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

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

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# FROM THE PEN OF THE EDITOR

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

Esteemed Readers

This is the penultimate issue of this year. As we will be leaving this year in a short while from now, we must retrospect ourselves as to what we have achieved in terms of our responsibility and what was our contribution to this noble field of administration of justice that we have chosen. Dispensation of justice is the prime duty of every Judicial Officer from the highest to the lowest rung as envisaged in our Constitution.

Peace and justice go together. There is no peace without justice. Injustice remains always a cause and potential factor of conflict. Injustice prevails where human rights are denied. Sometimes there may not be any actual conflicts even though injustice exists. But under no circumstances can peace in its full sense co-exist with injustice. Therefore, there is a need to strengthen the justice delivery system by ensuring timely justice. But administration of timely justice is not an easy task. It is very delicate and complex issue as number of factors are responsible for the same. Even then every judge is supposed to do his level best to achieve the goal by his untiring and selfless dedication towards his duty.

Judiciary at present is facing with the daunting task of reducing the arrears of cases. We should tread on these problems softly and carefully. Introspecting our weaknesses and knowing our strength is enough for all of us to tide over this problem. To get a solution to this uphill task, we should manage the affairs of the Court by continuously upgrading ourselves by resorting to the new developments that take place in the legal field.

We have chosen this job out of sheer liking for it. This should not end here. This being a noble job, it plunges one into action to serve others. We must be responsible towards it because a responsible person is always appreciated and respected by all. The person who accepts responsibility is morally liable to carry out that commitment. It helps us to discharge our duty properly.

Duty has an important place in life and work. It strengthens one's moral character. It disciplines man to complete his work in a spirit of selfless service and sacrifice for the organization he works for. There is great joy in doing our job well. It gives us an inner satisfaction and makes us creative. Dutifulness implies obligation to perform one's duty sincerely.

We must do the work assigned to us in the best possible way. This can be achieved by doing our work excellently. Excellence is the quality of being highly perfect. It aims at perfection. It drives us to give our very best to the task we undertake. Unwavering devotion, total dedication, complete concentration and specific goals are few attributes of excellence. We should strive to bring out the best in oneself by way of results.

We are living in a highly competitive world. There is tough competition in every field. The future in such a world belongs to those, who can bring excellence to whatever they do. There is no question of 'too early' or 'too late' in pursuit of excellence. We must begin this quest for excellence right from now.

Judiciary is also not aloof to this competition. To be at par with others, we should also move with the same speed. Innovative and creative thinking enhances one's effort to achieve a quality performance in the area we are in. How we crack a particular problem in the right spirit, is the real art.

The Institute conducted Training Programmes on Application of Information and Communication Technology to District Judiciary & Application of ADR & Workshop on Electricity Act for the Special Judges dealing cases under Electricity Act in two batches and Refresher Course Training for Civil Judges Class of 2008 Batch (3rd Batch) in the months of August and September, 2009.

Part-I of this issue contains articles on varied topics. Part II is abundant with the various pronouncements of Hon'ble the Supreme Court as well as of our High Court. Due to paucity of space, we are not including Part III and Part IV in this issue.

The constant endeavour of the Institute is to help the judicial officers in all possible ways. Any suggestions from your side for the improvement of the Journal are always welcome.

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## HON'BLE SHRI JUSTICE BRIJ MOHAN GUPTA DEMITS OFFICE

*Hon'ble Shri Justice Brij Mohan Gupta demitted office on 19.08.2009 on His Lordship's attaining superannuation Was born on 20.08.1947. Joined Judicial Service as Civil Judge Class II on 14.06.1972, was promoted to the post of Additional District Judge on 30.07.1988. Was District & Sessions Judge, Datia from October, 1997 to April, 1999. Worked as Registrar (Judicial), Supreme Court of India from April, 1999 to June, 2004. Was Court Administrator-cum-Registrar General, Supreme Court of India prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 25th October, 2005. Was accorded farewell ovation on 19.08.2009.*

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

## HON'BLE SMT. JUSTICE MANJUSHA P. NAMJOSHI DEMITS OFFICE

*Hon'ble Smt. Justice Manjusha P. Namjoshi demitted office on 20.08.2009 on Her Lordship's attaining superannuation. Born on 21.08.1947. Obtained her LL.B. degree in the year 1969. Joined Judicial Service as Civil Judge Class II on 04.06.1970, was promoted as Additional District Judge on 15.04.1987. Worked as President of District Consumer Forum from 17.05.1996 to May, 2001 and as Additional Director, J.O.T.R.I., High Court of Madhya Pradesh from May 2001 to May 2002. Was District and Sessions Judge, Ratlam prior to her elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th October, 2005 and Permanent Judge on 2nd February, 2007. Was accorded farewell ovation on 20.08.2009.*

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

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Precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the superior courts.

— N. Santosh Hegde, J.
(2000) 1 SCC 644

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Complete justice would be justice according to law, and though it would be open to the Supreme Court to mould the relief, the Supreme Court would not grant a relief which would amount to perpetuating an illegality."

—P.K. Balasubramanyan, J.
(Secy., State of Karnataka v. Umadevi (3), (2006) 4 SCC 1)

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When judicial review is barred, democracy evaporates. And when fundamental rights are at stake, they must be harmonized with, not made subject to, the directive principles.

—Dalveer Bhandari, J.
(Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1)

PART - I

# न्यायिक दण्डाधिकारी की जाँच प्रक्रिया का स्वरूप

**जस्टिस ए.के. सक्सेना**
**सदस्य**
**मध्यप्रदेश मानव अधिकार आयोग**

हमारा समाज एक सभ्य समाज है तथा हमारे यहाँ कानून का राज है, जहाँ कि संविधान सर्वोपरि है। ऐसे समाज में व्यक्तियों के अधिकारों के हनन करने संबंधी किसी भी कार्यवाही का कोई स्थान नहीं है। इसी कारण से व्यक्तियों के अधिकारों को हनन करने संबंधी किसी भी कार्यवाही को अत्यंत गंभीरता से लेते हुए कठोर से कठोर कार्यवाही किये जाने का प्रयास किया जाना अत्यंत ही आवश्यक है। इसी दृष्टि से दण्ड प्रक्रिया संहिता (जिसे आगे ''संहिता'' लिखा जावेगा) में संशोधन किया गया है।

दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2005 द्वारा धारा 176 में एक महत्वपूर्ण संशोधन करते हुए धारा 176 (1–क) को अंत:स्थापित किया गया है, जिसके अंतर्गत न्यायिक दण्डाधिकारी को एक अतिमहत्वपूर्ण कार्य को किये जाने हेतु अधिकृत किया गया है। यह कार्य पुलिस अभिरक्षा में अथवा दण्डाधिकारी या न्यायालय द्वारा प्राधिकृत किसी अन्य अभिरक्षा में किसी व्यक्ति के मृत हो जाने या गायब हो जाने अथवा किसी स्त्री के साथ बलात्संग किये जाने पर जॉच के संबंध में है।

धारा 176 (1–क) संहिता में दिये गये महत्वपूर्ण अधिकार की विवेचना के पूर्व संबंधित प्रावधान को शब्दश: उल्लेखित किया जाना उचित होगा, जो कि निम्नानुसार है:

धारा–176 (1)

(1–क)

(क) कोई व्यक्ति मर जाता है या गायब हो जाता है, अथवा

(ख) किसी स्त्री के साथ बलात्संग किया गया अभिकथित है, तो उस दशा में जबकि ऐसा व्यक्ति या स्त्री पुलिस अभिरक्षा या इस संहिता के अधीन मजिस्ट्रेट या न्यायालय द्वारा प्राधिकृत किसी अन्य अभिरक्षा में है तो पुलिस अधिकारी द्वारा की गई जाँच या किये गये अन्वेषण के अतिरिक्त, यथास्थिति, ऐसे न्यायिक मजिस्ट्रेट या महानगर मजिस्ट्रेट द्वारा, जिसकी अधिकारिता की स्थानीय सीमाओं के भीतर अपराध किया गया है, जाँच की जाएगी।

(2) ऐसी जाँच करने वाला मजिस्ट्रेट उसके संबंध में लिये गये साक्ष्य को इसमें इसके पश्चात् विहित किसी प्रकार से, मामले की परिस्थितियों के अनुसार अभिलिखित करेगा।

(3) जब कभी ऐसे मजिस्ट्रेट के विचार में यह समीचीन है कि किसी व्यक्ति के, जो पहले ही गाड़ दिया गया है, मृत शरीर की इसलिए परीक्षा की जाये कि उसकी मृत्यु के कारण का पता चले तब मजिस्ट्रेट उस शरीर को निकलवा सकता है और उसकी परीक्षा करा सकता है।

(4) जहाँ कोई जाँच इस धारा के अधीन की जानी है, वहाँ मजिस्ट्रेट, जहाँ कहीं साध्य है, मृतक के उन नातेदारों को, जिनके नाम और पते ज्ञात हैं, इत्तिला देगा और उन्हें जाँच के समय उपस्थित रहने की अनुज्ञा देगा।

(5) उपधारा (1क) के अधीन, जैसा भी मामला हो, जाँच या अन्वेषण करने वाला न्यायिक मजिस्ट्रेट अथवा मेट्रोपोलिटन मजिस्ट्रेट अथवा कार्यपालिक मजिस्ट्रेट अथवा पुलिस अधिकारी व्यक्ति की मृत्यु के चौबीस घंटे के भीतर शरीर को इसे नजदीकतम सिविल सर्जन अथवा राज्य सरकार द्वारा इस संबंध में नियुक्त अन्य अर्हत चिकित्सीय व्यक्ति को परीक्षण कराये जाने के लिए अग्रेषित करेगा जब तक कि लिखित में अभिलिखित कारणों से ऐसा किया जाना संभव न हो।

**स्पष्टीकरण** – इस धारा में ''नातेदार'' पद से माता–पिता, संतान, भाई, बहन और पति–पत्नि अभिप्रेत हैं।

उपरोक्त प्रावधानों के अवलोकन से स्पष्ट है कि न्यायिक दण्डाधिकारी को ऐसे मामले, जिनमें पुलिस अभिरक्षा में या संहिता के अधीन मजिस्ट्रेट या न्यायालय द्वारा प्राधिकृत किसी अन्य अभिरक्षा में किसी व्यक्ति के मर जाने या गायब हो जाने अथवा किसी स्त्री के साथ बलात्संग किये जाने के तथ्य अभिकथित होने पर, उसकी जाँच करने का अधिकार है और यह जाँच **आज्ञात्मक (Mandatory)** प्रकृति की है। इन प्रावधानों से स्पष्ट है कि विधायिका द्वारा उपरोक्त अभिकथित तथ्यों की गंभीरता को समझा गया और इसी कारण न्यायिक दण्डाधिकारी को ऐसे मामलों में जाँच करने का अधिकार दिया गया। जहाँ विधायिका द्वारा विषय की गंभीरता को दृष्टिगत रखते हुए उपरोक्त तथ्यों को संज्ञान में लेकर विधि में महत्वपूर्ण संशोधन किया गया, वहाँ न्यायिक दण्डाधिकारी का यह कर्तव्य हो जाता है कि ऐसे मामलों में जाँच करने के अधिकार को गंभीरता से लिया जावे। वैसे तो न्यायिक दण्डाधिकारी को विधि द्वारा दिया गया प्रत्येक कार्य महत्वपूर्ण है, परन्तु जहाँ व्यक्ति के अधिकारों के हनन का प्रश्न आ जाता है, वहाँ उनका कार्य और अधिक उत्तरदायित्वपूर्ण हो जाता है।

## जाँच के लिए आवश्यक तत्व

(1) न्यायिक दण्डाधिकारी द्वारा उपरोक्त प्रावधानों के अंतर्गत जाँच की जानी आवश्यक है, जहाँ पर यह अभिकथित किया गया हो कि पुलिस अभिरक्षा में अथवा संहिता के अधीन मजिस्ट्रेट या न्यायालय द्वारा प्राधिकृत किसी अन्य अभिरक्षा में रहते हुए किसी व्यक्ति की मृत्यु हो गई है या ऐसी अभिरक्षा से कोई व्यक्ति गायब हो गया है अथवा ऐसी अभिरक्षा मे किसी स्त्री के साथ बलात्संग किया गया है।

