.P. No. 1324 of 2010, reported in 2010 (3) MPLJ 151 (DB)**

Held:

We are of the considered view that the order of interim maintenance cannot be treated as interlocutory order and hence, no bar of Section 397(2), Criminal Procedure Code is applicable. In the present case, petitioner-wife is substantially affected by the order which has been put to challenge because, right to get maintenance or survive with dignity which is as good as fundamental right granted by the Constitution to the petitioner has been substantially affected and prejudiced. Any order which affects right of a person drastically or affects it substantially or prejudices it substantially, cannot be treated as an "interlocutory order". Order of interim maintenance which affects right of parties substantially, cannot be treated as 'interlocutory'.

Hence, it cannot be treated as "interlocutory order" and criminal revision can be preferred under Section 19(4) of the Family Courts Act.

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***269. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 162 and 164 EVIDENCE ACT, 1872 – Sections 145 and 155 (3)**
**The FIR or the statement recorded u/s 164 Cr.P.C. does not constitute substantive evidence of the truth of the facts – It can only be used as a previous statement for the purposes of either corroborating or for contradicting the person, who made it – It can be used to impeach the credibility of the prosecution witness – Such previous statement cannot be used for contradiction unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness.**

**Utpal Das and another v. State of West Bengal**
**Judgment dated 07.05.2010 passed by the Supreme Court in Criminal Appeal No. 800 of 2007, reported in (2010) 6 SCC 493**

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**270. CRIMINAL PROCEDURE CODE, 1973 – Section 202 (2) Proviso**
**Whether examination of all witnesses cited in the complaint is *sine qua non* for taking cognizance by a Magistrate in a case exclusively triable by the Court of Session? Held, No.**

**Shivjee Singh v. Nagendra Tiwary and others**
**Judgment dated 06.07.2010 passed by the Supreme Court in Criminal Appeal No. 1158 of 2010, reported in (2010) 7 SCC 578**

Held:

Chapter XIV of Cr.P.C. enumerates conditions for initiation of proceedings. Under Section 190, which forms part of the scheme of that chapter, a Magistrate

can take cognizance of any offence either on receiving a complaint of facts which constitute an offence or a police report of such facts or upon receipt of information from any person other than a police officer or upon his own knowledge, that such an offence has been committed. Chapters XV and XVI contain various procedural provisions which are required to be followed by the Magistrate for taking cognizance, issuing of process/summons, dismissal of the complaint, supply of copies of documents and statements to the accused and commitment of case to the Court of Sessions when the offence is triable exclusively by that Court.

An analysis of the provisions shows that when a complaint is presented before a Magistrate, he can, after examining the complainant and his witnesses on oath, take cognizance of an offence. This procedure is not required to be followed when a written complaint is made by a public servant, acting or purporting to act in discharge of his official duties or when a Court has made the complaint or if the Magistrate makes over the case for inquiry/trial to another Magistrate under Section 192.

Section 202 (1) empowers the Magistrate to postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person whom he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No. 25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath.

Section 203 empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then he may issue summons for attendance of the accused in a summons-case. If it is a warrant-case, then the Magistrate can issue warrant for causing attendance of accused.

The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a prima facie case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is *prima facie* satisfied that a case is made out against the person accused of committing an offence then he is required to issue process.

Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/ investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is satisfied that there is sufficient ground for doing so.

The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a prima facie case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. This interpretation of the provisions contained in Chapters XV and XVI of Cr.P.C. finds adequate support from the judgments of this Court in *Ramgopal Ganpatrai Ruia v. State of Bombay, AIR 1958 SC 97, Vadilal Panchal v. Duttatraya Dulaji Ghadigaonkar, AIR 1960 SC 1113, Chandra Deo Singh v. Prokash Chandra Bose, AIR 1963 SC 1430, Nirmaljit Singh Hoon v. State of West Bengal, (1973) 3 SCC 753, Kewal Krishan v. Suraj Bhan, 1980 Supp SCC 499, Mohinder Singh v. Gulwant Singh, (1992) 2 SCC 213 and Chief Enforcement Officer v. Videocon International Ltd., (2008) 2 SCC 492.*

The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word 'his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process.

The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the

trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint.

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***271. CRIMINAL PROCEDURE CODE, 1973 – Section 357**

**(i) Section 357 of the Code empowers the Court not to just impose a fine alone or fine along with sentence but also when the situation arises direct the accused to pay compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.**

**(ii) Section 357 (3) of the Code provides that when a Court imposes a sentence of which fine does not form a part, the Court may while passing judgment, order the accused person to pay by way of compensation such amount as may be specified in order to the victim and in default of payment of such compensation, a default sentence of imprisonment can also be imposed.**

**(iii) This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system – It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender – It is, to some extent, a constructive approach to crimes – It is indeed a step forward in our criminal justice system – The Apex court, therefore, recommend to all the Courts to exercise this power liberally so as to meet the ends of justice in a better way – While passing order u/s 357 (3), it is imperative for the Courts to look at the ability and capacity of the accused to pay the amount otherwise, the very purpose of granting compensation under the section would stand defeated – Case laws on** *Sarwan Singh v. State of Punjab, (1978) 4 SCC 111, Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528, Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551, Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420, Vijayan v. Sadanandan K., (2009) 6 SCC 652 and Shantilal v. State of M.P., (2007) 11 SCC 243* **referred.**

**K.A. Abbas H.S.A v. Sabu Joseph and another**
**Judgment dated 11.05.2010 passed by the Supreme Court in Criminal Appeal No. 1052 of 2010, reported in (2010) 6 SCC 230**

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***272. CRIMINAL PROCEDURE CODE, 1973 – Section 438**
**Anticipatory bail – The principles laid down by the Apex Court with regard to pre-arrest or regular bail in the cases of** *State v. Anil Sharma (1997) 7 SCC 187, Anil Kumar Tulsiyani v. State of U.P., (2006) 9 SCC 425 and State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21* **are normally required to be followed while granting bail, but the same have to be applied according to the facts and circumstances of each case – Except for indicating the broad outlines for grant of regular bail/anticipatory bail, no straitjacket formula can be prescribed for universal application, as each case for grant of bail has to be considered on its own merits and in the facts and the nuances of each case.**

**Pravinbhai Kashirambhai Patel v. State of Gujarat and others**
**Judgment dated 08.07.2010 passed by the Supreme Court in SLP (Crl.) No. 1923 of 2010, reported in (2010) 7 SCC 598**

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**273. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457**
**GAUVANSH VADH PRATISHEDH ADHINIYAM, 2004 (M.P.) – Sections 4, 6 and 9**
**AGRICULTURE CATTLE PRESERVATION ACT, 1959 (M.P.) – Sections 4 and 6**
**PREVENTION OF CRUELTY TO ANIMALS ACT, 1960 – Sections 10 and 11**
**ESSENTIAL COMMODITIES ACT, 1955 – Section 3/7**

**(i) 27 cattle were transported by truck for slaughtering purposes which was seized by Police and offence under Sections 4, 6 and 9 of Adhiniyam, 2004, Sections 4 and 6 of Act, 1959 and Sections 10 and 11 of Act of 1960 registered – Cattle were given in the temporary custody to a benevolent institution which is acting in the welfare of cattle – CJM declined to hand over the cattle in the interim custody of applicant – Held, cattle were being carried in a very deplorable condition – Out of 27 cattle, 4 were found dead – This is clear indicative of the fact that they were being carried for slaughtering purposes – No document for purchasing these cattle have been filed – If the cattle are given in the custody of the applicant, the possibility of their slaughtering cannot be ruled out – Revision dismissed.**

**(ii) Truck was seized by police also for the offence of transporting the cattle for slaughtering purposes – CJM declined to hand over the truck in the interim custody of applicant – Held, since the offence u/s 3/7 of Essential Commodities Act has also been registered and the confiscation proceeding of the truck was going on before the Competent Authority, hence there was no question to give the truck on Supurdginama – Revision dismissed.**

**Mohammad Ajeem Khan v. State of M.P. & anr.**
**Judgment dated 03.02.2010 passed by the High Court in Criminal Revision No. 1702 of 2008, reported in ILR 2010 M.P. 1187**

Held :

In the case of *Manager, Pinjrapole Deodar and another v. Chakram Moraji Nat and others, 1998 AIR SCW 2943,* the Apex Court has held thus :

> "Under S.35(2) of the Act, the Magistrate has discretion to handover interim custody of the animal to Pinjrapole but he is not bound to handover custody of the animal to Pinjrapole in the event of not sending it to an infirmary. In a case where the owner is claiming the custody of the animal, Pinjrapole has no preferential right. In deciding whether the interim custody of the animal be given to the owner who is facing prosecution, or to the Pinjrapole, the following factors will be relevant: (1) the nature and gravity of the offence alleged against the owner; (2) whether it is the first offence alleged or he has been found guilty of offences under the Act earlier; (3) if the owner is facing the first prosecution under the Act, the animal is not liable to be seized, so the owner will have a better claim for the custody of the animal during the prosecution; (4) the condition in which the animal was found at the time of inspection and seizure; (5) the possibility of the animal being again subjected to cruelty."

So far as the present case is concerned, the cattle were being carried in a very deplorable condition. Out of 27 cattle, 4 were found dead. This is clear indicative of the fact that they were being carried for slaughtering purposes. No documents for purchasing these cattle have been filed. The respondent No.2 is a benevolent institution and acts in the welfare of the cattle. If the cattle are given in custody of the applicant the possibility of their slaughtering cannot be ruled out.

In the matter of *State of U.P. v. Mustakeem, Criminal Appeal No. 283-287/2002* vide order dated 22.02.2002, the Hon'ble Apex Court has observed as under:-

"The State of Uttar Pradesh is in appeal against the direction of the Court directing release of the animals in favour of the owner. It is alleged that while those animals were registered for alleged violation of the provisions of Prevention of Cruelty to Animals Act, 1960, and the specific allegation in the FIR was that the animals were transported for being slaughtered, and the animals were tied very tightly to each other. The criminal case is still pending. On an appeal for getting the custody of the animals was filed, the impugned order has been passed. We are shocked as to how such an order could be passed by the learned Judge of the High Court in view of the very allegations and in view of the charges, which the accused may face in the criminal trial. We, therefore, set aside the impugned order and direct that these animals be kept in the Goshala and the State Government undertakes to take the entire responsibility of the preservation of those animals so long as the matter is under trial."

Keeping in view the facts and circumstances of this case the court below has rightly declined to hand over the cattle in the interim custody of applicant. The discretion appears to be exercised in proper manner.

Since the offence under Section 3/7 of the Essential Commodities Act has also been registered and the confiscation proceeding of the truck was going on before the competent authority, hence there was no question to give that truck on supurdginama.

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***274 CRIMINAL TRIAL:**

**Group rivalry – In the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault – In such situations, the Courts are called upon to be very cautious and sift the evidence with care – Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the Court with regard to the participation of any of those who have been roped in, the Court would be obliged to give the benefit of doubt to them.**

**Eknath Ganpat Aher and others v. State of Maharashtra and others**

**Judgment dated 07.05.2010 passed by the Supreme Court in Criminal Appeal No. 173 of 2007, reported in (2010) 6 SCC 519**

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*275. CRIMINAL TRIAL:

EVIDENCE ACT, 1872 – Sections 3, 27 and 45

Appreciation of evidence in respect of so called weapon of offence – So called weapon of the offence was lost – In absence of weapon being produced before the Court, the evidence of the discovery of the so called weapon could not be relied upon – Similarly, the medical officer conducting the post-mortem of the deceased cannot relate the injuries found upon the dead body with that particular weapon without being seen that weapon in the Court – This evidence should have been discarded.

**Niranjan Panja v. State of West Bengal**

Judgment dated 14.05.2010 passed by the Supreme Court in Criminal Appeal No. 564 of 2005, reported in (2010) 6 SCC 525

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*276. CRIMINAL TRIAL:

EVIDENCE ACT, 1872 – Section 32 (1)

Evidentiary value of dying declaration – As per the medical evidence, injured victim (deceased) sustained 100% burn injuries and her tongue was swollen and protruded and lips were burnt – But at the time of recording her statement (DD) she was in a fit condition and in a fit state of mind to make a statement – Executive Magistrate recorded her statement (DD) in the presence of Medical Officer and after recording of the statement, her left thumb impression was taken on the statement as well as the signature of the medical officer – In these circumstances, though Executive Magistrate had not obtained the certificate from the medical officer regarding the condition of the deceased; that itself is not sufficient to discard the dying declaration – Only the person, who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind.

**Govindappa and others v. State of Karnataka**

Judgment dated 11.05.2010 passed by the Supreme Court in Criminal Appeal No. 1469 of 2008, reported in (2010) 6 SCC 533

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277. DEBT AND FINANCIAL LAWS:

Hypothecation – Meaning and legal position regarding rights of the parties thereunder, explained.

**Eureka Forbes Limited v. Allahabad Bank and others**

Judgment dated 03.05.2010 passed by the Supreme Court in Civil Appeal No. 4029 of 2010, reported in (2010) 6 SCC 193

Held:

In *Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736* the meaning of 'entrustment' in relation to hypothecation was described as follows:

> "25. ...The creditor may also have the right to claim payment from the sale proceeds (if such proceeds are identifiable and available). The following definitions of the term 'hypothecation' in P. Ramanatha Aiyar's Advanced Law Lexicon [3rd Edn. (2005), Vol. 2] are relevant:
>
> "Hypothecation — It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrowers enters into an agreement with the lender to hand over the possession of the hypothecated assets whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledgee
>
> ★ ★ ★
>
> 'Hypothecation' means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property. [Borrowed from Section 2(n) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002]."

Physical domain over the hypothecated goods is no way a *sine qua* non for enforcing Bank's rights against the borrower.

There is, in fact, hardly any dispute before us that the goods in question had been hypothecated to the Bank. The appellant had complete knowledge of this fact, still it went on to sell the goods. It was obligatory upon the appellant to deal with the goods only with the leave and permission of the Bank. Absence of such consent in writing would obviously result in breach of Bank's rights. The Bank had been negligent and, to some extent, irresponsible, in invoking the rights and taking appropriate remedy in accordance with law. Mere irresponsibility on the part of the Bank, would not wipe out the rights of the Bank in law. Without the consent of the Bank, no person can utilise the hypothecated goods for his own benefit or sale by the borrower or any person connected thereto. It is nobody's case that the Bank had consented to such sale.

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*278. EVIDENCE ACT, 1872 – Section 3
CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 161

(i) Appreciation of evidence – Delay in recording statement u/s 161 Cr.P.C. – Statement of eye-witness recorded after 22 days of the incident – No inimical relations with the accused persons or any animosity against them – Plausible explanation given by the witness that on account of illness of his father he had gone out of city and came back after 20-22 days, then he gave statement to the police – His evidence cannot be discarded and doubted on the ground of his delayed examination by the I.O.