(2) यह जाँच ऐसे न्यायिक दण्डाधिकारी द्वारा की जावेगी जिसकी अधिकारिता की स्थानीय सीमाओं के भीतर अपराध किया गया है।

(3) मामले की परिस्थितियों के अनुसार जाँच करने वाले दण्डाधिकारी को संहिता में विहित किसी भी प्रकार से साक्ष्य अभिलिखित करने का अधिकार दिया गया है।

(4) ऐसे किसी मामले के संबंध में यदि मृत शरीर को पहले से गाड़ दिया गया है, तब आवश्यकता होने पर, दण्डाधिकारी को यह अधिकार प्रदान किया गया है कि उस मृत शरीर को निकलवाकर उसका परीक्षण करा सके।

(5) जहाँ तक संभव हो, जाँच के दौरान मृतक के नातेदारों को, जिनके नाम और पते ज्ञात हैं, सूचना दी जावेगी और उन्हें जाँच के समय उपस्थित रहने की अनुमति प्रदान की जा सकेगी।

(6) स्पष्टीकरण के अनुसार माता–पिता, संतान, भाई, बहन और पति या पत्नि, मृतक के नातेदारों की श्रेणी में आयेंगे।

(7) जाँच करने वाले न्यायिक दण्डाधिकारी के लिए यह आवश्यक है कि किसी व्यक्ति की मृत्यु के 24 घंटे के भीतर उसके मृत शरीर को निकटतम सिविल सर्जन या अन्य अर्हित चिकित्सक या राज्य सरकार द्वारा इस निमित्त नियुक्त किये गये किसी अन्य चिकित्सक को, परीक्षण हेतु भेजे तथा जहाँ यह कार्यवाही संभव न हो वहाँ ऐसा न करने के कारणों को लेखबद्ध किया जाना आवश्यक है।

धारा 176 (1–क) संहिता के प्रावधानों का अर्थ यह कदापि नहीं है कि जाँच करने वाले न्यायिक दण्डाधिकारी को मात्र यह ज्ञात करना है कि पुलिस अभिरक्षा अथवा प्राधिकृत अन्य अभिरक्षा में किसी व्यक्ति के मर जाने या वहाँ से गायब हो जाने अथवा किसी स्त्री के साथ बलात्संग किये जाने के तथ्य अभिकथित होने पर, किस व्यक्ति, कर्मचारी अथवा अधिकारी ने कोई अपराध किया अथवा नहीं। इन प्रावधानों को संकुचित रूप में नहीं लिया जाना चाहिये। इस प्रकार की जाँच के परिणाम अत्यंत विस्तृत हो सकते हैं क्योंकि निष्कर्षों के विस्तार की कोई सीमा नहीं है। ऐसे मामलों में किस व्यक्ति, अधिकारी या कर्मचारी ने क्या अपराध किया है, यह तो देखा जाना अत्यंत ही आवश्यक है परन्तु इसके अलावा अन्य महत्वपूर्ण निष्कर्षों के विकल्पों पर भी विचार किया जाना आवश्यक है। उपरोक्त प्रावधानों में यह कहीं भी वर्णित नहीं किया गया है कि ऐसी जाँच मात्र इस दृष्टिकोण से की जावेगी कि अभिरक्षा में किसी व्यक्ति के मरने या गायब होने अथवा किसी स्त्री के साथ बलात्संग किये जाने के तथ्य अभिकथित होने पर किस व्यक्ति ने क्या अपराध किया। इस सम्पूर्ण प्रावधान में निष्कर्ष के संबंध में कहीं कोई सीमा परिलक्षित नहीं होती है। इस प्रावधान का दायरा सीमित कदापि नहीं है। इसका स्पष्ट अर्थ है कि न्यायिक दण्डाधिकारी को जाँच करने के उपरांत अपना निष्कर्ष, मामले के विभिन्न बिन्दुओं पर विचार करते हुए विभिन्न दृष्टिकोणों से देना आवश्यक है।

जाँच के उपरांत रिपोर्ट अभिलिखित करते समय न्यायिक दण्डाधिकारी को यह तो देखना आवश्यक है ही कि ऐसे मामलों में किस व्यक्ति ने क्या अपराध किया परन्तु साथ ही साथ यह भी देखना आवश्यक है कि ऐसे मामलों में किस व्यक्ति, कर्मचारी या अधिकारी की क्या त्रुटि थी। प्रत्यक्ष या अप्रत्यक्ष रूप से मामले से संबंधित व्यक्ति ने किस प्रकार की लापरवाही की, इस संबंध में भी विचार किया जाना आवश्यक है। क्या ऐसे किसी व्यक्ति ने पीड़ित अथवा संबंधित पक्ष के किसी भी प्रकार के अधिकारों का हनन किया है। ऐसा अपराध अथवा अभिकथित तथ्य पुलिस अथवा प्राधिकृत अभिरक्षा मे कैसे संभव हुआ। न्यायिक दण्डाधिकारी द्वारा की गई जाँच के निष्कर्षों को किसी सीमा में नहीं बांधा जा सकता है, अर्थात जाँच के उपरांत दिये गये निष्कर्ष, प्रतयेक मामले में आई साक्ष्य, घटना की परिस्थितियों, अभिरक्षा के दौरान की गई कार्यवाही आदि अनेक तथ्यों पर विचारमय, भिन्न–भिन्न स्वरूप में हो सकते हैं। इस प्रकार की जाँच का उद्देश्य सत्यता को सामने लाना है, भले ही वह सत्य किसी भी प्रकृति का हो।

एक अन्य महत्वपूर्ण तथ्य यह है कि जाँच रिपोर्ट किसी भी स्थिति में अस्पष्ट नहीं होनी चाहिये तथा जाँच के दौरान जो भी साक्ष्य अभिलिखित की गई है, उसकी विवेचना स्पष्ट रूप से की जानी चाहिये ताकि यह ज्ञात हो सके कि जाँच करने वाले न्यायिक दण्डाधिकारी ने समस्त तथ्यों एवं साक्ष्य पर विचार करने के उपरांत ही

अपना निष्कर्ष प्रदान किया है। जाँच इस प्रकार से होना चाहिये कि जिससे यह ज्ञात हो सके कि अभिकथित तथ्यों की सत्यता को जानने का गंभीर प्रयास किया गया। निष्कर्षों की स्पष्टता जाँच का एक महत्वपूर्ण पहलू है।

जहाँ तक हो सके, जाँच की कार्यवाही को शीघ्रता से किया जाना अत्यंत ही आवश्यक है ताकि उपलब्ध साक्ष्य को किसी के द्वारा नष्ट करना संभव न हो सके।

जहाँ तक व्यवहारिक हो अर्थात् साध्य हो, मृतक के ज्ञात नाम व पते के नातेदारों को जाँच के दौरान उपस्थित रहने हेतु अनुज्ञा देनी चाहिये। नातेदारों की उपस्थिति की अनुमति जाँच के दौरान देने का अर्थ यह कदापि नहीं है कि मृतक या पीड़ित पक्ष के नातेदार मूक दर्शक बनकर जाँच के दौरान उपस्थित रहेंगे। इसका यह अर्थ है कि यदि वे चाहें तो उन्हें भी सुनवाई का अवसर प्रदान किया जाना चाहिये। जाँच के दौरान नातेदारों की उपस्थिति मात्र औपचारिक नहीं रह सकती है। नातेदारों के नाम व पते ज्ञात न होने पर यदि न्यायिक दण्डाधिकारी के मत में, उनकी उपस्थिति आवश्यक है अथवा जाँच में उनका सहयोग अत्यंत महत्वपूर्ण हो सकता है, तब ऐसे नातेदारों के नाम व पते भी ज्ञात करने का प्रयास किया जाना भी अपेक्षित है।

इस प्रकार की जाँच किसी भी स्थिति में औपचारिक नहीं होनी चाहिये। इस तरह की जाँच कानून के दायरे में रहते हुए संवेदनशीलता से किये जाने की आवश्यकता है। जाँच के दौरान प्रयास यह होना चाहिये कि वास्तविकता को सामने लाया जा सके। सामान्यतः यह देखा गया है कि समय के साथ–साथ अथवा विलंब होने पर जाँच इसलिए पूर्ण कर ली जाती है कि विधि में जाँच करने का प्रावधान है। इस तरह की औपचारिक जाँच न हो इसके लिए निरंतर चौकसी की भी आवश्यकता है। अधीनस्थ न्यायालयों की कार्यप्रणाली के निरीक्षण किये जाने का प्रावधान नियमों के अंतर्गत दिया गया है। इन्हीं प्रावधानों के अंतर्गत अधिकारिता का उपयोग करते हुए संबंधित न्यायिक अधिकारियों द्वारा इस तथ्य का अवलोकन समय–समय पर किया जा सकता है कि जाँच, गंभीरता से एवं विधि के प्रावधानों के अनुरूप, सत्यता को जाने के उद्देश्य से की जा रही है अथवा मात्र औपचारिकता पूरी करने के लिए की गई है।

**निष्कर्ष:–**

उपरोक्त संशोधित प्रावधानों के अंतर्गत न्यायिक दण्डाधिकारी को महत्वपूर्ण अधिकार विधायिका द्वारा प्रदाय किये गये हैं। इसका कारण यह है कि हमारी न्याय प्रणाली पर सभी को विश्वास है और तब ऐसी स्थिति में न्यायिक दण्डाधिकारी का यह कर्तव्य हो जाता है कि ऐसे मामलों में की गई जाँच पूर्णतः प्रावधानों के अनुरूप एवं निष्पक्ष हों। साथ ही साथ सम्पूर्ण परिस्थितियों, तथ्यों एवं साक्ष्य की विवेचना करते हुए स्पष्ट निष्कर्ष अपराध, त्रुटि, लापरवाही, अधिकारों के हनन आदि के संबंध में दिये जाने चाहिये ताकि उत्तरदायी व्यक्तियों को सामने लाया जा सके। इस प्रकार की जाँच का मूल उद्देश्य सत्यता को ज्ञात किया जाना है और यह सत्यता किसी भी स्थिति में सीमित नहीं हो सकती है। कानून के राज को समाज में स्थापित रहने देने के उद्देश्य से इस प्रकार की जाँच व उनके निष्कर्ष मील का पत्थर साबित हो सकते हैं तथा दोषी व्यक्तियों के विरूद्ध विभिन्न प्रकार की कार्यवाही किये जाने हेतु अथवा निर्दोष व्यक्तियों पर कार्यवाही न होने देने के लिए एक महत्वपूर्ण आधार हो सकते हैं।

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# LEGAL POSITION OF DEVOLUTION OF INTEREST IN COPARCANARY PROPERTY UNDER SECTION 6 OF THE HINDU SUCCESSION ACT, 1956 BEFORE AND AFTER INCORPORATION OF THE AMENDMENT IN 2005

**Judicial Officers**
**Districts Dhar & Jabalpur***

The Hindu Succession Act, 1956 (for brevity 'the Act') is an Act to amend and codify the law relating to intestate succession amongst Hindus. Section 6 dealt with the question of devolution of interest in coparcanary property in a case of coparcener, in a Mitakshara coparcenary dying after the coming into operation of this Act without making any testamentary disposition of his undivided share. It was generally felt that a radical reform was required in Mitakshara Law of coparcenary and that where one of the coparceners died, it was necessary that his undivided interest in coparcenary property should be equally distributed amongst his male and female heirs. But, because of various reasons, the Act has been unable to fulfill the gap of gender discrimination.