(ii) Appreciation of evidence – Effect of non-mentioning the name of eye-witness in FIR – There was crowd on the place of occurrence – Therefore, it cannot be reasonably expected from the first informer that the name of every onlooker should be mentioned in the FIR – Testimony of eye-witness cannot be disbelieved on the ground that he was not named in the FIR.

(iii) Hostile witness – First informer turned hostile to prosecution and resiled from the contents of the FIR but he admitted his signature on the FIR and the factum of lodging the report at the police station – Evidence of eye-witness clearly reflects the presence of both the accused persons on the place of occurrence as also their complicity in the commission of the crime – First informer was declared hostile by the prosecution – The evidence of such witness cannot be treated as effaced or washed off from the record altogether – But, the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.

**Pillu @ Prahlad & anr. v. State of M.P.**

Judgment dated 11.02.2010 passed by the High Court in Criminal Appeal No. 766 of 2001, reported in ILR (2010) M.P. 1181.

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*279. EVIDENCE ACT, 1872 – Sections 3 and 9
INDIAN PENAL CODE, 1860 – Section 364-A
WORDS AND PHRASES:

(i) Child witness – Boy of seven years kidnapped for ransom – Since, the child witness himself was the victim of the offence and the natural manner and confidence with which, he narrated the incident in the Court, he cannot be disbelieved merely on the ground that he was a child witness.

(ii) Test Identification Parade – Boy of seven years kidnapped for ransom – He had remained with accused persons for 7 days and had correctly identified all the four accused persons – It was not necessary to have held the test identification proceeding for him.

(iii) Seven year boy was kidnapped and a demand for ransom was made – Defence plea that it was not proved that accused persons made demand of ransom for release of kidnappee and that there was no apprehension that the kidnappee might be put to death or hurt – Held, to attract the provisions of Section 364-A, it is required to prove that accused kidnapped a person and kept him under detention for a ransom.

(iv) Seven year boy was kidnapped – He was not kept confined in any closed room or house but he was kept in the village, which was 200 km. away from his residence – Seven year boy could not have gone to his house himself – He was kept there by extending assurance to him that his parents would come there to fetch him – In these circumstances, such detention after his kidnapping is clearly punishable u/s 364-A.

(v) Three accused persons kidnapped a seven year old boy and one of the accused persons communicated the demand of ransom to the grandfather of the boy – Prosecution has not proved which particular accused made or communicated the demand of ransom – Held, it is not always necessary to be proved that which particular accused made or communicated the demand of ransom.

(vi) From the evidence of kidnappee and other circumstances proved by prosecution evidence, it has been amply established that accused had wrongfully concealed and kept kidnappee in his house knowingly that he had been kidnapped – Therefore, accused is guilty for the charge u/s 368 r/w/s 364-A of IPC.

(vii) 'Ransom' – An imperative request preferred by one person to another requiring the latter to do or yield something or to abstain from some act.

'Detention' – Means the act of keeping back or withholding either accidentally or by design, a person or thing – Detention is depriving of a person of his personal liberty.

**Irfan & anr. v. State of M.P.**

**Judgment dated 01.02.2010 passed by the High Court in Criminal Appeal No. 285 of 2002, reported in ILR (2010) M.P. 1170**

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**280. EVIDENCE ACT, 1872 – Section 109**
**ALL INDIA BAR COUNCIL (FIRST CONSTITUTION) RULES, 1961 – Rule 13**

**(i) Burden of proof on advocate to prove that the relationship with party, which he represents in the case before the Court, has ceased to stand because he affirmed that at the time of transaction, the relationship was ceased.**

**(ii) Acquiring interest in litigation – During pendency of litigation An advocate of the party purchased the disputed property by sale deed – Held, said transaction was forbidden by Rule 13 of Rules, 1961, therefore it was unlawful and void.**

**Amar Singh and others v. Balmukund and others**
**Judgment dated 13-01-2010, passed by M.P. High Court in S.A. No. 123/1988, reported in ILR (2010) MP 1427**

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**281. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 6 and 13**
**Custody of minor – Considerations thereto – The interest of the minor is of paramount importance to the Court which stands in *loco parentis* to the minor – The wishes of the minor are also to be given due weightage – Legal position reiterated.**

**Mohan Kumar Rayana v. Komal Mohan Rayana**
**Judgment dated 06.04.2010 passed by the Supreme Court in SLP (C) No. 9821 of 2009, reported in (2010) 5 SCC 657**

Held:

Having the interest of the minor in mind, we decided to meet her separately in order to make an assessment of her behavioural pattern towards both the petitioner as well as the respondent. Much against the submissions which have been made during the course of hearing of the matter, Anisha appeared to have no inhibitions in meeting the petitioner-father with whom she appeared to have an excellent understanding. There was no evidence of Anisha being hostile to her father when they met each other in our presence. From the various questions which we put to Anisha, who, in our view, is an extremely intelligent and precocious child, she wanted to enjoy the love and affection both of her father as well as her mother and even in our presence expressed the desire that what she wanted most was that they should come together again. However, Anisha seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. Anisha is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, we are of the view that she requires her mother's company more at this stage of her life.

There is no doubt that the petitioner is very fond of Anisha and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the *status quo* prevailing with

regard to Anisha's custody. The conditions laid down by the High Court regarding visitation rights to the petitioner are, in our view, sufficient for Anisha to experience the love and affection both of her father and mother. There is no reason why the petitioner, who will have access to Anisha on holidays and weekends, cannot look after her welfare without having continuous custody of her person.

As has repeatedly been said, in these matters the interest of the minor is of paramount importance to the Court which stands in *loco parentis* to the minor. Of course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done. We, therefore, see no reason to interfere with the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the Bombay High Court.

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**282. INDIAN PENAL CODE, 1860 – Sections 149 and 96 to 106**

**'Common object', translation there of – 'Common object' does not require a prior concert and a common meeting of minds before the attack – It is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances – It may be gathered from the course of conduct adopted by the members of the assembly – Legal position restated.**

**Right of private defence, exercise of – It does not include a right to launch an offensive or aggression.**

## Sikandar Singh and others v. State of Bihar

**Judgment dated 09.07.2010 passed by the Supreme Court in Criminal Appeal No. 227 of 2007, reported in (2010) 7 SCC 477**

Held:

Section 149 IPC reads as follows:

> *"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.*— If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the

purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly, Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to which rule of self defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

The scope and width of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions, the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although

the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (See: *Jai Dev v. State of Punjab, AIR 1963 SC 612.*)

To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self created. Necessity must be present, real or apparent. (See: *Laxman Sahu v. State of Orissa, AIR 1988 SC 83.*)

Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. (See: *Dharam & Ors. v. State of Haryana, JT 2007 (1) SC 299.*)

It is well settled that the burden of establishing the plea of self defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

In *Vidhya Singh v. State of Madhya Pradesh,(1971) 3 SCC 244,* this Court had observed that right of self defence should not be construed narrowly because it is a very valuable right and has a social purpose.

(Also see: *Munshi Ram & Ors. v. Delhi Administration, AIR 1968 SC 702; The State of Gujarat v. Bai Fatima & Anr., AIR 1975 SC 1478 and Salim Zia v. State of Uttar Pradesh, AIR 1979 SC 391.*)

In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of

threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injury so caused on the accused probabilise the version of the right of private defence.

The right to defend does not include a right to launch an offensive, or aggression. In our opinion, therefore, the appellants have failed to establish that they were exercising right of private defence.

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**283. INDIAN PENAL CODE, 1860 – Sections 153-A, 292, 499, 500 and 509**
**INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT, 1986 – Sections 4 and 6**
**CRIMINAL PROCEDURE CODE, 1973 – Section 199**

**(i) Promoting enmity between different groups – Held, when the appellant was not speaking on behalf of one group and the content of her statement was not directed against any particular group, Section 153-A IPC has no application.**

**(ii) Obscenity – Gauging thereof – The appellant has merely referred to the increasing incidence of premarital sex and called for its societal acceptance – She made that statement in the context of a survey which has touched on numerous aspects relating to the sexual habits of people in big cities and same was published in a news magazine as the part of survey – Appellant's remarks does not amount to obscenity within the meaning of Section 292 IPC**

**(iii) Premarital sex and live-in relationship – Held, mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults engage in sexual relations outside the marital setting, with the exception of adultery under Section 497 IPC.**

**(iv) Insult the modesty of woman – Held, in order to establish this offence, it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act – When grievance is with the publication of what the appellant had stated in a written form, this offence must be made out.**

**(v) Defamation – Ingredients of offence – There is neither any intent on the part of appellant to cause harm to the reputation of the**

**complainant nor can Court discern any actual harm done to their reputation – Both the elements i.e. *mens rea* and *actus* reus are missing – No case of defamation is made out.**

**(vi) Defamation – Filing of criminal complaint – Legal standing therfor – Complaint can only be filed by an "aggrieved person" – When there was no specific injury caused to any of the complainants since the appellants remarks were not directed at any individual or a readily identifiable group of people, complainants cannot be described as "persons aggrieved" within the meaning of Section 199 CrPC.**

**(vii) Indecent representation of women – Act of 1986 – Object of – It was enacted to punish publishers and advertisers who knowingly disseminate materials that portray women in an indecent manner**

## S. Khusboo v. Kanniammal and another

**Judgment dated 28.04.2010 passed by the Supreme Court in Criminal Appeal No. 913 of 2010, reported in (2010) 5 SCC 600**

Held :

A perusal of the complaints reveals that most of the allegations have pertained to offences such as defamation (Sections 499, 501 and 502 IPC), obscenity (Section 292 IPC), indecent representation of women and incitement among others. At the outset, we are of the view that there is absolutely no basis for proceeding against the appellant in respect of some of the alleged offences. For example, Indecent Representation of Women (Prohibition) Act, 1986 was enacted to punish publishers and advertisers who knowingly disseminate materials that portray women in an indecent manner. However, this statute cannot be used in the present case where the appellant has merely referred to the incidence of pre-marital sex in her statement which was published by a news magazine and subsequently reported in another periodical. It would defy logic to invoke the offences mentioned in this statute to proceed against the appellant, who cannot be described as an "advertiser" or "publisher" by any means.

Similarly, Section 509 IPC criminalises a "word, gesture or act intended to insult the modesty of a woman" and in order to establish this offence it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act. Clearly this offence cannot be made out when the complainants' grievance is with the publication of what the appellant had stated in a written form. Likewise, some of the complaints have mentioned offences such as those contemplated by Section 153A IPC (promoting enmity between different groups, etc.) which have no application to the present case since the appellant was not speaking on behalf of one group and the content of her statement was not directed against any particular group either.

Coming to the substance of the complaints, we fail to see how the appellant's remarks amount to 'obscenity' in the context of Section 292 IPC. Sub-section (1) of Section 292 states that the publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure, etc., will be deemed obscene, if -

- It is lascivious (i.e. expressing or causing sexual desire); or
- Appeals to the prurient interest (i.e. excessive interest in sexual matters); or
- If its effect, or the effect of any one of the items, tends to deprave and corrupt persons, who are likely to read, see, or hear the matter contained in such materials.

There are numerous decisions, both from India and foreign country which mandate that 'obscenity' should be gauged with respect to contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person. Owing to the clear formulation on this issue it is not necessary for us to discuss these precedents at length.

In the present case, the appellant has merely referred to the increasing incidence of pre-marital sex and called for its societal acceptance. At no point of time appellant described the sexual act or said anything that could arouse sexual desires in the mind of a reasonable and prudent reader. Furthermore, the statement has been made in the context of a survey which has touched on numerous aspects relating to the sexual habits of people in big cities. Even though this survey was not part of a literary or artistic work, it was published in a news magazine thereby serving the purpose of communicating certain ideas and opinions on the above-mentioned subject. In the long run, such communication prompts a dialogue within society wherein people can choose to either defend or question the existing social mores. It is difficult to appreciate the claim that the statements published as part of the survey were in the nature of obscene communications.

We must also respond to the claim that the appellant's remarks could have the effect of misguiding young people by encouraging them to indulge in pre-marital sex. This claim is a little far-fetched since the appellant had not directed her remarks towards any individual or group in particular. All that the appellant did was to urge the societal acceptance of the increasing instances of premarital sex when both partners are committed to each other. This cannot be construed as an open endorsement of sexual activities of all kinds. If it were to be considered so, the criminal law machinery would have to take on the unenforceable task of punishing all writers, journalists or other such persons for merely referring to any matter connected with sex in published materials. For the sake of argument, even if it were to be assumed that the appellant's statements could encourage some people to engage in premarital sex, no legal injury has been shown since the latter is not an offence.

While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under Section 497 IPC. At this juncture, we may refer to the decision given by this Court in *Lata Singh v. State of U.P., AIR 2006 SC 2522,* wherein it was observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or "live with anyone she likes". In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. This Court had entertained a writ petition and granted relief by quashing the criminal trial. Furthermore, the Court had noted that "no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court".

We now turn to the question whether the appellant's remarks could reasonably amount to offence of defamation as defined under Section 499 IPC. In the impugned judgment dated 30.4.2008, the High Court observed that as to whether the appellant could claim a defence against the allegations of defamation was a factual question and thus would be decided by a trial Court. However, even before examining whether the appellant can claim any of the statutory defences in this regard, the operative question is whether the allegations in the impugned complaints support a prima facie case of defamation in the first place.

It is our considered view that there is no prima facie case of defamation in the present case. This will become self-evident if we draw attention to the key ingredients of the offence contemplated by Section 499 IPC. The definition makes it amply clear that the accused must either intend to harm the reputation of a particular person or reasonably know that his/her conduct could cause such harm. Explanation 2 to Section 499 further states that "It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such."

With regard to the complaints in question, there is neither any intent on part of the appellant to cause harm to the reputation of the complainants nor can we discern any actual harm done to their reputation. In short, both the elements i.e. *mens rea* and *actus reus* are missing. As mentioned earlier, the appellant's statement published in 'India Today' (in September 2005) is a rather general endorsement of premarital sex and her remarks are not directed at any individual or even at a 'company or an association or collection of persons'. It is difficult to fathom how the appellant's views can be construed as an attack on the reputation of anyone in particular. Even if we refer to the remarks published

in 'Dhina Thanthi' (dated 24.9.2005) which have been categorically denied by the appellant, there is no direct attack on the reputation of anyone in particular. Instead, the purported remarks are in the nature of rhetorical questions wherein it was asked if people in Tamil Nadu were not aware of the incidence of sex. Even if we consider these remarks in their entirety, nowhere has it been suggested that all women in Tamil Nadu have engaged in premarital sex. That imputation can only be found in the complaints that were filed by the various respondents. It is a clear case of the complainants reading in too much into the appellant's remarks.

This takes us to the question of whether the impugned complaints were made in a bona fide manner. As we have already noted, most of the complainants are associated with the PMK, a political party which is active in the State of Tamil Nadu. This fact does add weight to the suggestion that the impugned complaints have been filed with the intention of gaining undue political mileage.

It may be reiterated here that in respect of the offence of defamation, Section 199 Cr.PC mandates that the Magistrate can take cognizance of the offence only upon receiving a complaint by a person who is aggrieved. This limitation on the power to take cognizance of defamation serves the rational purpose of discouraging the filing of frivolous complaints which would otherwise clog the Magistrate's Courts. There is of course some room for complaints to be brought by persons other than those who are aggrieved, for instance when the aggrieved person has passed away or is otherwise unable to initiate legal proceedings. However, in given facts of the present case, we are unable to see how the complainants can be properly described as 'persons aggrieved' within the meaning of Section 199(1)(b) Cr.PC. As explained earlier, there was no specific legal injury caused to any of the complainants since the appellant's remarks were not directed at any individual or a readily identifiable group of people.

A complaint under Sections 499, 500 and 501 IPC was filed in response to this report. Like the present case, the Court had to consider whether the complainant had the proper legal standing to bring such a complaint. The Court did examine Section 198 of the Code of Criminal Procedure, 1898 (analogous to Section 199 of the Cr.PC. 1973) and observed that the said provision laid down an exception to the general rule that a criminal complaint can be filed by anyone irrespective of whether he is an "aggrieved person" or not. But there is a departure from this norm in so far as the provision permits only an "aggrieved person" to move the Court in case of defamation. This section is mandatory and it is a settled legal proposition that if a Magistrate were to take cognizance of the offence of defamation on a complaint filed by one who is not an "aggrieved person", the trial and conviction of an accused in such a case by the Magistrate would be void and illegal.

Coming back to the facts of the present case, the complainants have alleged defamation in respect of imputations against the character of Tamil-speaking women, which could perhaps be viewed as a class of persons. However, we have already explained, the appellant's remarks did not suggest that all women in Tamil Nadu have engaged in premarital sex. In fact her statement in India Today did not refer to any specific individual or group at all. If we refer to one of the questions asked as part of the concerned survey, one of the answers shows that 26% of the people who responded to the same did not think that it was necessary for women to retain their virginity till the time of marriage. Clearly the appellant was not alone in expressing such a view, even though it may be unpopular or contrary to the mainstream social practices. Even if it were assumed that the news-item carried in Dhina Thanthi caused mental agony to some sections of women in Tamil Nadu, there is no prima facie case for any offence. What is interesting to note is that not all of the complainants are women, and in fact almost all the complainants are associated with a particular political party.

We are of the view that the institution of the numerous criminal complaints against the appellant was done in a mala fide manner. In order to prevent the abuse of the criminal law machinery, we are therefore inclined to grant the relief sought by the appellant. In such cases, the proper course for Magistrates is to use their statutory powers to direct an investigation into the allegations before taking cognizance of the offences alleged. It is not the task of the criminal law to punish individuals merely for expressing unpopular views. The threshold for placing 'reasonable restrictions on the 'freedom of speech and expression' is indeed a very high one and there should be a presumption in favour of the accused in such cases. It is only when the complainants produce materials that support a prima facie case for a statutory offence that Magistrates can proceed to take cognizance of the same. We must be mindful that the initiation of a criminal trial is a process which carries an implicit degree of coercion and it should not be triggered by false and frivolous complaints, amounting to harassment and humiliation to the accused.

Admittedly, the appellant's remarks did provoke a controversy since the acceptance of premarital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive.

In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

Thus, dissemination of news and views for popular consumption is permissible under our constitutional scheme. The different views are allowed to be expressed by the proponents and opponents. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being co-extensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author.

In conclusion, we find that the various complaints filed against the appellant do not support or even draw a prima facie case for any of the statutory offences as alleged. Therefore, the appeals are allowed and the impugned judgment and order of the High Court dated 30.4.2008 is set aside. The impugned criminal proceedings are hereby quashed.

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**284. INDIAN PENAL CODE, 1860 – Sections 300 and 149**

**Murder – Unlawful assembly – Merely on the ground that appellant was member of the assembly of which one member had gun when appellant cannot be attributed with knowledge that there was likelihood of commitment of murder of deceased on the ground of prior altercation with his brother – Apart from that, there was no enmity between deceased and appellant – No exhortation was given by appellant to kill deceased and no injury was caused by him – Therefore, accused/appellant cannot be convicted for murder with the aid of Section 149 IPC.**

## Daya Kishan v. State of Haryana

**Judgment dated 22.04.2010 passed by the Supreme Court in Criminal Appeal No. 879 of 2007, reported in AIR 2010 SC 2147**

Held:

Section 149 IPC creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt under Section 149 IPC is mere membership of the unlawful assembly, with the requisite common object or knowledge. This Section makes a member of the unlawful assembly responsible as a member for the acts of each and all, merely because he is a member of an unlawful assembly. While overt act and active

participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. There are two essential ingredients of Section 149, viz., (1) commission of an offence by any member of an unlawful assembly, and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor it would be open to the Court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established.

Applying the abovementioned well settled principles to the facts of the present case, this Court finds that the prosecution has not led any evidence to prove that the accused party had any grievance or grudge against the deceased Rajesh, who was nephew of the first informant Bhale Ram. The only fact, which can be held to be proved by the prosecution, is that the accused Krishan had an altercation with Sanjay relating to purchase of some goods, after which Krishan had threatened Sanjay and had then left the shop and come back within a short duration with other four accused including the appellant, who were variously armed. The further fact proved by the prosecution is that immediately on coming to the place of incident, the son of the appellant named Sat Narayan @ Pohla had fired a shot at Rajesh without any provocation or previous enmity or any other reason. It may be mentioned that the defence had tried to prove enmity between the first informant and the appellant but the substantive evidence of first informant Bhale Ram, examined as PW-4, and injured Sanjay, examined as PW-10, in fact goes to prove that there was no such dispute relating to the land and/or enmity between the first informant Bhale Ram and the appellant. The record does not indicate that any altercation had taken place between Krishan, who is son of the appellant, and deceased Rajesh when accused Krishan had gone to the shop of injured Sanjay for purchasing certain articles. In fact, the altercation had taken place between Krishan and injured Sanjay. Though it was the case of the prosecution that after reaching the place of incident, the members of the unlawful assembly had given lalkara before the attack, the first informant in his substantive evidence before the court has not mentioned anything about the said lalkara though it was so mentioned by him in his FIR. Thus, the fact that

lalkara was made before the attack will have to be disbelieved. If the evidence of the injured witness is appreciated in the above background, it becomes evident that no evidence could be adduced by the prosecution to establish that common object of the unlawful assembly was to do away with Rajesh or cause any injury to him. As mentioned earlier the evidence clinchingly establishes that immediately after reaching the place of incident a shot was fired by accused Pohla from his gun. It would have been a different matter if Rajesh had suffered injuries in some other manner, e.g., Rajesh had tried to intervene when Sanjay was being attacked and was shot at. In such circumstances provisions of Section 149 IPC could have been well invoked. There is no evidence regarding meeting of minds or formation of the common object even at the spur of the moment, when Pohla immediately after reaching the place of incident shot at the deceased Rajesh. There is no evidence suggesting that the appellant said something to indicate that he wanted the deceased to be done away with. There is nothing to establish that the appellant knew that Pohla would cause fatal injuries to the deceased, though the appellant must have anticipated that Pohla would cause injuries to Sanjay. In the present case, no overt act is attributed to the appellant so far as the deceased is concerned. Mere fact that the appellant was armed with a lathi by itself would not prove that he shared common object with which the main accused phola was inspired. The prosecution has not led the evidence to establish nexus between the common object and the offence committed. The appellant, being father of the accused Krishan, who had an altercation earlier with injured Sanjay, had accompanied Krishan, which can be termed as natural conduct on the part of the appellant. It is relevant to notice that in the course of the incident the appellant himself had sustained serious injuries. The testimony of PW-14, Dr. Rajesh Saini indicates that he had examined the appellant Daya Kishan on December 1, 1998 at 2.30 P.M. and noticed abrasion of 1.5 cm x 0.2 cm on anterior surface of left leg and swelling around the abrasion. According to him the movements of leg were restricted and he had also found lacerated wound of 6 cm x 0.3 cm on left parietal region. The testimony of Dr. Gaurav Bhardwaj, examined as DW-1, makes it clear that the appellant had sustained fracture of both bones of the left leg for which POP cast was given. As noticed earlier the first informant Bhale Ram has mentioned in his First Information Report itself that he had caused injuries to the appellant in exercise of his right of self-defence. The record does not indicate that the injuries sustained by the appellant were caused by deceased Rajesh. It is not the case of the prosecution that the appellant retaliated or asked others to attack the first informant despite having received serious injuries, which would indicate that the appellant had no grudge nor shared the object with which the accused Pohla had fired shot at the deceased Rajesh. The only circumstance on the basis of which the prosecution wants to hold that the common object of the unlawful assembly was to murder Rajesh is that Pohla had a gun and the appellant was a member of an unlawful

assembly. The test for application of Section 149 IPC as suggested by the prosecution cannot be accepted. On the peculiar facts and in the circumstances of the case it can be safely concluded that the appellant did not share common object of one of the members of the unlawful assembly to cause death of Rajesh. The appellant cannot be reasonably attributed with knowledge that there was likelihood of commission of murder of Rajesh, because no altercation or quarrel had taken place between Rajesh and the accused Krishan nor there was any enmity between the appellant and Rajesh. Under the circumstances, this Court is of the opinion that the conviction of the appellant recorded under Section 302 read with Section 149 IPC for causing death of deceased Rajesh is not well-founded and is liable to be set aside.

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**285. INDIAN PENAL CODE, 1860 – Sections 300 and 149**

**Murder – Unlawful assembly – Proof – Evidence of eye witnesses is consistent about weapons used to assault the deceased i.e.** *pharsa, lathi* **etc. – But doctor has stated that deceased had also sustained four punctured wounds – In this regard, he was declared hostile and admitted that he had not measured dimension, depth and thickness of the injuries – Such opinion of medical expert should be ignored and his evidence regarding nature of other injuries as to the cause of death can be relied on – Conviction upheld.**

## Suraj & Anr. v. State of U.P.

**Judgment dated 06.07.2010 passed by the Supreme Court in Criminal Appeal No. 1223 of 2004, reported in AIR 2010 SC 2259**

Held:

It is evident that PW.6 Dr. A.K. Srivastava has been declared hostile but that itself shall not wipe out his entire evidence. In his evidence he has given the details of the injuries sustained by the deceased and the cause of death. Merely an erroneous opinion in regard to the punctured wounds led the prosecution to declare him hostile but this will not dilute his other evidence if otherwise worthy of reliance. Merely the fact that PW.6 Dr. A.K. Srivastava has been declared hostile, his entire evidence is not wiped out and for the purpose of nature of injuries and the cause of death, his evidence can be relied on.

Counsel for the appellants, then points that injury Nos. 7, 8, 10 and 11, according to the doctor himself are punctured wounds and the weapon alleged to have been used by the accused persons cannot cause punctured wounds. According to her, eye-witnesses' account has not been corroborated by the medical evidence and hence on this ground alone, the case of the prosecution deserves to be rejected.

We do not find any substance in the submission of Mrs. Maheshwari. The doctor who had conducted the post-mortem examination has been declared hostile when he opined that injury Nos. 7, 8, 10 & 11 as punctured wounds. He had admitted that before giving the opinion, he had not measured dimensions i.e. thickness or depth of the injuries. In view of the aforesaid, this opinion of the doctor, which has no foundation deserves to be ignored and has rightly been ignored by the trial Court and the appellate Court.

Smt. Sirawan (PW.1) who happens to be the wife of the deceased Mansha, Swamidin (PW.2), an independent witness and Dhanti (PW.3) daughter of the deceased have clearly stated that it was the appellants alongwith other accused persons who had assaulted the deceased with pharsa, lathi etc. The doctor has found contusion and incised wounds on the person of the deceased. Eye-witnesses' account are consistent and there is no material contradiction in their evidence to discredit their truthfulness. In our opinion, the prosecution has been able to prove its case beyond all reasonable doubts.

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**286. INDIAN PENAL CODE, 1860 – Sections 300 Exception 1, 302 or 304 Part II**

**(i) Grave and sudden provocation – Provocation is an external stimulus which can result into loss of self-control – Such provocation and the resulting reaction need to be measured from the surrounding circumstances – Here, the provocation must be such as will upset not merely a hasty, hot-tempered and hypersensitive person but also a person with calm nature and ordinary sense – Thus, the protection extended by the exception is to the normal person acting normally in the given situation.**

**(ii) There is no fixed rule that whenever a single blow is inflicted, Section 302 IPC would not be attracted – Under Clause Thirdly of Section 300 IPC, culpable homicide is murder if it is proved that the act which caused death was done with the intention of causing death or was done with the intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death – Once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows.**

## Arun Raj v. Union of India and others

**Judgment dated 13.05.2010 passed by the Supreme Court in Criminal Appeal No. 1123 of 2008, reported in (2010) 6 SCC 457**

Held:

Section 300 IPC describes murder and provides five exceptions wherein the culpable homicide would not amount to murder. Under Exception I, an injury

resulting into death of the person would not be considered as murder when the offender has lost his self-control due to the grave and sudden provocation. It is also important to mention at this stage that the provision itself makes it clear by the Explanation provided, that what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact. Provocation is an external stimulus which can result into to loss of self-control. Such provocation and the resulting reaction need to be measured from the surrounding circumstances. Here the provocation must be such as will upset not merely a hasty, hot-tempered and hypersensitive person but also a person with clam nature and ordinary sense. What is sought by the law by creating the exception is that to take into consideration situations wherein a person with normal behavior reacting to the given incidence of provocation. Thus, the protection extended by the exception is to the normal person acting normally in the given situation.

The scope of the "doctrine of provocation" was stated by Viscount Simon in *Mancini v. Director of Public Prosecution, (1941) 3 All ER 272 (HL):*

> "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result, must be such as temporarily deprive the person provoked of the power of self-control as result of which he commits the unlawful act which caused death. The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v. Lesbini, (1914) 3 K.B.1116* so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

In this case on the previous night of the incidence, there was an altercation between the appellant (accused) and the deceased, as the deceased has abused the appellant. On the date of incident at 2.15 p.m., the appellant came in the barrack and went towards the cot of the deceased, which was at the door and took out the knife from the lungi and stabbed on the right side of the chest of the

deceased when he was asleep. The knife, which was completely made of iron and had a sharp edge, was hidden at the waistline of the lungi of the appellant.

The facts like that there was time lag of 40-45 minute after appellant had come from the office of Higher Officer after complaining and was present with the appellant in the same barrack without any conversation between them, that he had got the knife which was sharp enough to have the knowledge that it might cause death of a human being when stabbed, that the knife was hidden and removed by appellant only when he was about to stab the deceased, that the appellant stabbed the deceased on the chest which is a fragile portion of the body and can cause death when stabbed by sharp weapon and also that the eyewitness was unable to link the abusing and the altercation of the deceased and appellant to the action of stabbing, rules out the possibility of the offence being committed due to 'grave and sudden' provocation. The appellant clearly had time to deliberate and plan out the death of Havildar R C Tiwari (the deceased). Therefore, the appellant accused cannot get the benefit of Exception 1 of Section 300 IPC.