In *Principles of Hindu Law: Mulla,* (20th Edition, page 322), the learned author commented thus; "Even after legislation in the form of the Act which came into force in 1956, a growing need was perceived to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. This was felt in order to bring about uniformity of succession throughout the country. Though, under the old Section 6, daughters would get rights in the property of the deceased coparcener, it was perceived that the erstwhile section had too constricted an applicability since daughters were not merited as equal in status to sons of the coparcener. The law as regards a joint Hindu family, governed by Mitakshara law, was not uniform in India. Several states like, Andhra Pradesh, Tamilnadu, Karnataka and Maharashtra had made changes in the Act, so as to extend equal rights to daughters in a Mitakshara Coparcenary."

To achieve full equality in the matter of succession, the Act was amended on the basis of proposals made in the 174th Report of Joint Committee, Law Commission of India on "Property Rights of Woman; Proposed Reforms under Hindu Law". The Law Commission has recommended eliminating major gender discrimination clause of the Act. It is relevant to note that the Hindu Code Bill, as originally framed by B.N. Rau Committee, had recommended abolishing coparcenary with its concept of survivorship and the son's birth right and substitute it with a principle of inheritance by succession. Now, by the Hindu Succession (Amendment) Act, 2005, Section 6 of the Act has been substituted by a new Section. The Amendment Act, 2005 has widely affected the concept of

* The articles received from Districts Dhar and Jabalpur have been substantially edited and supplemented by the Institute.

Mitakshara Hindu coparcenary. Thus, the law relating to joint Hindu family governed by the Mitakshara law has undergone unprecedented changes.

## LEGAL POSITION PRIOR TO THE AMENDMENT ACT, 2005

The erstwhile Section 6 of the Act reads as under:

> **Section 6. Devolution of interest in coparcenary property.** – When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property devolve by survivorship upon the surviving members of the coparcenary and not accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation I.* – For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation II.* – Nothing contained in the proviso to this Section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Prior to Amendment Act, 2005, in Mitakshara school of Hindu law, a woman was not given a birth right in the family property like a son. Under the Mitakshara law, on birth, the son acquires a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of coparceners, based on birth in the family. No female was member of the coparcenary in Mitakshara law. The Mitakshara, does not permit any woman to be a member of coparcenary. Though, it recognize a share in coparcenary property to certain females on partition but they have no right to demand partition. For example, a wife cannot herself demand a partition, but if partition does takes place between her husband and husband's son, she is entitled to receive an equal share. If partition takes place between brothers, one share equal to that of brother will go to the mother. If a partition takes place between

paternal uncle and nephew, the mother of the uncle, who is the grandmother of the nephew as well as the mother of the nephew will be entitled to a share each. A paternal grandmother, if partition takes place between her son's son, her own son being dead, will be entitled to a share equal to that of a son's son.

Section 6 provides for devolution of interest in coparcenary property. Mitakshara divides property into two classes, namely, (i) apratibandh daya (unobstructed heritage) and (ii) sapratibandh daya (obstructed heritage). The property in which a person acquires an interest by birth is called unobstructed heritage because the accrual of the right to it is not obstructed by the existence of the owner. The property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue is called obstructed heritage because the accrual of right to it is obstructed by the existence of the owner. The obstructed heritage as well as the self acquired property is wholly out of the scope of Section 6. This section regulates only undivided interest in the Mitakshara coparcenary property when the holder of the Mitakshara coparcenary interest dies intestate.

Section 6 of the Act applies only to those cases where a Hindu dies after the commencement of the Act i.e. 17-6-1956 after having interest in the joint coparcenary property. The section applies only where there are at least two coparceners and one of them had died leaving behind the other coparcener. [See *Ramchandra Pillai v. Arunscha Thammal and others, (1971) 3 SCC 873*]

The erstwhile Section 6 of the Act incorporates traditional rule of coparcenary property/interest to survivorship among surviving members of the copracenary. The initial part of the section stresses that the Act does not interfere with the special rights of the members of Mitakshara coparcenary. The section proceeds first by making provision for the retention of the right by survivorship, and then engrafts on that rule the important qualification enacted by the proviso. The proviso in the old section engrafts the exception to the aforesaid general rule and lays down that if a deceased coparcener had left surviving him a female relative in Class I of the Schedule or a male relative specified in that Class who claims through such female relative the interest of the deceased shall be devolved by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. Thus, the proviso operates only where the deceased has left, surviving him a daughter's son or any female heir specified in Class I of the schedule. (See- *Principles of Hindu Law: Mulla, 20th Edition, page 329*)

For the ascertainment of the share of the deceased coparcener, Explanation I provides a notional formula under which undivided interest of the deceased coparacener shall be deemed to be a share in the property that would have been allotted to him if a partition had taken place immediately before his death. But this deemed or notional partition does not disrupt the coparcenary of remaining members.

In case of *Chandradatta v. Sanatkumar, AIR 1973 MP 169,* Their Lordships held thus:

> "(1) The Hindu Succession Act, 1956, has left undisturbed the law relating to Mitakshara coparcenary and coparceners, as it was in force prior to the commencement of the Act except in so far as that law is modified by Section 30 and the proviso to Section 6 of the Act. (2). On the death of a coparcener, if he is survived by such female or male relative as is specified in the proviso to Section 6, by operation of the Explanation I to that proviso, a notional partition is deemed to have been effected immediately before the death of such coparcener, by which the share of the deceased is separated. The share so separated thus devolves, by virtue of the proviso, on the personal heirs of the deceased instead of vesting in the other coparceners by survivorship. (3) The legal fiction, which brings about such notional partition, does not prevail any farther. Such a partition does not bring about disruption of the coparcenary. It is only the interest of the deceased which is separated. The coparcenary, minus the interest, of the deceased, continues with its own incidents. The surviving coparceners continue as such."

The question relating to the principle of notional partition and its real implication has been considered by the Supreme Court in *Gurupad Khandappa v. Hirabai Khandappa, AIR 1978 SC 1239* wherein it has been held that:

> "In order to ascertain the share of heirs in the property of a deceased coparcener, it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation I to S. 6 resorts to the simple expedient; undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and

ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased".

The view taken by the Supreme Court in *Gurupad Khandappa's case (supra)* has been reiterated in *Smt. Rajrani v. Chief Settlement Commissioner of Delhi and others, AIR 1984 SC 1234.* The Apex Court in *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh, AIR 1985 SC 716,* held as under:

> "A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under Section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs."

The legal position is that the ascertainment and allotment of share in a notional partition is a concrete reality and the heirs take it along with share in the interest of the deceased coparcener. But even after the death of the coparcener, the remaining members of the coparcenary continues to be joint as laid down in *Narayan Rao's case* (supra). There would be no disruption of the joint family on notional partition as laid down in *Shrimant Rajmata Vijay Raje Scindia v. Jyotiraditya Scindia, AIR 1993 MP 184.*

The question has at times arisen as to whether a son who inherits the self-acquired property or coparcenary property of his father under Section 8 of the Act takes it as his separate property or holds it as property of his own joint family. There was divergence of judicial opinion on this point which related to the doctrine of ancestral property in the hands of a father and his son acquiring interest in it by birth till the decision of the Supreme Court in *Commissioner* of *Wealth Tax v. Chander Sen, AIR 1986 SC 1753.* In this case, the Apex Court has

the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

*Explanation.*– For the purposes of clause (a), the expression "son", "grandson" or "great grandson" shall be deemed to refer to the son, grandson or great grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

*Explanation.*– For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

**FEMALE BECOMES COPARCENER**

As the new Section 6 (1) makes the daughter of a coparcener by birth in her own right in the same manner as son and have same rights and liabilities as that of a son. According to the new provision, the discrimination against daughter has been brought to an end, as her rights and liabilities are the same as that of a son.

Prior to amendment, the law by excluding the daughter from participating in the coparcenary ownership not only contributed to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need to render social justice to women, the legislature, for the benefit of the women and to give them equal status in the society, amended the Act by giving better right to the women to protect themselves against the torture and harassment, if any. By virtue of this amendment, daughter has been treated like son and is now entitled to a share in coparcenary. She has become the coparcener in the Mitakshra coparcenary by birth in her own right and in the same manner as the son. She can also claim partition and can act as *'Karta'* of the joint Hindu family [See *Principles of Hindu Law: Mulla,* (20th Edition, page 323)]. She has been given all the rights in coparcenary as possessed by a son. Similarly she is also subject to all the liabilities as that of a son.

Sub-section (2) stipulates that any property to which a female Hindu becomes entitled, would be held by her with all the incidents of coparcenary ownership and such property can be disposed off by such female by testamentary disposition.

After amendment, the term "Hindu Mitakshara coparcener" used in original Hindu Law shall now includes the daughter giving her same right and same

liabilities by birth as those of the son. Now, a daughter has right to sue for partition against other coparcener including her father. [See- *Ram Belas Singh v. Uttamraj Singh and others, AIR 2008 Pat. 81*]. Female heir of a coparcener is also entitled to sue for partition in respect of a dwelling house of a joint Hindu Family being a coparcener. Even in pending proceedings, the amended Section 6 would be applicable as laid down in *Prabhudayal v. Ramsiya, 2009 (2) MPLJ 247.*

## DOCTRINE OF SURVIVORSHIP

The rule of survivorship now has been abolished and the property shall devolve either by testamentary or intestate succession. Under the old Section 6, if the matters do not come within the perview of proviso I to that section, devolution will take place by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. By sub-section (3) of Section 6, the right to survivorship in Mitakshara coparcenary is altogether abolished. Now, under the new section, an interest in a Mitakshara coparcenary property shall not be devolving, in any manner, by way of survivorship. Such an interest shall devolve only by testamentary or intestate succession, as the case may be, under the Act.

There was an inequity, under the old law, between son and daughter that has been removed by the amendment. After the amendment, daughters will now get a share equal to that of son at the time of the notional partition, just before the death of the father, and an equal share of the father's separate share.

## CONCEPT OF NOTIONAL PARTITION

The new provision, while retaining succession to the property by either testamentary or intestate succession has however, brought about a radical change. The explanation to this sub-section had also been incorporated as explanation I to the old Section 6, as it existed prior to the amendment. The amendment retains concept of notional partition but modified its application. While affecting this notional partition, the amended Act provides in detail the calculation of shares under which the daughter taking a share equal to that of son and the share of the pre-deceased son or a pre-deceased daughter being allotted to the surviving child of such heirs.

## SEPARATION IS NO BAR TO CLAIM INTESTACY

Before 2005, there was bar to claim intestacy who has separated himself from the coparcenary before the death of the deceased. Now, the amendment completely omitted Explanation II of the erstwhile Section 6. It indicates that separation is no bar as stood before amendment.

## DOCTRINE OF PIOUS OBLIGATION

The doctrine of pious obligation is peculiar in Hindu law. The new sub-section (4) states that after the commencement of the amendment, no court shall recognise the right of a creditor to proceed against the son, grandson or

> "The present appeal has arisen from a partition suit filed by plaintiff Ramsiya who is respondent no.1.The suit was partly decreed on 14.12.2001 resulting into filing of this appeal.
>
> During the pendency of this appeal, Section 23 has been omitted and Section 6 of the Act has been amended by Amendment Act of 2005. Since the appeal is continuation of the suit, therefore, I am of the view that even in pending proceedings; the amended section would be applicable which would mean that present plaintiff is also entitled to sue for partition in respect of dwelling house of a Joint Hindu Family being a coparcener."

The Supreme Court in its recent decision in the case of *G. Sekar v. Geetha and others, (2009) 6 SCC 99* held thus:

> "Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it is not retrospective in nature, its application in prospective."

Therefore, it is clear that the amended provisions, which creates substantive right in favour of the daughter, are prospective in nature. The succession which had opened prior to coming into force of the amendment cannot be re-opened. The Amendment Act, 2005 cannot be applied retrospectively, so that, successions which had taken place prior to the promulgation of the Act of 2005, should not be disturbed.

## CONCLUSIVE COMMENT

By virtue of the new provisions, a daughter of a coparcener in a joint Hindu family governed by the Mitakshara law now become a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son. A daughter now stands on an equal footing with a son. She is now invested with all the rights, including the right to seek partition of the coparcenary property. Where under the old law, since a female could not act as *Karta* of the joint family, as a result of the new provision, she could also become *Karta* of the joint family. After the Amendment Act, 2005, the rule of survivorship now has been abolished and the coparcenary property shall devolve only by testamentary or intestate succession. The liability of heir under the doctrine of pious obligation now comes to an end. With prospective effect of the new law, the old law stands abrogated to a large extent.