The appellant-accused in this incident has used a kitchen knife with sharp edges, which is a dangerous weapon, obviously the appellant was aware that the use of such weapon could cause death or serious bodily injury, that was likely to cause death. There was no sudden altercation, rather the appellant waited till the next day, went on to procure a deadly weapon like a kitchen knife and then proceeded to strike a blow on the chest of the appellant when he was sleeping, points unerringly towards due deliberation on the part of the appellant to avenge his humiliation at the hands of the deceased. The nature of weapon used and the part of the body where the blow was struck, which was a vital part of the body helps in proving beyond reasonable doubt, the intention of the appellant to cause the death of the deceased. Once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows.

This court in the case of *State of Rajasthan v. Dhool Singh, (2004) 12 SCC 546* has stated that:

> "It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case, it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft. in length on a vital part of body, namely, the neck. This act of the respondent though solitary in number had severed sternoclinoid muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous

death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury, in our opinion, not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The reasoning of the High Court as to the intention and knowledge of the respondent in attacking and causing death of the victim, therefore, is wholly erroneous and cannot be sustained."

In the case of *Virsa Singh v. State of Punjab, AIR 1958 SC 465,* this Court while referring to intention to cause death laid down:

"13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

This court further observed: (*Virsa Singh Case* (supra)

"17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident this victim stumbled and fell on the sword or spear that was used, then of course the

offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture."

In *Anil v. State of Haryana, (2007) 10 SCC 274,* while referring to *Virsa Singh* (supra) this court laid down:-

"29. ....'32. In *Thangaiya v. State of T.N., (2005) 9 SCC 650* relying upon a celebrated decision of this Court in *Virsa Singh v. State of Punjab* (supra), the Division Bench observed: (*Thangaiya case* (supra)

17. These observations of *Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh case* (supra) for the applicability of Clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under Clause "Thirdly" of Section 300 IPC, culpable homicide is murder, if both the following, conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to, cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

18. Thus, according to the rule laid down in *Virsa Singh* case even if the intention of the appellant was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

In the aforesaid decision, this Court held that there is no fixed rule that whenever a single blow is inflicted Section 302 would not be attracted.

It is clear from the above line of cases, that it is necessary to prove first that there was an intention of causing bodily injury; and that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. From the evidence on record, it is very clear that the appellant intended to cause death. In light of this finding, the evidence on record makes it clear that Section 304 Part II of the IPC will not be attracted. Further PW-1, in his cross- examination asserts that the deceased held his hand out after he was stabbed in the chest. It is very likely that this action on the part of the deceased prevented the appellant from stabbing him multiple number of times. The argument might deserve some merit in case there is a sudden altercation which ensues in the heat of the moment and there is no deliberate planning.

In the present case, as stated above there was due deliberation on the part of the appellant and he assaulted the deceased a day after he misbehaved with him. Hence, the contention of the learned counsel that the appellant had no intention to cause death of the deceased has no merit and, accordingly, it is rejected.

We, accordingly, hold that the conviction of the appellant for the offence under Section 302 of Indian Penal Code, is not bad in law.

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***287. INDIAN PENAL CODE, 1860 – Section 304-B/498-A**
**CRIMINAL PROCEDURE CODE, 1973 – Section 161**

**(i) Dowry death – Bride burning – Appreciation of evidence – Complaint lodged by the father of the deceased was not elaborate and specific complaint – He can hardly be blamed for it as it was a tragic moment for him and that time was of pain and agony for him – Therefore, accused cannot take any advantage of it – Moreso, subsequent statements of different witnesses have fairly established on record that the deceased was tortured and harassed for satisfying the demand of dowry by the accused – Offence proved.**

**(ii) Use of police statement – Re-examination/fresh examination of witnesses – It is settled position of law that statements under Section 161 Cr.P.C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for a very limited purpose, that is for confronting the witnesses – If some earlier statements were recorded under Section 161 Cr.P.C., then they must be on the police file and would continue to be a part of police file.**

**When investigating officer has been changed due to unsatisfactory conduct of previous investigating officer and new investigating officer has been directed to conduct the investigation afresh and in accordance with law, it cannot be**

**said that the investigating officer has committed any jurisdictional error in examining the witnesses afresh and filing the charge sheet as per law.**

**Uday Chakraborty and others v. State of West Bengal**
**Judgment dated 08.07.2010 passed by the Supreme Court in Criminal Appeal No. 1733 of 2008, reported in (2010) 7 SCC 518**

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**288. INDIAN PENAL CODE, 1860 – Section 498-A**
**Complaints under Section 498-A – Tendency of over implicating the husband and all his immediate relations is not uncommon – Held, the Courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases – Duty of Bar and Bench, in such cases underlined.**

**Preeti Gupta and another v. State of Jharkhand and another**
**Judgment dated 13.08.2010 passed by the Supreme Court in Criminal Appeal No. 1512 of 2010, reported in (2010) 7 SCC 667**

Held:

It is a matter of common knowledge that unfortunately matrimonial litigation is rapidly increasing in our country. All the courts in our country including this court are flooded with matrimonial cases. This clearly demonstrates discontent and unrest in the family life of a large number of people of the society.

It is a matter of common experience that most of these complaints under Section 498-A IPC are filed in the heat of the moment over trivial issues without proper deliberations. We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment are also a matter of serious concern.

The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fiber of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under section 498-A as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fiber, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases.

The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

Before parting with this case, we would like to observe that a serious relook of the entire provision is warranted by the legislation. It is also a matter of common knowledge that exaggerated versions of the incident are reflected in a large number of complaints. The tendency of over implication is also reflected in a very large number of cases. The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law.

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**289. INDIAN PENAL CODE, 1860 – Sections 499 and 500 and Exception 10 of Section 499**
**EVIDENCE ACT, 1872 – Sections 101 and 102**
**Complaint of defamation u/s 500 r/w/s 499 IPC – The defence of accused under Exception 10 of Section 499 IPC – Ground of consideration and stage – Held, said question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made, the circumstances in which it came to be made and status of person who makes the imputation as also status of person against whom the imputation is allegedly made – Accused must justify his defence by adducing evidence – Onus is discharged, the moment he proves the same on preponderance of probability.**

## Jeffrey J. Diermeier and another v. State of West Bengal and another

**Judgment dated 14.05.2010 passed by the Supreme Court in Criminal Appeal No. 1079 of 2010, reported in (2010) 6 SCC 243**

Held:

Since the factum of publication of the "Word of Caution" is not in dispute, the question for determination is whether the afore-extracted allegations in the complaint constitute an offence of "defamation" as defined in Section 499 of the IPC and would attract the penal consequences envisaged in Section 500 of the IPC?

To constitute "defamation" under Section 499 of the IPC, there must be an imputation and such imputation must have been made with intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.

However, as per Explanation 4 to the Section, no imputation is said to harm a person's reputation, unless that imputation directly or indirectly lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, in the estimation of others or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

As stated above, the thrust of the argument of learned counsel for the appellants was that since the "Word of Caution" was issued in "good faith" for the benefit of those who were planning to acquire CFA Certificate, and the same being for the "public good", the case falls within the ambit of Tenth Exception to Section 499 of the IPC and, therefore, the appellants cannot be held liable for defamation.

The Tenth Exception to Section 499 of the IPC reads as follows:

> **"Tenth Exception.— Caution intended for good of person to whom conveyed or for public good.—** It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."

It is trite that where to the charge of defamation under Section 500 IPC, the accused invokes the aid of Tenth Exception to Section 499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.

It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with a degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception.

The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made.

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**290. INDIAN SUCCESSION ACT, 1925 – Section 63**

**Execution of *will* – Onus of proof – When the *will* is surrounded by suspicious circumstances, the person propounding the *will* has a very heavy burden to discharge – Position explained.**

## Balathandayutham and another v. Ezhilarasan

**Judgment dated 16.04.2010 passed by the Supreme Court in Civil Appeal No. 7357 of 2002, reported in (2010) 5 SCC 770**

Held:

When a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge. This has been authoritatively explained by this Court in the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma., AIR 1959 SC 443.* Justice P.B. Gajendragadkar, as His Lordship then was, in para 20 of the judgment, speaking for the Three Judge Bench in *H. Venkatachala* (supra) held that in a case where testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the Will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the Will is not the result of testator's free will and mind, the Court may consider that the Will in question is encircled by suspicious circumstances.

In so far as execution of the Will is concerned, under Section 63 of the Indian Succession Act, 1925 it has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen

some other person sign the Will, in the presence, and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of the Indian Evidence Act, 1872 further provides if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court is capable of giving evidence. There is a proviso under Section 68 but we are not concerned with the proviso here.

Commenting on these provisions, this Court in *H. Venkatachala* (supra) laid down that Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. It was further held that Section 63 of Indian Succession Act requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This Section also requires that Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions.

The law thus laid down in *H. Venkatachala* (supra) is still holding field and this Court has followed the same in various other judgments. [See *Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao, (2006) 13 SCC 433* and *Savithri v. Karthyayani Amma, (2007) 11 SCC 621*]

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**291. INDIAN SUCCESSION ACT, 1925 – Section 114**

**Rule against perpetuity – The restriction which was meant to ensure that the property bequeathed does not go into the hands of third party is perfectly valid and does not violate the rule against perpetuity contained in Section 114 of the Act – Legal position explained.**

**K. Naina Mohamed (Dead) through L.Rs. v. A.M. Vasudevan Chettiar (Dead) through L.Rs. and others**

**Judgment dated 07.07.2010 passed by the Supreme Court in Civil Appeal No. 8365 of 2002, reported in (2010) 7 SCC 603**

Held:

The suit property belonged to one Smt Ramakkal Ammal, wife of Pattabiraman of Uraiyur of Tiruchirapalli. She executed a registered will dated 22-9-1951 in respect of her properties and created life interest in favour of her two sisters, namely, Savithri Ammal and Rukmani Ammal with a stipulation that after their death their male heirs will acquire absolute right in A and B properties respectively subject to the rider that they shall not sell the property to strangers.

The issue which needs consideration is whether the restriction enshrined in Clause 11 of the will executed by Ramakkal Ammal can be declared as void on the ground that it violates the rule against perpetuity. This rule has its origin in *Duke of Norfolk case, 3 Chan Cas 1 22 ER 931 of 1682.* That case concerned Henry, 22nd Earl of Arundel, who had tried to create a shifting executory limitation so that one of his titles would pass to his eldest son (who was mentally deficient) and then to his second son, and another title would pass to his second son, but then to his fourth son. The estate plan also included provisions for shifting the titles many generations later, if certain conditions were to occur. When the second son, Henry, succeeded to one title, he did not want to pass the other to his younger brother, Charles. The latter sued to enforce his interest. The House of Lords held that such a shifting condition could not exist indefinitely and that tying up property too long beyond the lives of people living at the time was wrong. In England, the rule against perpetuity was codified in the form of the Perpetuities and Accumulations Act, 1964 and in the latest report of the British Law Commission, a new legislation has been recommended.

In India, the rule against perpetuity has been incorporated in Section 114 of the Succession Act, 1925 which reads thus:

> "114. Rule against perpetuity – No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

In *Ram Baran Prasad v. Ram Mohit Hazra, AIR 1967 SC 744* this Court considered whether covenant of pre-emption contained in an arbitration award violates the rule against perpetuity and whether the same is binding on assignees or successor-in-interest of the original contracting parties. The factual matrix of that case was that two brothers, Tulshidas Chatterjee and Kishorilal Chatterjee owned certain properties in the suburbs of Calcutta. In 1938, Kishorilal sued for partition of the properties. The matter was referred to arbitration. The arbitrators gave award, which was made the rule of the Court. Under the award, two of the four blocks into which the properties were divided by the arbitrators were allotted to Tulshidas and the remaining two blocks to Kishorilal. In the award there was a clause to the following effect:

> "2 .... We further find and report with the consent of and approval of the parties that any party in case of disposing or transferring any portion of his share, shall offer preference to the other party, that is, each party shall have the right of pre-emption between each other."

After the arbitration award became the rule of the Court, Tulshidas sold some of the portion of his properties to Nagendra Nath Ghosh. This was done after Kishorilal refused to pre-empt the same. Later on, Kishorilal sold his two blocks to Rati Raman Mukherjee and others. The Mukherjees sold the property to the respondent-plaintiffs. Nagendra Nath also sold the property to Defendant 1. Thereupon, the plaintiffs filed suit for pre-empting the transaction between Nagendra Nath Ghosh and Defendant 1. The trial court held that the covenant of pre-emption was not hit by the rule against perpetuities and was enforceable against the assignees of the original parties to the contract. Accordingly, a decree was granted to the plaintiffs. The defendants took the matter in appeal to the Calcutta High Court which was dismissed. Before this Court, it was argued that the covenant for pre-emption was merely a personal covenant between the contracting parties and was not binding against successors-in-interest or the assignees of the original parties to the contract.

The Court then referred to Sections 14 and 54 of the Transfer of a Property Act and observed as under: (*Ram Baran Prasad case (Supra)* = AIR p. 749, para 11)

> "11 .... the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

The Court further held that the covenant of pre-emption was not violative of the rule against perpetuity and could not be declared as void.

The same view was reiterated in *Shivji v. Raghunath, (1997) 10 SCC 309.* In that case, the Court found that the restriction contained against alienation of the property was not absolute and held that the same was not violative of the rule against perpetuity. After noticing the ratio of the judgment in *Ram Baran Prasad (supra) the* Court held: *(Shivji case (supra) = SCC p.311, para 5)*

> "5 .... when a contract has been executed in which no interest in praesenti has been created, the rule of perpetuity has no application. As a result, the agreement is in the nature of a pre-emptive right created in favour of the co-owner. Therefore, it is enforceable as and when an attempt is made by the co-owner to alienate the land to third parties."

In *Mohd. Raza v. Abbas Bandi Bibi, AIR 1932 PC 158* the Privy Council confirmed the judgment of the Chief Court of Oudh which had ruled that when a

person is allowed to take property under a conditional family arrangement, he cannot be heard to complain against the restriction on alienation of the property outside the family. The appellant before the Privy Council was a purchaser of the property belonging to Smt Sughra Bibi which she got in furtherance of compromise arrived at between the parties in a suit brought against her cousin. The Privy Council held that even though it may not be possible to hold that Sughra Bibi took nothing more than a life estate, the restriction against alienation to strangers was valid.

In our view, the restriction which was meant to ensure that the property bequeathed by Smt Ramakkal Ammal does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English courts or the one contained in Section 114 of the Indian Succession Act, 1925.

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**292. INSURANCE CONTRACT :**

**CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (o) (g)**

**(i) Construction of insurance contract – Principles of – Held, in interpreting documents relating to a contract of insurance, duty of the Court is to interpret the words in which the contract is expressed by the parties because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves – Moreover, the terms of the agreement have to be strictly construed to determine the extent of liability of the insurer – Legal position reiterated.**

**(ii) Liability of insurer – "Excess clause" in the insurance policy – Meaning of – It limits the liability of the insurer in regard to each claim, only to the amount of loss, in excess of the sum specified in the excess clause, which the insured has agreed to bear either by himself or by securing other insurance coverage – Legal position reiterated.**

**Amravati District Central Cooperative Bank Limited v. United India Fire and General Insurance Company Limited**

**Judgment dated 15.04.2010 passed by the Supreme Court in Civil Appeal No. 3307 of 2010, reported in (2010) 5 SCC 294**

Held :

In *General Assurance Society Ltd. v. Chandumull Jain, AIR 1966 SC 1644* a Constitution Bench of this Court laid down the principle relating to interpretation of Insurance Contracts. This Court held: (AIR p. 1649, para 11)

> "11. ...In interpreting documents relating to a contract of Insurance, the duty of the court is to interpret the words in which the contact is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves."

In *Oriental Insurance Co. Ltd v. Sony Cheriyan, (1999) 6 SCC 451,* this Court held: (SCC p. 455, para 17)

> "17. The insurance policy between the insurer and the insured represents a contract between the parties. Since the insurer undertakes to compensate the loss suffered by the insured on account of risks covered by the insurance policy, the terms of the agreement have to be strictly construed to determine the extent of liability of the insurer. The insured cannot claim anything more than what is covered by the insurance policy. That being so, the insured has also to act strictly in accordance with the statutory limitations or terms of the policy expressly set out therein."

"Excess" clauses are commonly used in Insurance contracts. In insurance parlance, the term "excess" in the Excess clause in the policy refers to "that part of the amount of loss, under each claim, which is not covered by the policy" or the "amount that the policy holder has, by agreement, to bear or contribute to each insurance claim". In other words it limits the liability of the insurer in regard to each claim, only to the amount of loss, in excess of the sum specified in the Excess clause, which the insured has agreed to bear (either himself or by securing other insurance coverage).

Excess clauses in insurance policies have been interpreted in several English decisions. We may refer to one of them. In *Philadelphia National Bank v. Price, (1938) 2 All ER 199 (CA),* the Court of Appeal was concerned with a case where a policy of insurance indemnified the bank against loss sustained by, reason of making advances against forged or invalid documents subject to an excess of $25,000 "by each and every loss and occurrence". Credit facilities were granted by the Bank to a trader on the security of invoices assigned to the bank. Each day, the trader assigned a bundle of invoices and the Bank advanced a sum corresponding to the total of the invoices. The invoices turned out to be false and the bank was unable to recover advances of over $400,000 in the aggregate, although no single daily loss amounted to more than $25,000. The Court of Appeal held that a separate loss had occurred in respect of each day's advance and the loss cannot be treated as one loss, as each production of documents led to a fresh loss and must be treated as number of losses occasioned by a number of advances. The claim of the Bank was therefore dismissed as loss in each case was below the excess limit of $25000.

A learned Single Judge of Bombay High Court in *Central Bank of India Ltd. v. New India Assurance Co. Ltd., AIR 1981 Bombay 397,* interpreted the word "claim" in the excess clause therein, which provided that the Bank shall be considered co-insurer to the extent of 25% subject to the minimum excess of Rs. 25000/- for each and every claim. Negating the contention of the Bank that in view of the said clause, its liability as co-insurer was not in respect of each and every loss, but in regard to each claim (that is, the aggregate of several losses which constituted a "claim").

In accordance with the objects and interpretations of the terms and conditions of the policy, in my judgment, the Bank is liable to be considered as co-insurer to the extent of 25% subject to minimum excess of Rs. 25,000/- in respect of each loss sustained by each set of defalcation by its employees, and it is not permissible to aggregate the total loss for working out of excess clause.

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**293. LAND ACQUISITION ACT, 1894 – Sections 23 and 24**
**Determination of market value of land – Relevant considerations for capitalisation of yield method – Consequential or remote benefits occurring from agricultural activity is not relevant consideration for determination of fair market value. It is only direct agricultural crop produced by agriculturist from acquired land or its price in market at best, which is the relevant consideration to be kept in mind – Legal position explained.**

## Special Land Acquisition Officer v. Karigowda and others

**Judgment dated 26.04.2010 passed by the Supreme Court in Civil Appeal No. 3838 of 2010, reported in (2010) 5 SCC 708**

Held:

The statutory law as well as the judgments pronounced by the courts have consistently taken the view that compensation has to be determined strictly in accordance with the provisions of Sections 23 and 24 of the Act. The matters which are to be governed by the terms of Section 24 of the Act cannot be taken into consideration by extending discretion referable to the matters which should be considered by the courts in terms of Section 23 of the Act. To put it in another way, the court should apply the principle of literal or plain construction to these provisions, as the legislature in its wisdom has not given to the court absolute discretion in matter relating to awarding of compensation but has intended to control the same by enacting these statutory provisions.

In the light of these principles now we may advert to the language of Sections 23 and 24 of the Act. The provision opens with the words, that in determining the amount of compensation to be awarded for land acquired under the Act, the court shall take into consideration the stated criteria and in terms of Section 23(1-A), the claimants would be entitled to additional amount @ 12 % per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, to the date on which the Award is made by the Collector or possession of the land is taken, whichever is earlier. In addition to this, in terms of Section 23(2), the land owners-claimants are entitled to 30% on "such market value" because of the compulsory nature of acquisition.

"Such market value" is an expression which must be read *ejusdem generis* to the provisions of Section 23(1) of the Act, as they alone would provide meaning and relevancy to the guidelines which are to be taken into consideration by the courts for determining the market value of the land. The expression "shall" can

hardly be construed as "may" giving an absolute discretion to the court to take or not to take into consideration the factors stated in Section 23(1) of the Act. The expression 'shall' thus would have to be construed as mandatory and not directory. It is more so, keeping in view the language of Section 24 of the Act, which mandates that the court shall not take into consideration the matters indicated in clauses firstly to eighthly of Section 24 of the Act. This legislative intent needs to be noticed for beneficial and proper interpretation of these provisions in the light of the scheme underlining the provisions of the Act.

The discretion of the Court, therefore, has to be regulated by the legislative intent spelt out under these provisions. It is no more *res integra* and has been well settled by different judgments of this Court, requiring that the computation of compensation has to be in terms of Sections 23 and 24 of the Act and that too from the date of issuance of the Notification under Section 4 of the Act. It is only the statutory benefits which would be available in terms of Sections 23 (1-A) and 23 (2) of the Act.

The next question which is of some importance arises out as a corollary to the above discussion. Should there be direct nexus between the potentiality of the acquired land as on the date of the Notification or can any matter which may be consequential or remotely connected with the agricultural activity be the basis for determining the market value of the land? Does the scheme of the Act, particularly with reference to Sections 23 and 24 of the Act permit such an approach? This question has to be answered in the negative. What is required to be assessed, is the land and its existing potentiality alone as on the date of acquisition. Moreover, the potentiality has to be directly relatable to the capacity of the acquired land to produce agricultural products or, its market value relatable to the known methods of computation of compensation which we shall shortly proceed to discuss.

The second circumstance specified in Section 23 (1) to be considered by the Court in determining compensation is the damage sustained by the person on account of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof. Even from a reasonable practicable view it has to be understood that the compensation which is payable to the claimants is in relation to the acquired land, the standing crops or trees and what they earn from the agricultural crops or fruits or trees on the agricultural land. To extend the benefit for the purposes of compensation, considering that the fruits grown on the agricultural land would be converted into Jam or any other eatable products will not be a relevant consideration within the scheme of the Act. The purpose is not to connect the acquisition to remote factors which may have some bearing or some connection with the agricultural activity being carried on, on the land in question. Such an approach by the Court is neither permissible nor prudent, as it would be opposed to the legislative intent contained under the provisions of Sections 23 and 24 of the Act.

Consequential or remote benefits occurring from an agricultural activity is not a relevant consideration for determination of the fair market value on the date of the Notification issued under Section 4(1) of the Act. It is only the direct agricultural crop produced by the agriculturist from the acquired land or its price in market at best, which is a relevant consideration to be kept in mind by the court while applying any of the known and accepted method of computation of compensation or the fair market value of the acquired land.

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

**Cheque was issued in security of transaction of milk between accused and father of complainant – Dishonoured – Held, it would not come within the perview of Section 138 of the Act.**

## Laxman v. Vijay and another

**Judgment dated 29.01.2010, passed by M.P. High Court in Criminal Revision No. 926 of 2009, reported in 2010 (3) MPHT 220**

Held :

From perusal of the complaint it is evident that in the complaint no date of loan transaction has been mentioned. However, it is alleged that the loan of Rs. 1,15,000/- was given by the respondent No. 1 to the petitioner for a period of two months. Respondent No. 1 was aged 25 years at the time of transaction. In the complaint, purpose of loan has not been mentioned. In his cross-examination respondent No. 1 has admitted that the father of the respondent No. 1 is Proprietor of the Dairy. It is also admitted that petitioner is also in the Milk business. A suggestion is given that the petitioner was supplying the Milk @ 200-200 liter every day in morning and evening. Respondent No. 1 has shown his ignorance alleging that the business is being looked after by his father. Respondent No. 1 has admitted that father of the respondent No. 1 is having full knowledge about the case and he is present in Court and is sitting outside. In spite of the fact that the father of the respondent was having full knowledge about the case, and was present in Court, he was not examined.

So far as maintenance of account of Dairy is concerned, respondent No. 1 has stated that the account is being maintained or not is not known to the respondent No. 1. From perusal of Exh. D-1 it is evident that FIR was lodged by the petitioner on 13-8-07 relating to some quarrel between the petitioner and father of respondent No. 1. The alleged cheque is also dated 14-8-07. From perusal of the cheque itself it is evident that the petitioner is illiterate person and can hardly put signature. There is nothing on record to show that who has filled in the cheque. Respondent No. 1 has admitted in Para 13 of his cross-examination that some dispute took place on 13-8-07 between the petitioner and father of respondent No. 1 and in that regard Police report was lodged as Exh. D-1.

Petitioner has examined Jeevan Guru as D.W. 1, who is also in the Dairy business and is having Dairy. This witness has stated that he is in the Dairy business last 20 years. He has further stated that advance money is being given to the person who supplies the Milk and in security cheques are obtained. This witness has further stated that the petitioner was supplying the Milk to Shyam Sundar, who is father of respondent No. 1. He has also stated that the account was settled between the petitioner and Shyam Sundar in his presence. He has further stated that after settlement of account when the cheque was demanded, the same was not returned and dispute took place between respondent No. 1 and petitioner.

The case which was made out by the petitioner was rejected by the learned Court below on the ground that in the Exh. D-1 there is nothing relating to the cheque and it is only stated that the dispute is regarding some money transaction. Learned Court below has further observed that it is also not stated in the report that the cheque was issued in security.

Keeping in view the fact that the petitioner appears to be an illiterate person, who can hardly sign and some dispute took place on 13-8-07, while the cheque is dated 14-8-07 and no date is mentioned in the complaint about giving of loan of Rs. 1,15,000/- and also no purpose of loan has been mentioned in the complaint and also keeping in view the fact that respondent No. 1 is a young man hardly was of the age of 25 years at the time of alleged transaction, it can safely be said that the cheque was issued in security of some transaction of Milk which took place between the petitioner and father of respondent No. 1 and the prosecution has been filed in the name of respondent No. 1.

All these aspects were not taken into consideration by the learned Courts below while convicting the petitioner. In view of this, petition filed by the petitioner is allowed and the judgment passed by the learned Courts below whereby the petitioner has been convicted is set aside.

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

**(i) The word 'Liability' – Explained.**

**(ii) Dishonour of cheque – Appellant alleged that plot which was sold to him earlier by respondent was re-sold to another person without his knowledge and a cheque of Rs. 75,000/- was issued by respondents – Held, it is not a case of appellant that respondents had agreed to pay Rs. 75,000/– Cheque cannot be said to be issued in discharge of liability – Appeal dismissed.**

**Rajendra Prasad v. Sukleshwar**

**Judgment dated 17.03.2010 passed by the High Court in Criminal Appeal No. 328 of 2009, reported in ILR (2010) M.P. 1668**

Held:

With reference to Section 138 of the Negotiable Instruments Act, 1881, it is to be seen that when the complainant entered into witness box and gave his statement before the Court in Paragraph 2 of his statement he has not stated that the said plot which was earlier sold to the appellant was resold to someone with his consent. In paragraph 3 of the Complaint he only states that the aforesaid plot was resold to another person without the knowledge of the present appellant. In paragraph 2 of the statement he also corroborates that the plot which was sold to the present appellant by the respondent resold to some one without his knowledge and a cheque of Rs. 75,000/- was issued by the respondents which was not honoured.

The question in the present case is that whether the cheque which was issued by the respondent was in discharge of any debt or other liability. The burden was on the complainant to prove that the cheque which was issued was to discharge the debt or other liability. The statement of the complainant does not show that the cheque of Rs. 75,000/- which issued to the appellant by the respondent was in relation to the discharge of any debt or other liability. It may be a different thing that in the present case the respondent has committed a fraud by reselling the property which was already sold to the appellant but for the purposes of making out an offence u/s 138 of the Negotiable Instrument Act, 1881 the burden lies on the appellant to prove that cheque of Rs. 75,000/- was issued by the appellant in relation to the discharge debt or other liability.

On the basis of the facts enumerated in the complaint it does not show that the cheque was issued by the respondents to discharge a debt or any other liability.

The only question relates whether the cheque as such was issued to discharge any liability. It is not case of the appellant before the Court that the respondent agreed to pay a sum of Rs. 75,000/- as the plot as such was resold to someone else without his knowledge. The word 'liability' has not been defined under the Act of 1881.