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# PROCEDURE REGARDING TENDER OF PARDON TO ACCOMPLICE AND CONSEQUENCES OF ITS NON-COMPLIANCE

**Judicial Officers**
**Districts Chhindwara**
**Khandwa & Satna***

## A. Scope and Procedure to be followed to tender of pardon to accomplice by Chief Judicial Magistrate/Judicial Magistrate First Class

### INTRODUCTION:

The word 'pardon' means an official act to forgive i.e. not to punish. It is an act of grace which exempts the individual from punishment. Sections 306 and 307 of the Code of Criminal Procedure, 1973 provides for tender of pardon to the accomplice. The provision of pardon under the Code has been introduced with a view to see that grave offences do not go unpunished. It is an experience that in serious offence, there is paucity of evidence to prove it which leads to the acquittal of the accused. Looking to the fact of secrecy, scarcity of clues, recovery of incriminating objects, production of evidence otherwise unobtainable becomes available because of the approver who is supposed to have been directly or indirectly concerned in or privy to the offence. Grant of pardon, and examination of the approver can be considered a necessary evil which is to be adopted to reach the real facts. This concept of pardon is exclusive of the provisions under Sections 432 and 433 of the Code and Articles 72 and 161 of the Constitution of India, which operate after the sentence is imposed. The constitutionality of Section 306 CrPC was challenged before the Supreme Court which declared it constitutional in *Sardar Iqbal Singh v. Delhi Administration, AIR 1977 SC 2437.*

The principle underlying is the prevention of offenders from escaping punishment in grave cases for lack of evidence by grant of pardon to one of them. In *State of Andhra Pradesh v. Ganeshwar Rao, AIR 1963 SC 1850,* it has been observed that the main object of these sections is to pardon one of the accused in serious offence and make him an official witness so that his evidence is taken and offence against other accused is proved with the aid of evidence given by this person. The offer is to be made to the one least guilty among the several accused.

It is important to understand an 'accomplice' because he is the person who becomes the approver. The provision indicates towards 'any person'

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* The articles received from Districts Chhindwara, Khandwa and Satna have been substantially edited by the Institute.

supposed to have been directly or indirectly concerned in or privy to the offence. Accomplice is the guilty associate in crime and sustain such a relation with the criminal act that he can jointly be charged with the accused. The accomplice is one who confesses himself to be a criminal. He cannot be treated as an accomplice only on suspicion. Section 133 of the Indian Evidence Act, 1872 provides that an accomplice shall be a competent witness against the accused person and the conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, an accomplice is untrustworthy of credit unless corroborated in material particulars as provided in Illustration (b) of Section 114 of the Act,.

In *Subramania Goundan v. State of T.N., AIR 1958 SC 66,* it was held by the Apex Court that under S. 133 of the Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses. Illustration (b) to S. 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing, he is a depraved and debased individual who having taken part in the crime, tries to exculpate himself and wants to fasten the liability on another. In such circumstances, it is absolutely necessary that what he has deposed must be corroborated in material particulars.

In *Rameshwar v. State of Rajasthan, AIR 1952 SC 54* also the Apex Court held that it would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroborative. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent, the rules are clear: –

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection within the crime.

Recently in the case of *Sitaram Sao @ Mungeri v. State of Jharkhand, AIR 2008 SC 39,* the Apex Court reiterating the principle laid down in *Rameshwar* (supra) has clarified the legal position as under:

> "Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on an uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this Section has to be read along with Section 114, illustration (b). The latter section empowers the Court to presume the existence of certain facts and the illustration elucidates what the Court may presume and make clear by means of examples as to what facts the Court shall have regard in considering whether or not maxims illustrated apply to a given case. Illustration (b) in express terms says that accomplice is unworthy of credit unless he is corroborated in material particulars. The Statute permits the conviction of an accused on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in illustration (b) to Section 114 of the Evidence Act strikes a note of warning cautioning the Court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration is a matter of prudence except when it is safe to dispense with such corroboration must be clearly present in the mind of the Judge. [See *Suresh Chandra Bahri v. State of Bihar, AIR 1994 SC 2420*]

Although Section 114 illustration (b) provides that the Court may presume that the evidence of an accomplice is unworthy of credit unless corroborated, "may" is not must and no decision of Court can make it must. The Court is not obliged to hold that he is unworthy of credit. It ultimately depends upon the Court's view as to the credibility of evidence tendered by an accomplice."

Sections 306 and 307 CrPC discusses the circumstances where a co-accused is granted pardon and made official witness enabling him to adduce evidence against the accused of serious crime. This has been established by a

judicial pronouncement in *Sarabjeet Singh v. State of Punjab, 1970 CriLJ 944,* wherein it has been observed that the idea of granting pardon to the co-accused is to encourage him to give full information about the offence so that the culpability be determined.

**COMPETENCY OF THE COURTS U/S 306 :**

The Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial are competent to exercise their powers.

**OBJECT AND SCOPE:**

With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which Section 306 applies, the competent Magistrate may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge related to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

The Apex Court in *Commander Pascal Fernandes, Lt. v. State of Maharashtra, AIR 1968 SC 594 = 1968 Cr.L.J. 550* has observed thus:

> "Before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. No procedure or action can be in the interest of justice if it is prejudicial to an accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily, it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request."

[Also See : *Konajeti Rajababu v. State of A. P., 2002 CriLJ 2990*]

## OFFENCES COVERED:

Under Section 306 (2), pardon can be granted to the co-accused only in the following offences:

a. Any offence triable exclusively by the Court of Sessions;

b. Any offence triable by the Court of Special Judge appointed under the Criminal Procedure (Amendment) Act, 1952;

c. Any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

## DUTIES OF MAGISTRATE TO TENDER A PARDON:

Every Magistrate who tenders a pardon under sub-section (1) shall record–

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

## CUSTODY AND EXAMINATION OF AN ACCOMPLICE:

A person who has been granted pardon does not remain an accused in that case and he becomes a prosecution witness. If he has not been on bail prior to the pardon, he shall be kept in custody till the end of trial. This was held in *A.L. Mehra v. State, 1958 CriLJ 413.* It has been further held that the provision is mandatory and the Magistrate granting the pardon cannot release that person on bail [See *Laxamma v. State of Karnataka, 1981 CriLJ (NOC) 172*].

Under Section 306 (4) (a) CrPC, it is necessary that after the co-accused or the approver is given pardon, his evidence be taken later on as witness. In *Urava Konda Vijaygiri v. State, 1986 CriLJ 2104* (Kerala), it has been held that where an accused is given pardon under Section 306 CrPC and is involved in an offence exclusively triable by the court of Sessions then the Magistrate cannot, like a simple case commit the case under Section 209 to the Sessions Court. Under Section 306 (4) CrPC, he is to examine and record the evidence of that person in his Court.

In *Suresh Chandra Bahri* (supra) the Apex Court stated thus:

> "A bare reading of clause (a) of sub-sec. (4) of S. 306 of the Code will go to show that every person accepting the tender of pardon made under sub-sec. (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. The examination of accomplice or an approver after accepting the tender of pardon, as a witness in the court of the magistrate taking cognizance of the offence is thus a

mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with, it vitiates the trial."

Further in *Sitaram Sau case* (supra), the Apex Court has clarified the legal position of Section 306 (4) and observed that the stage of examining the approver/ accomplice under Section 306 (4) comes only after he has been granted pardon and after pardon he was examined as a witness in presence of the accused and also he was cross-examined.

Such examination is must and essential and it is under compulsion for committal Magistrate to record the statement of approver/accomplice before his Court and during such examination the rest of the accused persons shall have a right to cross examine him. [Also see *Randhir Basu v. State of West Bengal, AIR 2000 SC 908*].

**REGARDING COMMITTAL OR MAKE OVER OF THE CASE:**

Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case, –

(a) commit it for trial–

(i) to the Court of Session, if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law (Amendment) Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

The Apex Court in *Honajipi v. State A.P., 2002 Cr.L.J. 2990 while discussing Harshad S. Mehta v. State of Maharashtra, (2001) 8 SCC 257* and *Pascal Fernandes case* (supra) after considering Sections 306 and 307 Cr.P.C. has pointed out principles in case of pardoning of an approver:

(1) The power to grant pardon enjoined under Sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court.

(2) The power of the Court is not circumscribed by any condition except the one, namely that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in or privy to an offence.

(3) The Court has to proceed with great caution and on sufficient grounds recognising the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.

(4) The secrecy of the crime and paucity of evidence, solely for the apprehension of the other offenders, recovery of the incriminating object and production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.

(5) The disclosure of the person seeking pardon must be complete.

(6) While tendering pardon, the Court should make an offer to the one least guilty among the several accused.

(7) The reasons for tendering pardon must be recorded and also about the factum of accepting of pardon by the concerned.

**B. Procedure to be followed if the concerned accused person not complying with the conditions of pardon:**

Section 308 Cr.PC deals with the trial of a person who has accepted a tender of pardon under Sections 306 and 307 but has not complied with the conditions of pardon. Such person may be tried for the offence for which pardon was granted or for any other offence for which he has been found guilty in connection with the same matter and also for the offence of giving false evidence. If the Public Prosecutor certifies that he has not fulfilled the conditions of full and complete disclosure, this section will come in operation. A mere tender of pardon does not attract the provisions of this section. There must be acceptance of the pardon and the person who has accepted the pardon (approver) must be examined as a witness, then only this section comes into play. In *Bipin Behari Sarkar v. State of W.B., AIR 1959 SC 13,* the Apex Court held as under:

> "The provisions of S. 339 (1) pre-suppose that the pardon which had been tendered to a person had been accepted by him. Sub-section (2) of S. 337 requires that every person who has accepted a tender shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. It is, clear, therefore, that a mere tender of pardon does not attract the provisions of S. 339. There must be an acceptance of it and the person who has accepted the pardon must be examined as a witness. It is only thereafter that the provisions of S. 339 come into play and the person who accepted the pardon may be tried for the offence in respect

of which the pardon was tendered, if the Public Prosecutor certifies that in his opinion he has, either wilfully concealed anything essential or had given false evidence and had not complied with the condition on which the tender was made. Thus, where a pardon though tendered is not accepted, no question arises about the applicability of S. 339, because the provisions of S. 339 can only come into operation if there is in existence an effective pardon under S. 337 of the Code."

[**Note:** Sections 337 and 339 are Sections 306 and 308 respectively in new CrPC,1973.]

This Section does not expressly say as to how the approver is to be treated if he refuses to give evidence on behalf of the prosecution. It is evident that holding back of his evidence means to willfully concealing the facts which are essential for the prosecution. An approver where he gives false evidence or is unable to step in the witness-box on behalf of the prosecution, forfeits his pardon and in these circumstances he can be tried for the offence in respect of which he has been pardoned [See *State of M.P. v. Dalchand Hardayal, AIR 1960 MP 63*]. The certificate of the public prosecutor is essential because after the grant of pardon, the accused becomes a witness and ceases to be an accused. This necessitates a certificate to show that the approver has not complied with the conditions and be tried under Section 308.

The first proviso to Section 308 (1) prohibits trial of the approver jointly with the accused and even the committal of the approver alongwith the accused is illegal. Second proviso to this sub-section deals with the sanction for prosecution of approver for perjury. The discretion vested in the High Court has to be exercised with extreme caution.

In *The State v. Atma Ram, AIR 1966 HP 18,* it was held that:

"It is well-settled that the discretion vested in the High Court by S. 339(3) Cr. P.C. 1898, to sanction the prosecution of an approver for the offence of giving false evidence must be exercised with extreme caution and that the cardinal question, for consideration, in such a case, is whether the incriminating statement made by the approver, was or was not true, vide *Emperor v. Mathura, AIR 1934 All 43.* It was said in that case."