The word liability does not include any time debt, as such a debt is not existing liability and the court has no jurisdiction to order the admission to proof of any statute-barred debt. *Re Art Reproduction Cp. Ltd (1951) 2 ALL ER 984 (CH)* [Companies Act (1 of 1956) Section 468(1)]:-

(a) The term liability is of large and comprehensive significance, and when construed in its usual and ordinary sense, in which it is commonly employed, it expresses the state of being under obligation in law or injustice. *First National Bank Ltd. v. Seth Saut Lal, AIR 1959 Punj 328, 330* (Companies Act, 1913, Sch. I Table A regn. 28)

(b) the expression 'liability' in S.21 (b) of the Act must necessarily be other than the penalty contemplated by the

Act, It would include to have the execution case dismissed for want of proper permit as required by Section 13 and therefore that liability would continue by virtue of Section 21 notwithstanding the expirty of the *Act. Krishna Chandra Misra v. Sushila Mitra, AIR 1951 Orissa 105* [Orissa House Rent Control Act 5 of 1947]

(c) It is a broad terms of large and comprehensive significance and means-legal responsibility or obligation to do a thing. *Mohd. Yagule v. The Union of India and others, AIR 1971 Del 45, 48 (FB)* [Punjab Reorganisation Act (31 of 1966), Sec.67]

(d) the word liability in its widest import means an obligation or duty to do something or to refrain from doing something. Parliament intended to include in the word 'liability' not only a financial obligation but also obligations of every other kind, including one of reinstating a government servant wrongly dismissed. *W. W. Joshi v. State of Bombay, AIR 1959 Bom. 363, 365 (State Reorganisation Act, 1956 Sections 87, 88.*

Since the word liability has received consideration by the Courts, therefore it has to be understood with reference to the different judicial pronouncement. It is not a case of the appellant that after reselling of the property against the knowledge and wishes of the appellant the appellant agreed to pay. Paragraph 2 of the Statement of the complaint does not state so. The cheque which was issued for a sum of Rs. 75,000/- on 25/08/2003 can neither be treated to discharge the debt nor the liability.

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**296. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 142**

**Dishonour of cheque – Cause of action – Three demand notices were issued – First two notices returned unserved – Third notice issued by registered post – Duly served – Payment not made within 15 days – Held, cause of action for filing the complaint arises to complainant after service of the third notice.**

## Vishwanath Ghosh v. Ramesh Chandra Sindhi

**Judgment dated 11.02.2010 passed by M.P. High Court in Criminal Revision No. 1569 of 2009, reported in 2010 (II) MPJR 339**

Held :

So far admission of this revision is concerned, this court has to consider the question whether in the above-mentioned circumstances, the cause of action to file the complaint was available to the respondent after service of the third notice dated 23.3.04 (Ex.P/8) or not or, the limitation for filing the complaint should have been counted by the trial court and the appellate court from the date of issuing the first notice dated 9.2.04 (Ex.P/4).

On earlier occasion, taking into consideration the identical situation with slight differences on facts, the Apex Court, after considering such aspect has laid down the law in the matter of *D. Vinod Shivappa v. Nanda Beliappa, (2006) 6 SCC 456* which reads as under:-

> "14. If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for some time after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address."

In view of the aforesaid decisions of the Apex Court, the findings of both the courts below, on appreciation of evidence holding that the third notice of the respondent was served on the applicant, being finding of fact could not be interfered in the revisional jurisdiction by reappreciating the evidence. In any case, in view of the aforesaid dictum of the Apex Court, in the available facts and circumstances, the cause of action was available to the respondent for filing the above-mentioned complaint after service of the third notice dated 23.3.04 (Ex.P/8) and from such date, undisputedly, the payment was not made

by the applicant to the respondent within 15 days and thereafter before expiry of thirty days, the impugned complaint was filed. Hence the findings of the courts below could not be said to be contrary to the law in any manner.

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*297. **PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995 – Sections 32 and 33**

**Object and reasons of the Act – Intention of the legislature to provide for integration of persons with disabilities into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equilisation of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other respQnsibilities – Duties cast upon the appropriate Government underlined.**

**Identification of posts under Section 32 for persons with disabilities and reservation of vacancies for disabled persons under Section 33 of the Act – Interdependency of sections – Held, identification of posts under Section 32 is for the purpose of making appointment and not for the purpose of reservation – Under Section 33 a disabled cannot be appointed unless posts are identified under Section 32, but the provision for reservation under Section 33 became effective immediately when the Act came into force in 1996 – Delay in identification of posts under Section 32 cannot be used as a tool to delay the benefit of reservation under Section 33.**

**Government of India through Secretary and another v. Ravi Prakash Gupta and another**

**Judgment dated 07.07.2010 passed by the Supreme Court in SLP (C) No. 14889 of 2009, reported in (2010) 7 SCC 626**

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298. **PRACTICE AND PROCEDURE:**

**CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 4 (2)**

**The Court performing judicial functions should not pass judgments or orders in a casual and cryptic manner – Some of the guidelines which are required to be kept in mind while writing judgments/orders reiterated.**

**Joint Commissioner of IncomeTax, Surat v. Saheli Leasing and Industries Limited**

**Judgment dated 07.05.2010 passed by the Supreme Court in Civil Appeal No. 4278 of 2010, reported in (2010) 6 SCC 384**

Held:

No doubt, it is true that brevity is an art but brevity without clarity likely to enter into the realm of absurdity, which is impermissible. This Court, time and again, reminded the courts performing judicial functions, the manner in which

judgments/orders are to be written but, it is, indeed, unfortunate that those guidelines issued from time to time are not being adhered to. Therefore, once again some of the guidelines to be followed by the Courts while writing orders/ judgments reiterated as under:

(a) It should always be kept in mind that nothing should be written in the judgment/order, which may not be germane to the facts of the case; It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgment / order.

(b) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion.

(c) The ultimate finished judgment/order should have sustained chronology, regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.

(d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

(e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

(f) After arguments are concluded, an endeavour should be made to pronounce the judgment at the earliest and in any case not beyond a period of three months. Keeping it pending for long time, sends a wrong signal to the litigants and the society.

(g) It should be avoided to give instances,which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society.

These guidelines are only illustrative in nature and not exhaustive and further can be elaborated looking to the need and requirement of the given case.

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**299. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 12 Proviso**

**Whether Magistrate can take cognizance of application filed by the aggrieved person without calling the D.I.R. from Protection Officer or the service provider – Held, Yes.**

**Arif Ahmad Quraishi (Dr.) v. Smt. Shajia Quraishi**

**Judgment dated 28.04.2010, passed by M.P. High Court in M.Cr.C. No. 1602 of 2010, reported in 2010 (II) MPJR 284**

Held:

The proviso to Section 12 of the Act provides that before passing any order on the application filed under Section 12 (1) of the Act, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer. In this case, admittedly, the Protection order has not so far been passed and it is yet to be passed. The contention of the learned counsel for the petitioner is that the application itself should not have been taken cognizance in the absence of the domestic incident report from the Protection Office. A reading of Section 12 of the Act does not warrant such an interpretation. Nowhere, it is provided in the Act that even for taking cognizance of the application filed by the aggrieved person, the receipt of the domestic incident report from the Protection Officer is a condition precedent. Therefore, the contention of the learned counsel for the petitioner is untenable and does not merit acceptance.

As stated above, this Act being a beneficent piece of legislation enacted for providing minimum relief to an aggrieved person affected by domestic violence, even if there is any minor procedural deviation such minor procedural deviation being technical in nature, need not be taken serious note off and on that ground, the proceedings pending under the Act cannot be quashed.

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**300. STAMP ACT, 1899 – Schedule 1-A, Article 23 and Sections 33, 35 and 38**

**(i) Stamp duty payable – Agreement to sell immovable property with a recital in the document that possession has been delivered to the purchaser – Seller has raised a plea that possession is not delivered to purchaser – Held, seller's plea will not affect the character of document – Document would be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly [*2008 (2) MPLJ 416* overruled].**

**(ii) Agreement not properly stamped – Plaintiff was directed to file application to the Court below for referring the document to the Stamp Collector for deciding the question relating to duty and penalty.**

**Mansingh (Deceased) Through L.Rs. Smt. Sumranbai and ors. v. Rameshwar**

**Judgment dated 22.01.2010 passed by the High Court in Writ Petition No. 6464 of 2008, reported in ILR (2010) M.P. 1077 (DB)**

Held :

Article 23 of Schedule I-A of the Indian Stamp Act refers to conveyance but with an added explanation it says that whenever there is an agreement to sell immovable property and there is a recital in the document that possession has been delivered to the proposed purchaser then the document would be deemed to be a conveyance and the stamp duty at the rate of 7.5% will have to be paid.

A document would be admissible on basis of the recitals made in the document and not on basis of the pleadings raised by the parties. In the matter of *Laxminarayan and others v. Om Prakash and others, 2008 (2) MPLJ 416,* the learned Single Judge with due respect to his authority we don't think that he did look into the legal position but it appears that he was simply swayed away by the argument that as the defendant was denying the delivery of possession, the endorsement/recital in the document lost all its effect and efficacy.

It would be trite to say that if in a document certain recitals are made then the Court would decide the admissibility of the document on the strength of such recitals and not otherwise. In a given case, if there is an absolute unregistered sale deed and the parties say that the same is not required to be registered then we don't think that the Court would be entitled to admit the document because simply the parties say so. The jurisdiction of the Court flows from Sections 33, 35 and 38 of the Indian Stamp Act and the Court has to decide the question of admissibility. With all humility at our command we over-rule the judgment in the matter of *Laxminarayan* (supra).

Taking into consideration our judgment in the matter of *Umesh Kumar v. Rajaram and another* decided on *19.01.2009* in Writ Petition No. 3014/2008 we are of the opinion *that the* plaintiff would be entitled to make an application to the Court below for referring the document to the Stamp Collector under Section 38 (2) of the Indian Stamp Act for deciding the question relating to the duty and penalty.

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**301. TRANSFER OF PROPERTY ACT, 1882 – Section 53-A**

**Doctrine of part performance – The defendant is not entitled for protection of his possession when he failed to plead and prove that he ever sent any notice to the plaintiff to get the sale deed executed in order to show his readiness and willingness.**

**Harnam Singh and others v. Haricharan and others**

**Judgment dated 18.12.2009 passed by M.P. High Court in S.A. No. 4 of 2000, reported in 2010 (3) MPLJ 83**

Held:

The question which now hinges is as to whether even if this document has been taken to be a document of agreement of sale whether defendants are entitled to protect their possession within the sphere of Section 53-A of the Act. On going through the judgment passed by the learned First Appellate Court, this Court finds that the learned First Appellate Court did not find this document to be an agreement of sale. This Court is not paying any heed to this finding for this simple reason that I am of the view that defendants are not entitled for the protection of their possession under Section 53-A of the Act, for the simple reason that all these facts are neither pleaded nor has been proved by them that they ever sent any notice to the plaintiffs to get the sale deed executed in order to demonstrate that they are ready and willing to perform their part of contract. According to me, the doctrine of part performance is a weapon of the defence, however, if the defendants are seeking protection of this doctrine as envisaged under Section 53-A of the Act, they are required to discharge all the statutory obligations as provided under Section 53-A of the Act. Since there is nothing on record that defendants ever sent any notice to the plaintiff to get the sale deed executed in order to prove their readiness and willingness, according to me, in *stricto sensu* they have not discharged the statutory obligations. In these state of affairs, I am of the view that the decision of Supreme Court *Ramesh Chand Ardawatiya v. Anil Panjwani,* reported in *2003 (4) MPLJ (SC) 439,* placed heavy reliance by Shri Saxena learned counsel for the respondents/plaintiffs is squarely applicable in the facts and circumstances of the present case. The decision of Supreme Court in the case of *Shrimant Shamrao Suryavanshi and another v. Pralhad Bhairoba Suryavanshi (Dead) by LRs and others,* reported in *2002 (1) MPLJ (SC) 589 = (2002) 3 SCC 676,* placed heavy reliance by the learned counsel for the appellants is not contrary to the stand taken by the plaintiffs, rather it helps them for the simple reason that in this case also it has been held by the Supreme Court that the protection under Section 53-A would be given to the defendants only if they fulfil the requirements prescribed under this section. Since it has already been held hereinabove that the defendants were not ready and willing to perform their part of contract, according to me although they are in possession of the suit property, but they are not entitled for protection under Section 53-A of the Act.

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**NOTE:** Asterisk (*) denotes brief notes.

## PART - IV

# IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

## THE INFORMATION TECHNOLOGY (AMENDMENT) ACT, 2008

**(Act No.10 of 2009)**

*An Act further to amend the Information Technology Act, 2000.*

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

### PART – I
### PRELIMINARY

**1. Short title and commencement.** – (1) This Act may be called the Information Technology (Amendment) Act, 2008.

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

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

### PART–II
### AMENDMENTS TO THE INFORMATION TECHNOLOGY ACT, 2000

**2. Substitution of words 'digital signature' by words 'electronic signature'** – In the Information Technology Act, 2000 (hereinafter in this Part referred to as the principal Act), for the words "digital signature" occurring in the Chapter, section, sub-section and clause referred to in the Table below, the words "electronic signature" shall be substituted.

**TABLE**

| S.No. | Chapter/section/sub-section/clause |
|---|---|
| (1) | clauses (d), (g), (h) and (zg) of section 2; |
| (2) | section 5 and its marginal heading; |
| (3) | marginal heading of section 6; |
| (4) | clauses (a), (b), (c) and (e) of section 10 and its marginal heading; |
| (5) | heading of Chapter V; |
| (6) | clauses (f) and (g) of section 18; |
| (7) | sub-section (2) of section 19; |
| (8) | sub-sections (1) and (2) of section 21 and its marginal heading; |
| (9) | sub-section (3) of section 25; |

| S.No. | Chapter/section/sub-section/clause |
|---|---|
| (10) | clause (c) of section 30; |
| (11) | clauses (a) and (d) of sub-section (1) and sub-section (2) of section 34; |
| (12) | heading of Chapter VII; |
| (13) | section 35 and its marginal heading; |
| (14) | section 64; |
| (15) | section 71; |
| (16) | sub-section (1) of section 73 and its marginal heading; |
| (17) | section 74; and |
| (18) | clauses (d), (n) and (o) of sub-section (2) of section 87. |

**3. Amendment of Section 1.–** In section 1 of the principal Act, for sub-section (4), the following sub-sections shall be substituted, namely:-

"(4) Nothing in this Act shall apply to documents or transactions specified in the First Schedule:

Provided that the Central Government may, by notification in the Official Gazette, amend the First Schedule by way of addition or deletion of entries thereto.

(5) Every notification issued under sub-section (4) shall be laid before each House of Parliament."

**4. Amendment of Section 2.–** In section 2 of the principal Act, –

(A) after clause (h), the following clause shall be inserted, namely:-

'(ha) "communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, sent or transmit any text, video, audio or image;';

(B) for clause (j), the following clause shall be substituted, namely: –

(j) "computer network" means the inter-connection of one or more computers or computer systems or communication device through –

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(ii) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained;';

(C) in clause (n), the word "Regulations" shall be omitted;

(D) after clause (n), the following clauses shall be inserted, namely:-

'(na) "cyber café" means any facility from where access to the internet is offered by any person in the ordinary course of business to the members of the public;

(nb) "cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction;'.

(E) after clause (t), the following clauses shall be inserted, namely:-

'(ta) "electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature;

(tb) "Electronic Signature Certificate" means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate;';

(F) after clause (u), the following clause shall be inserted, namely :-

'(ua) "Indian Computer Emergency Response Team" means an agency established under sub-section (1) of section 70B;';

(G) in clause (v), for the words "data, text", the words "data, message, text" shall be substituted;

(H) for clause (w), the following clause shall be substituted, namely:-

'(w) "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;'.