"It is obvious that if an approver resiles from a previous statement made by him incriminating himself and certain other persons and makes a statement directly contradictory to the one previously made by him, one of his two statements must be false, and as such, he must

necessarily be guilty of giving false evidence. But the fact, that the legislature has prohibited the prosecution of an approver for the offence of giving false evidence without the sanction of the High Court, demonstrates that the mere fact that the two statements are contradictory, can not in every case be a warrant for directing the prosecution of the approver."

However, under this Section neither Section 195 nor Section 340 of the CrPC will apply.

Sub-section (2) of Section 308 deals with the admissibility of the statement under Section 164 CrPC or under Sub-section (4) of Section 306 CrPC after the pardon tendered to the approver is forfeited and that can be used against him.

At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case, it shall be for the prosecution to prove that the conclusion has not been complied with.

At such trial, the Court shall –

(a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal. [See *Renuka Bai v. State of Maharashtra, AIR 2006 SC 3056*]. The trial of such accomplice be conducted by that Court which has the jurisdiction to try the original offence.

The Sikkim High Court in *Surjay Bdr. Darjee v. State of Sikkim, 2006 CriLJ 2163* has observed thus:

"Section 308(4) and (5) makes it clear that in the trial of an approver who has forfeited the pardon the question whether he pleads that the conditions of pardon have been complied with by him has to be first decided before he is tried for the original offence. According to sub-section (4) of S. 308 it is imperative for the Sessions Court to ask the accused whether he pleads that the conditions of the pardon have been complied with by him before the charge in respect of

the original offence is read out and if he so pleads a clear finding on the question of compliance or non-compliance of the conditions of pardon would be a condition precedent to his prosecution for the original offence after he forfeits his pardon. There is, therefore, no doubt that a valuable right has been conferred on the approver by these provisions in his trial for the original offence following withdrawal of pardon for alleged non-compliance of the conditions thereof. The importance of this requirement of giving an opportunity to the approver lies in the fact that, if after the approver exercises this right it is found at the trial that he has complied with the conditions of pardon he will be entitled to a judgment of acquittal. It is, therefore, obvious that unless the word "shall" occurring in S. 308(4) is interpreted as laying down a mandatory requirement of law, the very purpose for which the provision has been engrafted would be defeated. Thus, the provisions contained in sub-sections (4) and (5) of S. 308, Cr. P.C., which require a finding to be given on whether the approver had complied with the conditions of pardon before prosecuting the approver for the original offence are compulsory and failure to comply with the same vitiates the trial".

In this regard, Hon'ble the Nagpur High Court in *Horilal Mohanlal Gond v. Emperor, AIR 1940 Nagpur 77 = 1939 (40) Cri LJ 956,* has observed that :

"It is the duty of the Court under Sec. 339-A to explain to the accused the terms of the Section and invite him to plead, record his plea, and call upon the assessors to deliver their opinion upon that plea and then to record his own finding. Failure to perform this duty vitiates the trial".

**CONCLUSION:**

Thus, there is a unique provision to immune a co-accused and fetch the real evidence against the other accused and in case the approver betrays the confidence put in him, he be tried and punished.

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# CONTINUING OFFENCE - PERIOD OF LIMITATION FOR TAKING COGNIZANCE & TERRITORIAL JURISDICTION PARTICULARLY WITH REFERENCE TO PROPERTY AND MATRIMONIAL OFFENCES

**Judicial Officers**
**Districts Panna & Neemuch***

## CONTINUING OFFENCE:

The expression 'continuing offence' is one of the expressions which has not been terminologically defined in any statute and it has found place in the CrPC for the purpose of jurisdiction under Section 178 (c) and limitation u/s 472. The conception underlying the word 'continuing' is the same whether it is considered in relation to breaches of contracts or wrongs independent of contracts or offence - the conception being that so far as 'breaches' and 'contracts' are concerned, they give rise to a fresh cause of action *de die in diem* so long as the wrongful state of affairs subsists, and so far as offence are concerned they give rise to a fresh offence *de die in diem* so long as the omission which has been made penal by the statute is not rectified. The term also got defined in different case laws.

While distinguishing the continuing offence from other offences the Apex Court in *State of Bihar, v. Deokaran Nenshi, AIR 1973 SC 908* held :

> "Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasioned on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

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* The articles received from Districts Panna & Neemuch have been substantially edited by the Institute

Further, in *Bhagirath Kanoria v. State of M.P., AIR 1984 SC 1688,* the Apex Court held that the question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence. The expression 'continuing offence' has not been defined in the Code because it is one of those expression which do not have affixed connotation or static import and that is reason why the concept of a continuing offence cannot be put in a straight jacket.

In the case of *S. Irani (Sorkhab) v. M/s. Dinshaw and Dinshaw, 1999 CriLJ 240,* the Hon'ble Bombay High Court has explained the concept of continuing offence and held in Para 19:

> "In order to understand this situation, a striking example can be drawn from any of the ordinary offences covered by Indian Penal Code. Take the simple example of offence under Section 323, I.P.C. The offence is committed on a given day at a given point of time. Thereafter if one asks a question to the accused whether he has committed any offence under Section 323, the answer will be except the one which is alleged against him, there is no offence. Obviously, this can never be a continuing offence. As against that in contrast if the like in the instant case the question is asked whether breach of the provisions of Section 11 of the said Act is committed on and after the expiry of four months' statutory period for executing the conveyance deed, the answer till today will be yes the breach is committed."

In *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath and others, (1991) 2 SCC 141 = 1991 AIR SCW 505,* Hon'ble the Supreme Court has defined continuing offence in the following words —

> "Continuing offence means type of crime which is committed over a span to time..... The concept of continuing offence under Section 472 Criminal Procedure Code does not wipe out the original guilt, but it keeps the contravention alive day to day."

In simple term, it is one of those offences which arises out of a failure to obey or comply with a rule or its requirements is obeyed or complied with. On every occasion that such disobedience and non-compliance occurs and recurs, there is the offence committed. Where such an act or omission continues, it constitutes afresh offence every time or occasion on which it continues. In order to constitute a continuing offence the acts complained of must, at every moment of continuance, reflect all the ingredients necessary for constituting the offence.

The following offences have been held to be continuing offence: —

1. Offences under Section 29 of the Industrial Disputes Act, 1947.
2. Accused travelling within territory without passport – Offence continuing one within Section 178 CrPC (*Abdul Samad v. State of U.P., AIR 1965 All 158*)
3. Where the accused owner had a forged permit and had the intention of using it whenever occasion demanded, he is guilty of the offence under Sections 471 and 474 IPC from the moment from which the forged permit was in his possession as this offence was a continuing offence. Even though if the truck was checked at Nasik (Maharashtra), the trial at Indore was held to be proper.

   [*Gajjan Singh v. State of M.P., AIR 1965 SC 1921* (3-Judge Bench)]
4. Criminal trespass - In *Begaram v. Jaipur Udyog, 1988 CriLJ 1452 Raj* and *Somnath Paul v. Ram Bharose, 1991 CriLJ 2499,* Allahabad High Court held that criminal trespass is a continuing offence.
5. Offence of kidnapping of minor girl by inducing her to go from any place or to do any act in order to force or seduce to elicit intercourse under Section 366-A of IPC
6. Offence of abduction under Section 364-A IPC (*Vinod v. State of Haryana, AIR 2008 SC 1142*)
7. Offence of non-payment of contribution by employer to provident fund - It is continuing offence (*Bhagirath Kanoria v. State of M.P., AIR 1984 SC 1688*)
8. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under S. 120-B of the Indian Penal Code. [*Kehar Singh v. State, AIR 1988 SC 1883*]
9. Wrongful withholding [example: Retired employee of company not vacating quarter] or wrongfully obtaining possession and wrongful application of the company's property, that is, for purposes other than those expressed or directed in the articles of the company and authorised by the Companies Act is a continuing offence and punishable under Section 630 of the Companies Act accordingly. [*Gokal Patel Volkart Ltd.* (supra)]
10. Offence under Section 498-A IPC *(Arun Vyas v. Anita Vyas, AIR 1999 SC 2071)*

**PERIOD OF LIMITATION FOR TAKING COGNIZANCE IN CONTINUING OFFENCE:**

The term "continuing offence" is relevant with reference to the period of limitation for taking cognizance and *inter alia.* Dispute regarding the fact that whether a particular offence is continuing one or not, is raised mainly in the offences which are punishable with an imprisonment for a term not exceeding

three years. This is because in these offences only there is a limitation for taking cognizance by the Courts. Here it would be worthwhile to reproduce Section 468 of the Cr. P.C. in this regard:

> **S.468. Bar to taking cognizance after lapse of the period of limitation** - (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation.
>
> (2) The period of limitation shall be -
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
>
> (3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

But Section 472 Cr. P.C. is a proviso to the above rule. The period of limitation in case of continuing offences shall be governed by Section 472 Cr.P.C. which reads thus:

> **S. 472. Continuing offence.** — In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

Similarly whether any offence is continuing one or not has a bearing on the territorial jurisdiction of the Criminal Courts. Ordinarily every offence has to be enquired into and tried by a Court within whose local jurisdiction it was committed (S. 177). But in the case of a continuing offence committed in more local areas than one, Section 178 instead of Section 177 would be applicable:

> S.178 (a) When it is uncertain in which of several local areas an offence was committed, or
>
> (b) where an offence is committed partly in one local area and partly in another, or
>
> (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or
>
> (d) where it consists of several acts done in different local areas, it may be enquired into or tried by a Court having jurisdiction over any of such local areas.

Hon'ble Supreme Court in case of *Arun Vyas v. Anita Vyas, AIR 1999 SC 2071,* held that cruelty under Section 498-A IPC is a continuing offence.

> "The essence of the offence in S. 498-A IPC is cruelty as defined in the explanation appended to that section. It is a continuing offence and on each occasion on which the respondent wife was subjected to cruelty, she would have a new starting point of limitation. The last act of cruelty was committed against the respondent wife within the meaning of the explanation, on October 13, 1988 when, on the allegation made by the respondent wife in the complaint to Additional Chief Judicial magistrate, she was forced to leave the matrimonial home. Having regard to the provisions of Ss. 469 and 472 of criminal P.C. the period of limitation commenced for offences under Ss. 406 and 498-A IPC from October 13. 1988 and ended on October 12, 1991."

The Courts when confronted with provisions which lay down a rule of limitation governing prosecutions, should give due weight and consideration to the provisions of S.473 of the Code which is in the nature of an overriding provision and according to which, notwithstanding anything contained in the provisions of Chapter XXXVI of the Code of Criminal Procedure and Court may take cognizance of an offence after the expiration of a period of limitation if, inter alia, it is satisfied that it is necessary to do so in the interest of justice.

In *Sanapareddy Maheedhar Seshagiri and anr. v. State of Andhra Pradesh and anr., AIR 2008 SC 787,* the Apex Court after referring the previous pronouncement made in *Venka Radhamanohari v. Vanka Venkata Reddy, (1993) 3 SCC 4, Arun Vyas (supra), State of H.P. v. Tara Dutt, (2000) 1 SCC 230 and Ramesh v. State of Tamil Nadu, (2005) 3 SCC 507* has also observed that the ratio of the above noted judgments is that while considering the applicability of Section 468 to the complaints made by the victims of matrimonial offences, the Court can invoke Section 473 and can take cognizance of an offence after expiry of the period of limitation keeping in view the nature of allegations, the time taken by the police in investigation and the fact that the offence of cruelty is a continuing offence and affects the society at large. To put it differently, in cases involving matrimonial offences the Court should not adopt a narrow and pedantic approach and should, in the interest of justice, liberally exercise power under Section 473 for extending the period of limitation.

If an offence is a continuing one, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed and continued by the accused. Making calls for payment of ransom is an offence. In case of murder coupled with abduction in a given case may be considered to be a continuous offence. [*Vimal Chadha v. Vikas Choudhary, 2008 AIR SCW 4259*]

Thus from the above discussion it is clear that the fact whether a particular offence is continuing one or not depends upon the language and the intention of the statute which creates that particular offence and to a certain extent upon the facts and circumstances of the case. Once the offence comes within the purview of continuing offence it has the effect of extending the period of limitation for taking cognizance and a fresh period of limitation starts every moment for which the offence continues.

**GENERAL PRINCIPLES REGARDING PLACE OF TRIAL :**

Criminal Court, while dealing with such offences, have to bear in mind that ordinarily every offence shall be inquired into and tried by the Court within whose local jurisdiction it was committed (Section 177 of CrPC). This word ordinarily means "except in the cases provided hereinafter to the contrary". Therefore, the rule under this section shall have to be read subject to any special provisions of law which may modify it such as Sections 178 to 186 and Section 188 of CrPC. The provisions of Sections 219, 220, 221 & 223 of the Code of Criminal Procedure are exceptions to this Section.

Section 178 provides for difficulties which may arise where there is a conflict between different areas and there may be some doubt as to which particular Magistrate has jurisdiction to try the case. It is always to be borne in mind that the facts of each individual case determine the venue of the Court which will try the particular offence. It is to be determined by the averments contained in the complaint.

**JURISDICTIONAL COMPETENCE REGARDING CONTINUING OFFENCE:**

The provisions relating to jurisdiction of criminal courts regarding taking cognizance of offence are mentioned in Chapter XIII of CrPC.

Section 178 (c) of the Code provides that where an offence is a continuing offence, and continues to be committed in more local areas than one, it may be inquired into or tried by a court having jurisdiction over any of such areas. Notably 'Local areas' means a local area to which the Code applies.

In *Y. Abraham Ajith and others v. Inspector of Police, Chennai and another, AIR 2004 SC 4286,* it was held that the complaint under Sections 498 A, 406 and 506 against husband and in-laws filed at place 'I' while complainant after marriage resided with opposite party at place 'A'; complainant left her husband's place and is residing at place 'I' and FIR not disclosing any demand of dowry or commission of any act constituting offences at place 'I'; the logic of Section 178 (c) relating to continuing offence was held not applicable since no part of cause of action arose at place 'I' complaint filed at place 'I' not maintainable.

The Apex Court in the case of *Sujata Mukherjee v. Prashant Kumar Mukherjee, AIR 1997 Supreme Court 2465* explained the situation where in a continuing offence on some occasions all of the accused took part in offence at one place while only one of them took part in the offence at another place and observed:

> "We have taken into consideration the complaint filed by the appellant and it appears to us that the complaint reveals a continuing offence of mal treatment and humiliation metal out to the appellant in the hands of all the accused-respondents and in such continuing offence, on some occasions all the respondents had taken part and on other occasion, one of the respondents had taken part. Therefore, clause (c) of Section 178 of the Code of Criminal procedure is clearly attracted."

In this case the Apex Court held that the Magistrate of local area where complaint is lodged has territorial jurisdiction to proceed against all of the accused.

In the case of *Vipin Kumar Agarwal, v. State of U.P. and another, 1998 CriLJ 2327,* Hon'ble Allahabad High Court discussed the situation where the offence of cruelty (u/s 498-A IPC) was partly committed outside India and partly in India. In this case the wife was treated curtly in USA and after coming to India she was continuously treated cruelly, assaulted and burn injuries caused to her. The Court held that the offence of cruelty under Section 498-A I.P.C. is a continuing offence and the plea, that Court in India has no jurisdiction, is not tenable.

Where a person entice away a married women from the jurisdiction of one court, and detains her within the jurisdiction of another, both the courts have the concurrent jurisdiction to try the offender u/s 498, I.P.C., as the enticing and detaining constitute a continuing offence.

Hon'ble the M.P. High Court has also held in *Gyaniram v. State of M.P., 1994 JLJ 733,* that where the husband and wife were living separately the trial can be held by that court within the local limit of whose jurisdiction dowry is demanded or cruelty is committed.

In *Jagdish and others v. State of Rajasthan and another, 1998 CriLJ 554* (Raj), the Hon'ble Rajasthan High Court also held that if repeated demand for dowry is made and harassment is meted out to a woman which may be physical or mental is an act of cruelty. It is not necessary that the husband or his relatives must be present at the time when the housewife is subjected to cruelty. If their act or conduct, omission or commission is of such a nature which results in mental and physical harassment it will amount to an act of cruelty to a woman and it is immaterial that the woman is living at that relevant time at her matrimonial home or at her parents house. The offence under Section 498A is a continuing offence and if the act of cruelty continues even while the woman is living at her parents house, the offence is triable by both the Courts in whose territorial jurisdiction the act of continuing offence of cruelty has been committed at matrimonial home or the parents house.

In *Tarsem Singh v. Amrit Kaur, 1995 CriLJ 3560 (P&H),* it was held that for offence under Section 498-A IPC, husband cannot be held guilty of harassment merely by not calling his wife to matrimonial house. No part of alleged cruelty or harassment arose within jurisdiction of Court at place where house of her parents is situated. Court of that place has no jurisdiction to entertain complaint.

In the case of dowry demand under Dowry Prohibition Act (28 of 1961), Section 4 it was held that every demand of dowry whenever repeated constitutes another offence and date of commission of offence under Section 4 would be when demand was made initially and also when said demand was repeated afresh. However, offence is not a continuing one. [*Harbans Singh v. Gurcharan Kaur, 1990 CriLJ 1591 (Del)*].

So far as the offences relating to property are concerned, they have also come to be decided in different case laws.

In the case of *Gajjan Singh* (supra), Hon'ble the Supreme Court while terming forgery a continuing offence, held that where the accused, an owner of the truck, was issued a permit at Indore for plying his truck between Indore and outstations for a period of one month (01.07.1960 to 31.07.1960) and on 19.08.1960 the truck was checked at Nasik while it was on its return journey to Indore and it was found that the number of the month in the date in the permit had been altered from 7 to 8, the question was whether the Court at Indore had jurisdiction, Held that the accused owner had a forged permit and had the intention of using it whenever occasion demanded. He was therefore guilty of the offence under Section 474 I.P.C. from the moment from which the forged permit was in his possession. Since this offence was a continuing offence it could be tried at Indore. The offence under Section 471 was the desired consequence and could also be tried at Indore in view of S. 179 Cr.P.C.

It was also held in *Govindrajalu, AIR 1962 Mys. 275* that a conspiracy and acts done in pursuance thereof would come within the scope of S.178.

Hon'ble the M.P. High Court in the case of *Bairo Prasad v. Laxmibai Pateria, 1991 CriLJ 2535,* held that where a complaint for offence u/s. 406 Penal Code was pled by the daughter-in-law that in spite of demand made several times for return of her Stridhan no heed was paid by her in-laws, the limitation for taking cognizance of offence would be governed by S. 472 and not S. 468 of Criminal P.C. when the demand is made and the notice is served, from that date a fresh period of limitation shall begin to run and this will be a continuing offence and the provision of S. 472, Cr.P.C. would be attracted.

In the case of *Balram Singh v. Sukhwant Kaur, 1992 CriLJ 792* the full bench of Hon'ble Punjab and Haryana High Court held that the offence of Criminal breach of trust (S. 406) is a continuing offence.

> 15. The matter can be viewed from another angle. Section 410 of the Indian Penal Code defines 'stolen property'. The definition is broad enough to include within its sweep property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed and it continues to be so till it comes into possession of a person legally entitled thereto. In other words, once a property is criminally misappropriated or in

respect of which criminal breach of trust has been committed the same continues to be stolen property till it is restored to the understanding of the nature of the offence of criminal misappropriation and criminal breach of trust. On principle, therefore, we are of the considered view that the offence under Section 406 of the Indian Penal Code is continuing offence.

★ ★ ★

22. We find an element of continuance in the offence of criminal misappropriation in view of the extended definition of 'stolen property'. The offence continues until the property which has been criminally misappropriated is restored to the true owner. We further find that the case of criminal misappropriation comes very close to one of the illustrations in *Best v. Butier & Fitsguibbon, (1932) KB 108* cited in *Deokaran Nenshi's case* (supra) in which it was held that the offence of withholding the money was a continuing offence, the basis of the decision being that every day that the money is willfully withheld, the offence was committed.

**CONCLUSION:**

Thus, on the basis of the above discussion, we may conclude as under: –

1. The continuing offence is one which is susceptible of continuance. In order to constitute a continuous offence, the act complaint of must at every moment of continuance reflect all the ingredients necessary for constituting the offence. Whether a particular offence is continuing or not depends upon the language and intention of the statute which creates that particular offence and to a certain effect upon the facts and circumstances of the case.
2. Once the offence comes within the purview of continuing offence, it has the effect of extending the period of limitation for taking cognizance. A fresh period of limitation starts every moment for which the offence continues. The Court should also give due weight and consideration to the provisions of Section 473 CrPC, if it is satisfied that it is necessary to do so in the interest of justice, particularly in cases involving matrimonial offence, the Court should not adopt a narrow and pedantic approach for extending the period of limitation.
3. Similarly it has the effect of extension of the territorial jurisdiction of the criminal courts as envisaged under Section 178 CrPC. It is always to be borne in mind that the facts of each individual case determine the venue of the Court which will try the particular offence. It is to be determined by the averments contained in the complaint particularly with reference to property and matrimonial offence as enunciated above.

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# ऐसा साक्षी जो मर गया है या जो मिल नहीं सकता इत्यादि के पूर्व कथन की ग्राह्यता

**न्यायिक अधिकारीगण**
**जिला–उज्जैन एवं गुना**

साक्ष्य विधि का यह सामान्य नियम है कि किसी तथ्य को साबित करने के लिए सर्वोत्तम साक्ष्य प्रस्तुत किया जाना चाहिए। स्थानापन्न प्रकृति का साक्ष्य तब ग्राह्य नहीं है जबकि मूल साक्ष्य उपलब्ध है। ऐसी साक्ष्य दी जा सकती हैं जबकि यह साबित कर दिया जाए कि वह व्यक्ति जिसने किसी पूर्ववर्ती प्रक्रम पर साक्ष्य दी थी, उसी कार्यवाही के किसी पश्चातवर्ती अवसर पर वह साक्ष्य देने के लिए उपलब्ध नहीं हैं। भारतीय साक्ष्य अधिनियम की धारा 33 ऐसे पूर्ववर्ती साक्ष्य को सुसंगत बनाती हैं। धारा 33 इस प्रकार हैं :

> 33. किसी साक्ष्य में कथित तथ्यों की सत्यता को पश्चात्वर्ती कार्यवाही में साबित करने के लिए उस साक्ष्य की सुसंगति – वह साक्ष्य, जो किसी साक्षी ने किसी न्यायिक कार्यवाही में या विधि द्वारा उसे लेने के लिए प्राधिकृत किसी व्यक्ति के समक्ष दिया है, उन तथ्यों की सत्यता को, जो साक्ष्य में कथित हैं, किसी पश्चात्वर्ती न्यायिक कार्यवाही में या उसी न्यायिक कार्यवाही के आगामी प्रक्रम में साबित करने के प्रयोजन के लिए तब सुसंगत है, जबकि वह साक्षी मर गया है या मिल नहीं सकता है या वह साक्ष्य देने के लिये असमर्थ है या प्रतिपक्षी द्वारा उसे पहुँच के बाहर कर दिया गया है अथवा यदि उसकी उपस्थिति इतने विलम्ब या व्यय के बिना, जितना कि मामले की परिस्थितियों में न्यायालय अयुक्तियुक्त समझता है, अभिप्राप्त नहीं की जा सकती :
>
> परन्तु वह तब जब कि–
>
> वह कार्यवाही उन्हीं पक्षकारों या उनके हित–प्रतिनिधियों के बीच में थी;
>
> प्रथम कार्यवाही में प्रतिपक्षी को प्रतिपरीक्षा का अधिकार और अवसर था;
>
> विवाद्य प्रश्न प्रथम कार्यवाही में सारतः वही थे जो द्वितीय कार्यवाही में हैं।
>
> स्पष्टीकरण–दाण्डिक विचार या जाँच इस धारा के अर्थ के अन्तर्गत अभियोजक और अभियुक्त के बीच कार्यवाही समझी जायेगी।