**5. Amendment of heading of Chapter II.–** In Chapter II of the principal Act, for the heading, the heading "DIGITAL SIGNATURE AND ELECTRONIC SIGNATURE" shall be substituted.

**6. Insertion of new Section 3-A. –** After section 3 of the principal Act, the following section shall be inserted, namely:-

"**3A. Electronic Signature.**– (1) Notwithstanding anything contained in section 3, but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which–

(a) is considered reliable;

(b) may be specified in the Second Schedule.

(2) For the purposes of this section any electronic signature or electronic authentication technique shall be considered reliable if –

(a) the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or, as the case may be, the authenticator and to no other person;

(b) the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person;

(c) any alteration to the electronic signature made after affixing such signature is detectable;

(d) any alteration to the information made after its authentication by electronic signature is detectable; and

(e) it fulfils such other conditions which may be prescribed.

(3) The Central Government may prescribe the procedure for the purpose of ascertaining whether electronic signature is that of the person by whom it is purported to have been affixed or authenticated.

(4) The Central Government may, by notification in the Official Gazette, add to or omit any electronic signature or electronic authentication technique and the procedure for affixing such signature from the Second Schedule:

Provided that no electronic signature or authentication technique shall be specified in the Second Schedule unless such signature or technique is reliable.

(5) Every notification issued under sub-section (4) shall be laid before each House of Parliament."

**7. Insertion of new Section 6-A.** – After section 6 of the principal Act, the following section shall be inserted, namely :-

'**6A. Delivery of services by service provider.**– (1) The appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorise, by order, any service provider to set up, maintain and upgrade the computerised facilities and perform such other services as it may specify by notification in the Official Gazette.

*Explanation* – For the purposes of this section, service provider so authorised includes any individual, private agency, private company, partnership firm, sole proprietor firm or any such other body or agency which has been granted permission by the appropriate Government to offer services through electronic means in accordance with the policy governing such service sector.

(2) The appropriate Government may also authorise any service provider authorised under sub-section (1) to collect, retain and appropriate such service charges, as may be prescribed by the appropriate Government for the purpose of providing such services, from the person availing such service.

(3) Subject to the provisions of sub-section (2), the appropriate Government may authorise the service providers to collect, retain and appropriate service charges under this section notwithstanding the fact that there is no express provision under the Act, rule, regulation or notification under which the service is provided to collect, retain and appropriate e-service charges by the service providers.

(4) The appropriate Government shall, by notification in the Official Gazette, specify the scale of service charges which may be charged and collected by the service providers under this section:

Provided that the appropriate Government may specify different scale of service charges for different types of services.'.

**8. Insertion of new Section 7 A.** – After Section 7 of the principal Act, the following section shall be inserted, namely: –

"**7A. Audit of documents, etc. maintained in electronic form.**– Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in the electronic form."

**9. Insertion of new Section 10-A.** – After Section 10 of the principal Act, the following section shall be inserted, namely:-

> **"10A. Validity of contracts formed through electronic means.–** Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."

**10. Amendment of Section 12.–** In section 12 of the principal Act, in sub-section (1), for the words "agreed with the addressee", the word "stipulated" shall be substituted.

**11. Substitution of new sections for sections 15 and 16.–** For sections 15 and 16 of the principal Act, the following sections shall be substituted, namely:-

> **'15. Secure Electronic Signature.** – An electronic signature shall be deemed to be a secure electronic signature if –
>
> (i) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and
>
> (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed.
>
> *Explanation* – In case of digital signature, the "signature creation data" means the private key of the subscriber.
>
> **16. Security, Procedures and Practices.** – The Central Government may, for the purposes of sections 14 and 15, prescribe the security procedures and practices;
>
> Provided that in prescribing such security procedures and practices, the Central Government shall have regard to the commercial circumstances, nature of transactions and such other related factors as it may consider appropriate.'

**12. Amendment of Section 17.–** In section 17 of the principal Act,–

> (a) in sub-section (1), for the words "and Assistant Controllers", the words "Assistant Controllers, other officers and employees" shall be substituted; and
>
> (b) in sub-section (4), for the words "and Assistant Controllers", the words "Assistant Controllers, other officers and employees" shall be substituted."

**13. Omission of Section 20.–** Section 20 of the principal Act shall be omitted.

**14. Amendment of Section 29.–** In section 29 of the principal Act, in sub-section (1), for the words "any contravention of the provisions of this Act, rules or regulations made thereunder", the words "any contravention of the provisions of this Chapter" shall be substituted.

**15. Amendment of Section 30.–** In section 30 of the principal Act,–

(i) in clause (c), after the word "assured", the word "and" shall be omitted;

(ii) after clause (c), the following clauses shall be inserted, namely :-

"(ca) be the repository of all Electronic Signature Certificates issued under this Act;

(cb) publish information regarding its practices, Electronic Signature Certificates and current status of such certificates; and".

**16. Amendment of Section 34.–** In section 34 of the principal Act, in sub-section (1), in clause (a), the words "which contains the public key corresponding to the private key used by that Certifying Authority to digitally sign another Digital Signature Certificate" shall be omitted.

**17. Amendment of Section 35.–** In section 35 of the principal Act, in sub-section (4),-

(a) the first proviso shall be omitted;

(b) in the second proviso, for the words "Provided further", the word "Provided" shall be substituted.

**18. Amendment of Section 36.–** In section 36 of the principal Act, after clause (c), the following clauses shall be inserted, namely:-

"(ca) the subscriber holds a private key which is capable of creating a digital signature;

(cb) the public key to be listed in the certificate can be used to verify a digital signature affixed by the private key held by the subscriber;"

**19. Insertion of new Section 40 A. –** After section 40 of the principal Act, the following section shall be inserted, namely:-

**"40A.Duties of subscriber of Electronic Signature Certificate.–** In respect of Electronic Signature Certificate the subscriber shall perform such duties as may be prescribed."

**20. Amendment of heading of Chapter IX.–** In Chapter IX of the principal Act, in the heading, for the words "PENALTIES AND ADJUDICATION", the words "PENALTIES, COMPENSATION AND ADJUDICATION" shall be substituted.

**21. Amendment of Section 43.–** In section 43 of the principal Act,-

(a) in the marginal heading, for the word "Penalty", the words "Penalty and Compensation" shall be substituted;

(b) in clause (a), after the words "computer network", the words "or computer resource" shall be inserted;

(c) after clause (h), the following clauses shall be inserted, namely:-

"(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;

(j) steal, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;";

(d) for the portion beginning with the words "he shall be liable to pay damages" and ending with the words "persons so affected" the following shall be substituted, namely:-

"he shall be liable to pay damages by way of compensation to the person so affected";

(e) in the *Explanation,* after clause (iv), the following clause shall be inserted, namely :-

'(v) "computer source code" means the listing of programmers, computer commands, design and layout and programme analysis of computer resource in any form".

**22. Insertion of new Section 43 A.–** After section 43 of the principal Act, the following section shall be inserted, namely:-

**'43A. Compensation for failure to protect data.–** Where as body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns; controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

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

(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

(ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;

(iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.'

**23. Amendment of Section 46.–** In section 46 of the principal Act,-

(a) in sub-section (1), for the words "direction or order made thereunder", the words "direction or order made thereunder which renders him liable to pay penalty or compensation," shall be substituted;

(b) after sub-section (1), the following sub-section shall be inserted, namely:-

"(1A) The adjudicating officer appointed under sub-section (1) shall exercise jurisdiction to adjudicate matters in which the claim for injury or damage does not exceed rupees five crore:

Provided that the jurisdiction in respect of the claim for injury or damage exceeding rupees five crore shall vest with the competent court";

(c) in sub-section (5), after clause (b), the following clause shall be inserted, namely:-

"(c) shall be deemed to be a civil court for purposes of Order XXI of the Civil Procedure Code, 1908."

**24. Amendment of heading of Chapter X.–** In Chapter X of the principal Act, in the heading, the word "REGULATIONS" shall be omitted.

**25. Amendment of Section 48.–** In section 48 of the principal Act, in sub-section (1), the word "Regulations" shall be omitted.

**26. Substitution of new sections for Sections 49 to 52.–** For Sections 49 to 52 of the principal Act, the following sections shall be substituted, namely:-

**"49. Composition of Cyber Appellate Tribunal.–** (1) The Cyber Appellate Tribunal shall consist of a Chairperson and such number of other Members, as the Central Government may, by notification in the Official Gazette, appoint:

Provided that the person appointed as the Presiding Officer of the Cyber Appellate Tribunal under the provisions of this Act immediately before the commencement of the Information Technology (Amendment) Act, 2008 shall be deemed to have been appointed as the Chairperson of the said Cyber Appellate Tribunal under the provisions of this Act as amended by the Information Technology (Amendment) Act, 2008.

(2) The selection of Chairperson and Members of the Cyber Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.

(3) Subject to the provisions of this Act-

(a) the jurisdiction, powers and authority of the Cyber Appellate Tribunal may be exercised by the Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Cyber Appellate Tribunal with one or two Members of such Tribunal as the Chairperson may deem fit;

(c) the Benches of the Cyber Appellate Tribunal shall sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Cyber Appellate Tribunal, by notification in the Official Gazette, specify;

(d) the Central Government shall, by notification in the Official Gazette specify the areas in relation to which each Bench of the Cyber Appellate Tribunal may exercise its jurisdiction.

(4) Notwithstanding anything contained in sub-section (3), the Chairperson of the Cyber Appellate Tribunal may transfer a Member of such Tribunal from one Bench to another Bench.

(5) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member of the Cyber Appellate Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of more Members, the case or matter may be transferred by the Chairperson to such Bench as the Chairperson may deem fit.

**50. Qualifications for appointment as Chairperson and Members of Cyber Appellate Tribunal.**– (1) A person shall not be qualified for appointment as a Chairperson of the Cyber Appellate Tribunal unless he is, or has been, or is qualified to be, a Judge of a High Court.

(2) The Members of the Cyber Appellate Tribunal, except the Judicial Member to be appointed under sub-section (3), shall be appointed by the Central Government from amongst persons, having special knowledge of, and professional experience in, information technology, telecommunication, industry, management or consumer affairs:

Provided that a person shall not be appointed as a Member, unless he is, or has been, in the service of the Central Government or a State Government, and has held the post of Additional Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than one years or Joint Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than seven years.

(3) The Judicial Members of the Cyber Appellate Tribunal shall be appointed by the Central Government from amongst persons who is or has been a member of the Indian Legal Service and has held the post of Additional Secretary for a period of not less than one year or Grade I post of that Service for a period of not less than five years.

**51. Term of office, conditions of service, etc., of Chairperson and Members.**– (1) The Chairperson or Member of the Cyber Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

(2) Before appointing any person as the Chairperson or Member of the Cyber Appellate Tribunal, the Central Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member.

(3) An officer of the Central Government or State Government on his selection as the Chairperson or Member of the Cyber Appellate Tribunal, as the case may be, shall have to retire from service before joining as such Chairperson or Member.

**52. Salary, allowances and other terms and conditions of service of Chairperson and Members.–** The salary and allowances payable to, and the other terms and conditions of service including pension, gratuity and other retirement benefits of, the Chairperson or a Member of the Cyber Appellate Tribunal shall be such as may be prescribed.

**52A. Powers of Superintendence, direction, etc.–** The Chairperson of the Cyber Appellate Tribunal shall have powers of general superintendence and directions in the conduct of the affairs of that Tribunal and he shall, in addition to presiding over the meetings of the Tribunal, exercise and discharge such powers and functions of the Tribunal as may be prescribed.

**52B. Distribution of business among Benches.–** Where Benches are constituted, the Chairperson of the Cyber Appellate Tribunal may, by order, distribute the business of that Tribunal amongst the Benches and also the matters to be dealt with by each Bench.

**52C. Power of Chairperson to transfer cases.–** On the application of any of the parties and after notice to the parties, and after hearing such of them as he may deem proper to be heard, or suo motu without such notice, the Chairperson of the Cyber Appellate Tribunal may transfer any case pending before one Bench, for disposal to any other Bench.

**52D. Decision of majority.–** If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Cyber Appellate Tribunal who shall hear the point or points himself and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard it."

**27. Amendment of Section 53.–** In section 53 of the principal Act, for the words "Presiding Officer", the words "Chairperson or Member, as the case may be," shall be substituted.

**28. Amendment of Section 54.–** In section 54 of the principal Act, for the words "Presiding Officer" wherever they occur, the words "Chairperson or the Member" shall be substituted.

**29. Amendment of Section 55.–** In section 55 of the principal Act, for the words "Presiding Officer", the words "Chairperson or the Member" shall be substituted.

**30. Amendment of Section 56.–** In section 56 of the principal Act, for the words "Presiding Officer", the word "Chairperson" shall be substituted.

**31. Amendment of Section 64.–** In Section 64 of the principal Act, –

(i) for the words "penalty imposed", the words "penalty imposed or compensation awarded" shall be substituted;

(ii) in the marginal heading, for the word "penalty", the words "penalty or compensation" shall be substituted.

**32. Substitution of new sections for sections 66 and 67.–** For Sections 66 and 67 of the principal Act, the following sections shall be substituted, namely:-

**'66. Computer related offences.** – If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

*Explanation.* – For the purposes of this section, –

(a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code;

(b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code.

**66A. Punishment for sending offensive messages through communication service, etc..–** Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

*Explanation* – For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received

on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

**66B. Punishment for dishonestly receiving stolen computer resource or communication device. –** Whoever dishonestly received or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both.

**66C. Punishment for identity theft. –** Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.

**66D. Punishment for cheating by personation by using computer resource. –** Whoever, by means for any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.

**66E. Punishment for violation of privacy. –** Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

*Explanation* – For the purposes of this section-

(a) "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;

(b) "capture", with respect to an image, means to videotape, photograph, film or record by any means;

(c) "private area" means the naked or undergarment clad genitals, public area, buttocks or female breast;

(d) "publishes" means reproduction in the printed or electronic form and making it available for public;

(e) "under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that-

(i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

**66F. Punishment for cyber terrorism.** – (1) Whoever,-

(A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by-

(i) denying or cause the denial of access to any person authorized to access computer resource; or

(ii) attempting to penetrate or access a computer resource without authorization or exceeding authorized access; or

(iii) introducing or causing to introduce any computer contaminant,

and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70; or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorization or exceeding authorized access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any

foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life.

**67. Punishment for publishing or transmitting obscene material in electronic form.** – Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to be prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

**67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form.** – Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

**67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.** – Whoever,

(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting

children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or

(d) facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,

shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of Section 67, Section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form–

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

*Explanation.* – For the purposes of this section, "children" means a person who has not completed the age of 18 years.

**67C. Preservation and retention of information by intermediaries.** – (1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.

**33. Amendment of Section 68.** – In section 68 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely: –

"(2) Any person who intentionally or knowingly fails to comply with any order under sub-section (1) shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years or a fine not exceeding one lakh rupees or with both."