उपरोक्तानुसार धारा 33 के अंतर्गत किसी साक्षी के कथनों की ग्राह्यता के लिए निम्न शर्तें आवश्यक है:

(1) साक्षी का पूर्ववर्ती कथन किसी न्यायिक कार्यवाही में या विधि द्वारा साक्ष्य लेने के लिए प्राधिकृत किसी व्यक्ति के समक्ष दिया गया हो,

(2) ऐसे साक्षी की मृत्यु हो गई हो, या

(3) साक्षी मिल नहीं सकता हैं, या

(4) साक्षी, साक्ष्य देने के लिए असमर्थ हो गया है, या

(5) प्रतिपक्षी द्वारा साक्षी को पहुंच के बाहर कर दिया गया है, या

(6) ऐसे साक्षी की उपस्थिति इतने विलम्ब या व्यय के बिना, जितना कि उस मामले की परिस्थितियों में न्यायालय अयुक्तियुक्त समझता है, अभिप्राप्त नहीं की जा सकती है।

उपरोक्त शर्तों के अलावा साक्ष्य की ग्राह्यता के लिए यह भी आवश्यक है कि :

(1) पूर्ववर्ती कार्यवाही उन्हीं पक्षकारों या उनके हित प्रतिनिधियों के बीच में थी जो पश्चातवर्ती कार्यवाही में हैं।

(2) पूर्ववर्ती कार्यवाही में प्रतिपक्षी को ऐसे साक्षी की प्रतिपरीक्षा करने का अधिकार और अवसर था, एवं,

(3) पूर्ववर्ती कार्यवाही में विवाद्यक सारतः वहीं थे जो पश्चात्वर्ती कार्यवाही में है।

धारा 33 सिविल और आपराधिक दोनों प्रकार के मामलों में अंतर नहीं करती है अर्थात धारा कि शर्तें पूरी होने पर साक्षी का कथन ग्राह्य होगा चाहें कार्यवाही सिविल अथवा आपराधिक प्रकृति की रही हो। आपराधिक कार्यवाही में अभिलिखित साक्ष्य को सिविल कार्यवाही में तथा सिविल कार्यवाही में अभिलिखित साक्ष्य को आपराधिक कार्यवाही में उपयोग में लाया जा सकता है।

इस धारा में प्रयुक्त ''न्यायिक कार्यवाही'' पद से अभिप्राय ऐसी कार्यवाही से हैं जिसमें साक्ष्य वैध रूप से शपथ पर लिया जा सकता है। धारा 33 के अंतर्गत जब कोई पक्षकार किसी साक्षी के पूर्ववर्ती कथन को पश्चात्वर्ती न्यायिक कार्यवाही में या पूर्व न्यायिक कार्यवाही के किसी आगामी प्रक्रम में साबित करने की वान्छा करता है तब उसे धारा में वर्णित वे आधार प्रथमतः साबित करना होंगे जो ऐसे पूर्ववर्ती कथन को ग्राह्य बनाने के लिए अपेक्षित है।

दण्ड प्रक्रिया संहिता, 1973 की धारा 299 यह प्रावधान करती है कि जहाँ अभियुक्त व्यक्ति फरार हो गया है या उसके तुरंत गिरफ्तार किये जाने की संभावना नहीं है वहां ऐसे अभियुक्त की अनुपस्थिति में अभियोजन साक्षियों की अभिलिखित की गई साक्ष्य ऐसे अभियुक्त के विरूद्ध उस मामले के अपराध की जाँच या विचारण में ग्राह्य होगी यदि साक्षी की मृत्यु हो गई है या वह साक्ष्य देने में असमर्थ हो गया है या मिल नहीं सकता है या, साक्षी की उपस्थिति ऐसे विलंब, व्यय या असुविधा के बिना जो उस मामले की परिस्थितियों में अनुचित होगी, नहीं करायी जा सकती है। धारा 299 मुख्यतः इस सिद्धांत पर आधारित है कि किसी अभियुक्त व्यक्ति को अपने स्वयं के कार्य एवं आचरण से उसके विरूद्ध साक्ष्य की उपलब्धता को समाप्त करने की अनुमति नहीं दी जा सकती है। धारा 33 में भी इस सिद्धांत को मान्यता दी गई है कि किसी पक्षकार को अपने ही दोषपूर्ण कार्य से लाभ उठाने की अनुमति नहीं दी जा सकती है।

धारा ऐसे साक्षी के पूर्ववर्ती कथन को सुसंगत बनाती हैं जिसे पश्चात्वर्ती प्रक्रम पर प्रतिपक्षी ने पहुंच से बाहर कर दिया हो। माननीय सर्वोच्च न्यायालय ने *निर्मल सिंह विरूद्ध हरियाणा राज्य, ए.आई.आर. 2000 सु.को. 1416* में अभिधारित किया है कि धारा 299 दण्ड प्रक्रिया संहिता के अंतर्गत फरार घोषित अभियुक्त के विरूद्ध ऐसे साक्षी की अभिसाक्ष्य जिसकी मृत्यु हो गई है, धारा 33 के प्रावधान के अंतर्गत ग्राह्य होगी और इसके आधार पर दोषसिद्धि की जा सकती है। माननीय सर्वोच्च न्यायालय ने धारा 299 दण्ड प्रक्रिया संहिता के प्रावधानों को धारा 33 भारतीय साक्ष्य अधिनियम के अपवाद के रूप में अभिधारित किया है क्योंकि धारा 33 भारतीय साक्ष्य अधिनियम के अंतर्गत ऐसी साक्ष्य, जिसके संबंध में विरोधीपक्ष को प्रतिपरीक्षण का अधिकार या अवसर नहीं था, विधिक रूप से अग्राह्य है।

पूर्ववर्ती प्रक्रम पर साक्षी द्वारा किया गया कथन उसके द्वारा साक्ष्य के रूप में और न्यायिक कार्यवाही में दिया गया होना चाहिए। धारा 161 दण्ड प्रक्रिया संहिता के अंतर्गत अभिलिखित पुलिस कथन इस श्रेणी में नहीं आते है। जैसा कि *सुखर विरूद्ध स्टेट ऑफ यू.पी., ए.आई.आर. 1999 सु.को. 3883* में प्रतिपादित किया

गया है। धारा 164 दण्ड प्रक्रिया संहिता के अंतर्गत अभिलिखित कथन भी इस धारा के अंतर्गत नहीं होंगे क्योंकि ऐसे कथन अभिलिखित किये जाने के समय दूसरे पक्ष (अभियुक्त) को प्रतिपरीक्षा का अधिकार व अवसर नहीं होता है। *शशि जैना विरूद्ध खादल हुसैन एवं अन्य, ए.आई.आर. 2004 सु.को. 1492* में शीर्ष न्यायालय ने अभिनिर्धारित किया है कि धारा 200 दण्ड प्रक्रिया संहिता के अंतर्गत मजिस्ट्रेट द्वारा अभिलिखित साक्षी के कथन पश्चात्वर्ती कार्यवाही में ग्राह्य नहीं होंगे क्योंकि ऐसे कथन अभिलिखित किये जाने के समय अभियुक्त को प्रतिपरीक्षा का अधिकार और अवसर प्राप्त नहीं होता हैं।

*घसीटी बाई विरूद्ध रामगोपाल सिंह व अन्य, आई.एल.आर 2008 एम.पी 872* में अवधारित किया गया है कि जहाँ मुख्य परीक्षण पूर्ण होने के उपरांत साक्षी की प्रतिपरीक्षा उसकी पश्चातवर्ती अक्षमता के कारण नहीं हुई है वहाँ मुख्य परीक्षण में किये गये कथन विरोधी पक्ष के विरूद्ध उपयोग में नहीं लाए जा सकते हैं। स्पष्ट है कि ऐसी स्थिति में प्रतिपक्षी को साक्षी की प्रतिपरीक्षा का अवसर नहीं था। जहाँ अभियुक्त को आरोप विरचना पूर्व अभियोजन साक्षी के प्रतिपरीक्षण का अधिकार और अवसर प्राप्त था किन्तु अभियुक्त साक्षी की प्रतिपरीक्षा करने में असफल रहा वहाँ उसी कार्यवाही के आगामी प्रक्रम पर ऐसे साक्षी की अभिसाक्ष्य अभियुक्त के विरूद्ध ग्राह्य होगी। जैसा की माननीय नागपुर उच्च न्यायालय ने *गुरूदीन विरूद्ध एम्परर, ए.आई.आर. 1935* नागपुर 8 में प्रतिपादित किया है। माननीय सर्वोच्च न्यायालय ने *मूल्खराज सिक्का विरूद्ध दिल्ली प्रशासन, ए.आई.आर. 1974 सु.को. 1723* में प्रतिपादित किया है कि यदि पक्षकार जानबूझकर प्रतिरक्षा करने के अधिकार का त्याग कर दे या प्रतिरक्षा करने के अवसर से जानबूझकर प्रविरत रहे तो यह माना जाएगा कि उसे प्रतिरक्षा का समुचित अवसर था। प्रतिपक्षी को केवल प्रतिपरीक्षा का अवसर प्राप्त होना प्रर्याप्त नही है वरन उसे इसका अधिकार भी होना चाहिए। *तरलोक सिंह विरूद्ध पंजाब राज्य, ए.आई.आर. 1974 सु.को. 1977* में उच्चतम न्यायालय द्वारा प्रतिपादित किया गया है कि जहाँ धारा 33 की शर्तें पूर्ण हो गई हैं वहाँ न्यायिक कार्यवाही के दौरान दिये गये साक्षी के पूर्व कथन उसी प्रकरण की पश्चातवर्ती कार्यवाही में ग्राह्य होंगे।

*राजस्थान राज्य विरूद्ध गजराज, ए.आई.आर. 1953 राजस्थान 66* में अवधारित किया गया है कि यदि चिकित्सक की राय में साक्षी साक्ष्य देने योग्य नहीं है तब उसका पूर्ववर्ती कथन स्वीकार किया जा सकता है। धारा 33 के द्वारा उपबंधित साक्षी की असमर्थता स्थाई स्वरूप की नहीं हैं आवश्यक यह है कि साक्ष्य के समय साक्षी साक्ष्य देने में असमर्थ है।

यह आवश्यक है कि पूर्ववर्ती और पश्चात्वर्ती दोनों कार्यवाही उन्हीं पक्षकारों या उनके हित प्रतिनिधियों के बीच होना चाहिए। *अंबिका प्रसाद विरूद्ध राम इकबाल राय, ए.आई.आर. 1966 सु.को. 605* में प्रतिपादित किया गया है कि जहाँ किसी साक्षी ने अन्य पूर्ववर्ती प्रकरण में किसी तथ्य के संबंध में स्वीकृति की है वहाँ पश्चात्वर्ती प्रक्रम पर ऐसी स्वीकृति केवल उस पक्षकार के विरूद्ध ग्राह्य होगी जिसके संबंध में पूर्ववर्ती कार्यवाही लंबित थी, शेष के विरूद्ध नहीं।

धारा 33 के परंतुक में प्रयुक्त पद ''प्रतिपक्षी'' पूर्ववर्ती कार्यवाही का वह पक्षकार है जिसके हित के विरूद्ध साक्ष्य दिया गया था और इस कारण से उसे प्रतिपरीक्षा का अधिकार और अवसर था। यह आवश्यक नहीं है कि उसके द्वारा वस्तुतः प्रतिपरीक्षा की गई थी या प्रतिपरीक्षा के अधिकार का प्रयोग किया गया था।

माननीय सर्वोच्च न्यायालय ने *व्ही.एम. मैथ्यू विरूद्ध व्ही.एस. शर्मा, ए.आई.आर. 1996 सु.को. 109* में प्रतिपादित किया है कि पद ''प्रतिपक्षी'' से तात्पर्य उस पक्षकार से है जिसे पूर्व कार्यवाही में प्रतिपरीक्षा का अधिकार और अवसर था। धारा 33 का परंतुक निश्चित रूप से प्रथम कार्यवाही के प्रतिपक्षी के अधिकार को संरक्षण देता है न कि उस पक्ष को जिसने साक्षी प्रस्तुत किया था अर्थात परंतुक में संदर्भित ''प्रतिपक्षी'' प्रथम कार्यवाही में का वह पक्ष है जिसके हित के विरूद्ध साक्ष्य दी गई थी। उदाहरण के लिए, जहाँ प्रतिवादी के विरूद्ध एक पक्षीय