**34. Substitution of new sections for Section 69.** – For Section 69 of the principal Act, the following sections shall be substituted, namely: –

**'69. Power to issue directions for interception or monitoring or decryption of any information through any computer resource.** – (1) Where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do, in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

(2) The procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.

(3) The subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1), extend all facilities and technical assistance to–

(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or

(b) intercept, monitor, or decrypt the information, as the case may be; or

(c) provide information stored in computer resource.

(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

**69A. Power to issue directions for blocking for public access of any information through any computer resource.** – (1) Where the Central Government or any of its officers specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

**69B. Power to authorize to monitor and collect traffic data or information through any computer resource for cyber security.** – (1) The Central Government may, to enhance cyber security and for identification, analysis and prevention of intrusion or spread of computer contaminant in the country, by notification in the Official Gazette, authorise any agency of the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource.

(2) The intermediary or any person in-charge or the computer resource shall, when called upon by the agency which has been authorised under sub-section (1), provide technical assistance and extend all facilities to such agency to enable online access or to secure and provide online access to the computer

resource generating, transmitting, receiving or storing such traffic data or information.

(3) The procedure and safeguards for monitoring and collecting traffic data or information, shall be such as may be prescribed.

(4) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (2) shall be punished with an imprisonment for a term which any extend to three years and shall also be liable to fine.

*Explanation* – For the purposes of this section,-

(i) "computer contaminant" shall have the meaning assigned to it in section 43;

(ii) "traffic data" means any data identifying or purporting to identify any person, computer system or computer network or location to or from which the communication is or may be transmitted and includes communications origin, destination, route, time, data, size, duration or type of underlying service and any other information.'

**35. Amendment of Section 70.** – In Section 70 of the principal Act,-

(a) for sub-section (1), the following sub-section shall be substituted, namely: –

'(1) The appropriate Government may, by notification in the Official Gazette, declare any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, to be a protected system.

*Explanation* – For the purposes of this section, –

"Critical Information Infrastructure" means the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety.';

(a) after sub-section (3), the following sub-section shall be inserted, namely: –

"(4) The Central Government shall prescribe the information security practices and procedures for such protected system."

**36. Insertion of new Sections 70A and 70B.** – After Section 70 of the principal Act, the following sections shall be inserted, namely:-

"**70A. National model agency.** – (1) The Central Government may, by notification published in the Official Gazette, designate any organisation of the Government as the national nodal agency in respect of Critical Information Infrastructure Protection.

(2) The national nodal agency designated under sub-section (1) shall be responsible for all measures including Research and Development relating to protection of Critical Information Infrastructure.

(3) The manner of performing functions and duties of the agency referred to in sub-section (1) shall be such as may be prescribed.

**70B. Indian Computer Emergency Response Team to serve as National Agency for incident response.** – (1) The Central Government shall, by notification in the Official Gazette, appoint an agency of the Government to be called the Indian Computer Emergency Response Team.

(2) The Central Government shall provide the agency referred to in sub-section (1) with a Director General and such other officers and employees as may be prescribed.

(3) The salary and allowances and terms and conditions of the Director-General and other officers and employees shall be such as may be prescribed.

(4) The Indian Computer Emergency Response Team shall serve as the national agency for performing the following functions in the area of cyber security, –

(a) collection, analysis and dissemination of information on cyber incidents;

(b) forecast and alerts of cyber security incidents;

(c) emergency measures for handling cyber security incidents;

(d) coordination of cyber incidents response activities;

(e) issue guidelines, advisories, vulnerability notes and white papers relating to information security practices, procedures, preventation, response and reporting of cyber incidents;

(f) such other functions relating to cyber security as may be prescribed.

(5) The manner of performing functions and duties of the agency referred to in sub-section (1) shall be such as may be prescribed.

(6) For carrying out the provisions of sub-section (4), the agency referred to in sub-section (1) may call for information and give direction to the service providers, intermediaries, data centers, body corporate and any other person.

(7) Any service provider, intermediaries, data centers, body corporate or person who fails to provide the information called for or comply with the direction under sub-section (6), shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to one lakh rupees or with both.

(8) No court shall take cognizance of any offence under this section, except on a complaint made by an officer authorised in this behalf by the agency referred to in sub-section (1)."

**37. Insertion of new Section 72A.** – After section 72 of the principal Act, the following section shall be inserted, namely:-

**"72A. Punishment for disclosure of information in breach of lawful contract.** – Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or= with both."

**38. Substitution of new sections for Section 77.** – For Section 77 of the principal Act, the following sections shall be substituted, namely:-

**"77. Compensation, penalties or confiscation not to interfere with other punishment.** – No compensation awarded, penalty imposed or confiscation made under this Act shall prevent the award of compensation or imposition of any other penalty or punishment under any other law for the time being in force.

**77A. Compounding of offences.** – A court of competent jurisdiction may compound offences, other than offences for which the punishment for life or imprisonment for a term exceeding three years has been provided, under this Act:

Provided that the court shall not compound such offence where the accused is, by reason of his previous conviction, liable to either enhanced punishment or to a punishment of a different kind:

Provided further that the court shall not compound any offence where such offence affects the socio economic conditions of the country or has been committed against a child below the age of 18 years or a woman.

(2) The person accused of an offence under this Act may file an application for compounding in the court in which offence is pending for trial and the provisions of sections 265B and 265C of the Code of Criminal Procedure, 1973 shall apply.

**77B. Offences with three years imprisonment to be bailable.** – Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence punishable with imprisonment of three years and above shall be cognizable and the offence punishable with imprisonment of three years shall be bailable.

**39. Amendment of Section 78.** – In Section 78 of the principal Act, for the words "Deputy Superintendent of Police" the word "Inspector" shall be substituted.

**40. Substitution of new Chapters for Chapter XII.** – For Chapter XII of the principal Act, the following Chapters shall be substituted, namely: –

## CHAPTER–XII
## INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

**79. Exemption from liability of intermediary in certain cases.** – (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not–

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if–

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

*Explanation* – For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

## CHAPTER XII–A
## EXAMINER OF ELECTRONIC EVIDENCE

**79A. Central Government to notify Examiner of Electronic Evidence.** – The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.

*Explanation* – For the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

**41. Amendment of Section 80.** – In Section 80 of the principal Act, in sub-section (1), for the words "Deputy Superintendent of Police", the word "Inspector" shall be substituted.

**42. Amendment of Section 81.** – In Section 81 of the principal Act, the following proviso shall be inserted at the end, namely:-

"Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 or the Patents Act, 1970."

**43. Amendment of Section 82.** – In Section 82 of the principal Act, –

(a) for the marginal heading, the following marginal heading shall be substituted, namely:-

"Chairperson, Members, officers and employees to be public servants.";

(b) for the words "Presiding Officer", the words "Chairperson, Members" shall be substituted.

**44. Amendment of Section 84.** – In Section 84 of the principal Act, for the words "Presiding Officer, the words "Chairperson, Members" shall be substituted.

**45. Insertion of new Sections 84A, 84B and 84C.** – After Section 84 of the principal Act, the following sections shall be inserted, namely: –

**"84A. Modes or methods for encryption.** – The Central Government may, for secure use of the electronic medium and for promotion of e-governance and e-commerce, prescribe the modes or methods for encryption.

**84B. Punishment for abetment of offences.** – Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Act for the punishment of such abetment, be punished with the punishment provided for the offence under this Act.

*Explanation* – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

**84C. Punishment for attempt to commit offences.** – Whoever attempts to commit an offence punishable by this Act or causes such an offence to be committed, and in such an attempt does any act towards the commission of the offence, shall, where no express provision is made for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

**46. Amendment of Section 87.** – In Section 87 of the principal Act, –

(A) in sub-section (2), –

(i) for clause (a), the following clauses shall be substituted, namely:-

"(a) the conditions for considering reliability of electronic signature or electronic authentication technique under sub-section (2) of section 3A;

(aa) the procedure for ascertaining electronic signature or authentication under sub-section (3) of Section 3A;

(ab) the manner in which any information or matter may be authenticated by means of electronic signature under section 5;";

(ii) after clause (c), the following clause shall be inserted, namely:-

(ca) the manner in which the authorised service provider may collect, retain and appropriate service charges under sub-section (2) of Section 6A;";

(iii) for clause (e), the following clauses shall be substituted, namely:-

"(e) the manner of storing and affixing electronic signature creation data under section 15;

(ea) the security procedures and practices under Section 16;";

(iv) in clause (f), for the words "and Assistant Controllers", the words "Assistant Controllers, other officers and employees" shall be substituted;

(v) clause (g) shall be omitted;

(vi) after clause (m), the following clause shall be inserted, namely:-

"(ma) the form of application and fee for issue of Electronic Signature Certificate under Section 35;";

(vii) after clause (o), the following clauses shall be inserted, namely:-

"(oa) the duties of subscribers under Section 40A;

(ob) the reasonable security practices and procedures and sensitive personal data or information under Section 43 A;";

(viii) in clause (r), for the words "Presiding Officer", the words "Chairperson and Members" shall be substituted;

(ix) the clause (s), for the words "Presiding Officer", the words "Chairperson and Members" shall be substituted;

(x) for clause (w), the following clauses shall be substituted, namely:-

"(w) the powers and functions of the Chairperson of the Cyber Appellate Tribunal under Section 52A;

(x) the information, duration, manner and form of such information to be retained and preserved under Section 67C;

(y) the procedures and safeguards for interception, monitoring, or decryption under sub-section (2) of Section 69;

(z) the procedure and safeguards for blocking for access by the public under sub-section (2) of Section 69A;

(za) the procedure and safeguards for monitoring and collecting traffic data or information under sub-section (3) of Section 69B;

(zb) the information security practices and procedures for protected system under Section 70;

(zc) manner of performing functions and duties of the agency under sub-section (3) of Section 70A;

(zd) the officers and employees under sub-section (2) of Section 70B;

(ze) salaries and allowances and terms and conditions of service of the Director General and other officers and employees under sub-section (3) of Section 70B;

(zf) the manner in which the functions and duties of agency shall be performed under sub-section (5) of Section 70B;

(zg) the guidelines to be observed by the intermediaries under sub-section (4) of Section 79;

(zh) the modes or methods for encryption under Section 84A;";

(B) in sub-section (3), –

(i) for the words, brackets, letter and figures "Every notification made by the Central Government under clause (f) of sub-section (4) of Section 1 and every rule made by it", the words "Every notification made by the Central Government under sub-section (1) of section 70A and every rule made by it" shall be substituted;

(ii) the words "the notification or" wherever they occur, shall be omitted.

**47. Amendment of Section 90.** – In Section 90 of the principal Act, in sub-section (2), clause (c) shall be omitted.

**48. Omission of Sections 91, 92, 93 and 94.** – Sections 91, 92, 93 and 94 of the principal Act shall be omitted.

**49. Substitution of new Schedules for First Schedule and Second Schedule.**– For the First Schedule and the Second Schedule to the principal Act, the following Schedules shall be substituted, namely: –

## FIRST SCHEDULE

**[See sub-section (4) of Section 1]**

**DOCUMENTS OR TRANSACTIONS TO WHICH THE ACT SHALL NOT APPLY**

| Sl.No. | Description of documents or transactions |
|---|---|
| 1. | A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881 |
| 2. | A power of attorney as defined in section 1A of the Powers-of-Attorney Act, 1882. |
| 3. | A trust as defined in section 3 of the Indian Trusts Act, 1882. |
| 4. | A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called. |
| 5. | Any contract for the sale or conveyance of immovable property or any interest in such property. |

## THE SECOND SCHEDULE

[See sub-section (1) of section 3A]

**ELECTRONIC SIGNATURE OR ELECTRONIC AUTHENTICATIONTECHNIQUE AND PROCEDURE**

| Sl.No. | Description | Procedure |
|---|---|---|
| (1) | (2) | (3) |

**50. Omission of Third Schedule and Fourth Schedule.** – The Third Schedule and the Fourth Schedule to the principal Act shall be omitted.

## PART III

### AMENDMENT OF THE INDIAN PENAL CODE

**51. Amendment of Indian Penal Code.** – In the Indian Penal Code –

(a) **Amendment of Section 4.** – In Section 4, –

(i) after clause (2), the following clause shall be inserted, namely: –

"(3) any person in any place without and beyond India committing offence targeting a computer resource located in India.";

(ii) for the Explanation, the following Explanation shall be substituted, namely:-

*'Explanation* – In this section –

(a) the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code;

(b) the expression "computer resource" shall have the meaning assigned to it in clause (k) of sub-section (1) of section 2 of the Information Technology Act, 2000.';

**(b) Amendment of Section 40.**– In Section 40, in clause (2), after the figure "117", the figures and word "118, 119 and 120" shall be inserted;

**(c) Amendment of Section 118.**– In Section 118, for the words "voluntarily conceals, by any act or illegal omission, the existence of a design", the words "voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design" shall be substituted.

**(d) Amendment of Section 119.**– In Section 119, for the words "voluntarily conceals, by any act or illegal omission, the existence of a design", the words "voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design" shall be substituted;

**(e) Amendment of Section 464.**– In Section 464, for the words "digital signature" wherever they occur, the words "electronic signature" shall be substituted;

## PART–IV

## AMENDMENT OF THE INDIAN EVIDENCE ACT, 1872

**52. Amendment of Indian Evidence Act.** – In the Indian Evidence Act, 1872, –

**(a) Amendment of Section 3.** – In Section 3 relating to interpretation clause, in the paragraph appearing at the end, for the words "digital signature" and "Digital Signature Certificate", the words "electronic signature", and "Electronic Signature Certificate" shall respectively be substituted;

(b) **Insertion of new Section 45A. –** After Section 45, the following section shall be inserted, namely: –

**"45A. Opinion of Examiner of Electronic Evidence. –** When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79A of the Information Technology Act, 2000, is a relevant fact.

*Explanation* – For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.";

(c) **Amendment of Section 47A. –** In Section 47A, –

(i) for the words "digital signature", the words "electronic signature" shall be substituted;

(ii) for the words "Digital Signature Certificate", the words "Electronic Signature Certificate" shall be substituted;

(d) **Amendment of Section 67A. –** In Section 67A, for the words "digital signature" wherever they occur, the words "electronic signature" shall be substituted;

(e) **Amendment of Section 85A. –** In Section 85A, for the words "digital signature" at both the places where they occur, the words "electronic signature" shall be substituted;

(f) **Amendment of Section 85B. –** In Section 85B, for the words "digital signature" wherever they occur, the words "electronic signature" shall be substituted;

(g) **Amendment of Section 85C. –** In Section 85C, for the words "Digital Signature Certificate", the words "Electronic Signature Certificate" shall be substituted;

(h) **Amendment of Section 90A. –** In section 90A, for the words "digital signature" at both the places where they occur, the words "electronic signature" shall be substituted;

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