कार्यवाही की गई थी वहाँ उसे साक्षी की प्रतिपरीक्षा का अधिकार और अवसर नहीं था। यदि प्रतिवादी के विरूद्ध ऐसी साक्ष्य उपयोग में लाई जाती है तब निश्चित ही प्रतिवादी प्रथम कार्यवाही में प्रतिपक्षी होते हुए भी उसे प्रतिपरीक्षा का अधिकार तथा अवसर नहीं होने से पश्चात्वर्ती कार्यवाही में ऐसी साक्ष्य उसके विरूद्ध ग्राह्य नहीं होगी ।

धारा का परंतुक यह प्रतिपादित करता है कि पश्चात्वर्ती कार्यवाही में साक्षी के कथन ग्राह्य बनाने के लिए ऐसे कथन दोनों पक्षों के द्वारा परीक्षण और प्रतिपरीक्षण से परखे जाना चाहिए और इसी कारण से, परंतुक ऐसे सहवादी या सहप्रतिवादी के अधिकार का भी संरक्षण करता है जिसे प्रतिपरीक्षा का अधिकार हो सकता था किन्तु इसका अवसर नहीं था। ऐसा पक्षकार जिसने साक्षी को प्रस्तुत किया है, पश्चातवर्ती कार्यवाही में ऐसे साक्षी की अभिसाक्ष्य उसके विरूद्ध उपयोग में लाये जाने पर यह आपत्ति करने के लिए अनुज्ञात नहीं होगा कि पूर्व कार्यवाही में उसके द्वारा साक्षी की प्रतिपरीक्षा करने का अधिकार या अवसर नहीं था क्योंकि यह संरक्षण केवल पूर्ववर्ती कार्यवाही के प्रतिपक्षी को ही उपलब्ध है।

उपरोक्तानुसार, भारतीय साक्ष्य अधिनियम की धारा 33 के अंतर्गत किसी ऐसे साक्षी जो मर गया है या जो मिल नहीं सकता आदि की साक्ष्य की सुसंगति और ग्राह्यता के लिए आवश्यक शर्तें और परिस्थितियाँ निम्न है;

(1) साक्षी की मृत्यु, अनुपलब्धता, असमर्थता या प्रतिपक्षी द्वारा पहुंच के बाहर कर दिये जाने जैसी परिस्थितियों को उस पक्षकार की ओर से साबित किया जाना आवश्यक होगा जो ऐसे साक्षी की साक्ष्य देना चाहता है।

(2) यह साबित करना भी आवश्यक होगा कि ऐसे साक्षी ने कथित अभिसाक्ष्य किसी न्यायिक कार्यवाही में या विधि द्वारा साक्ष्य लेने के लिए प्राधिकृत व्यक्ति के समक्ष दी थी।

(3) ऐसे साक्षी की अभिसाक्ष्य पश्चातवर्ती न्यायिक कार्यवाही में या उसी न्यायिक कार्यवाही के आगामी प्रक्रम में साबित करने के प्रयोजन से दी जानी चाहिए।

(4) पश्चातवर्ती न्यायिक कार्यवाही उन्हीं पक्षकारों या उनके हित प्रतिनिधियों के मध्य होनी चाहिए जिनके मध्य पूर्ववर्ती न्यायिक कार्यवाही थी। ऐसा व्यक्ति जो पूर्ववर्ती कार्यवाही में पक्षकार नहीं था, के विरूद्ध इस धारा के अंतर्गत साक्ष्य ग्राह्य नहीं होगी।

(5) पूर्व और पश्चात दोनों ही कार्यवाही में विवाद्य प्रश्न सारतः समान होना चाहिए।

(6) यह भी साबित किया जाना चाहिए कि पूर्ववर्ती कार्यवाही में प्रतिपक्षी को ऐसे साक्षी की प्रतिपरीक्षा करने का अधिकार और अवसर दोनों ही थे। किन्तु यह आवश्यक नहीं है कि प्रतिपक्षी द्वारा वस्तुतः साक्षी की प्रतिपरीक्षा की गई हो।

(7) ऐसा पक्षकार जिसने पूर्व कार्यवाही में साक्षी को प्रस्तुत किया था, पश्चातवर्ती कार्यवाही में ऐसे साक्षी की अभिसाक्ष्य उसके विरूद्ध उपयोग में लाये जाने पर इस आधार पर आपत्ति नहीं कर सकता है कि पूर्व कार्यवाही में उसे साक्ष्य की प्रतिपरीक्षा का अधिकार या अवसर नहीं था। पूर्व कार्यवाही में साक्षी की प्रतिपरीक्षा के अधिकार और अवसर की शर्त का संरक्षण केवल पूर्व कार्यवाही के प्रतिपक्षी को ही उपलब्ध होगा।

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# विधिक समस्याऐं एवं समाधान

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

## मूक/बधिर साक्षी के कथन एवं ऐसे अभियुक्त की परीक्षा लिपिबद्ध करने में क्या सावधानियाँ बरतना आवश्यक है?

भारतीय साक्ष्य अधिनियम की धारा 119 के अनुसार बोलने में असमर्थ साक्षी किसी अन्य बोधगम्य रूप में यथा लिखकर या संकेतों के माध्यम से खुले न्यायालय में अपनी साक्ष्य दे सकता है जिसे मौखिक साक्ष्य ही माना जाएगा। इस संबंध में दण्ड प्रक्रिया संहिता की धारा 282 अवलोकनीय है जो प्रावधानित करती है कि जब किसी साक्ष्य या कथन के भाषान्तर के लिये दुभाषिये की सेवा की अपेक्षा किसी न्यायालय द्वारा की जाती है तब वह दुभाषिया ऐसी साक्ष्य या कथन का सत्य भाषान्तर करने के लिये आबद्ध होगा।

ऐसा साक्षी जो मौन व्रत धारण किये हुये हो उसकी साक्ष्य उसे बोलने को मजबूर किये बिना लिखित में ली जा सकती है एवं धारा 119 के परिप्रेक्ष्य यह माना जाएगा कि वह बोलने में असमर्थ है। (देखिये *लाखन सिंह विरूद्ध आर., ए.आई.आर. 1942 पटना 183*)। ऐसा साक्षी यदि पढ़ा लिखा न हो तो न्यायालय उसके कथन उसके द्वारा किये गये संकेतों के माध्यम से लेखबद्ध कर सकता है।

इस प्रकार मूक बधिर साक्षी के द्वारा अपने कथन में उपयोग में लाये गये संकेतों के भाषान्तर और अर्थ के लिये न्यायालय द्वारा ऐसे दुभाषिये या परिजन/परिचित व्यक्ति की सहायता ली जाना चाहिये जो निष्पक्ष हो तथा जिसकी मामले में हितबद्धता नहीं हो। न्याय दृष्टाँत *कदूनगोठ आलवी विरूद्ध केरल राज्य, 1982 सी.आर.एल.जे. 94* में केरल उच्च न्यायालय द्वारा हत्या के प्रकरण में मूक–बधिर साक्षी का न्यायालय द्वारा विशेषज्ञ या साक्षी के दैनिक जीवन में अपनी बात को प्रकट करने के तरीकों से परिचित व्यक्ति की सहायता के बिना परीक्षण करने को उचित नहीं माना गया और ऐसे लिपिबद्ध की गई साक्ष्य को विश्वास योग्य नहीं होना ठहराया गया।

ऐसा मूक साक्षी जो लिखित में कथन देने में असमर्थ है तब वह जो कहना चाहता है, संकेतों के माध्यम से व्यक्त कर सकता है तथा न्यायालय के लिये उन संकेतों को लिखना अनिवार्य है। विचारण न्यायालय द्वारा उक्त संकेतों में से सभी संकेत न लिखते हुए कुछ ही संकेतों को लिखना या साक्षी द्वारा किये गये संकेतों को न लिखते हुए मात्र दुभाषिये द्वारा व्यक्त किया गया अर्थ मात्र ही लेखबद्ध करना विधिपूर्ण नहीं होगा और ऐसी

दशा में संकेतों का मात्र अर्थान्वयन साक्ष्य में ग्राह्य नहीं होगा क्योंकि साक्ष्य में, साक्षी द्वारा अपने हाथों या भाव–भंगिमा से किये गये ऐसे संकेत ग्राह्य हैं जो साक्षी द्वारा अपने कथन को अभिव्यक्त करने में प्रयोग किये गये है। इस संबंध में न्याय दृष्टाँत क्रमशः *कुंभर मुसा अलीब विरूद्ध गुजरात राज्य, ए.आई.आर. 1966 गुजरात 101, एवं दिलावरसाब अलीसाब जकाती विरूद्ध कर्नाटक राज्य, 2005 सी.आर.एल.जे. 2687 (कर्नाटक)* अवलोकनीय है, जिनमें क्रमशः गुजरात एवं कर्नाटक उच्च न्यायालय ने संकेतों को लिपिबद्ध न करते हुए दुभाषिये द्वारा संकेतों के किये गये अर्थान्वयन मात्र को लिपिबद्ध करने पर ऐसी साक्ष्य को अग्राहय माना है।

आन्ध्रप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टाँत *लोक अभियोजक, आन्ध्रप्रदेश उच्च न्यायालय, हैदराबाद विरूद्ध लींगीसेट्टी सीनु, 1997, सी.आर.एल.जे. 4003* में मूक विद्यालय के प्राचार्य के कथन को बधिर साक्षी के संकेतों की व्याख्या करने हेतु विशेषज्ञ साक्षी का कथन होना ठहराते हुए साक्षी द्वारा किये गये संकेतों को लिपिबद्ध करने के साथ–साथ ऐसे विशेषज्ञ साक्षी की सहायता से बधिर साक्षी के लिपिबद्ध किये गये कथन को विश्वास योग्य होना माना गया है।

यहां यह उल्लेखनीय है कि शपथ अधिनियम, 1969 की धारा 4 और 5 के प्रावधानों के अनुसार यह आवश्यक है कि कथन के पूर्व न्यायालय साक्षी और दुभाषिये दोनों को शपथ दिलाये या प्रतिज्ञान कराये तथा न्यायालय के लिये यह भी आवश्यक है कि साक्षी द्वारा कथन में हाथों या भाव–भंगिमा से किये गये संकेतों को अनिवार्यतः उचित रूप से लेखबद्ध करे और उसके साथ–साथ उन संकेतों का दुभाषिये द्वारा किया गया अर्थान्वयन (व्याख्या) भी लेखबद्ध करे।

इसी प्रकार, किसी मूक/बधिर अभियुक्त व्यक्ति की धारा 313 द.प्र.सं. के अंतर्गत परीक्षा भी इसी पद्धति से अभिलिखित की जा सकती है। (देखें– *इन री बेडा, ए.आई.आर. 1970 उड़ीसा 3*)

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## बाल साक्षी के कथन लिपिबद्ध करते समय न्यायालय द्वारा क्या प्रक्रिया अपनाया जाना अपेक्षित है ? क्या बाल साक्षी को शपथ दिलाया जाना आवश्यक है ?

धारा 118, भारतीय साक्ष्य अधिनियम के अनुसार बाल साक्षी यदि उसके पूछे गये प्रश्न की प्रकृति समझता है एवं उनके तार्किक उत्तर देता है तब वह साक्ष्य देने के लिये समक्ष होगा। अतः न्यायालय के समक्ष किसी बाल साक्षी के कथन हेतु उपस्थित होने पर यथोचित प्रारंभिक जांचकर यह समाधान लेखबद्ध करना होगा कि साक्षी उससे पूछे गये प्रश्न को समझकर उनके तार्किक उत्तर देने की सामर्थ्य रखता है या नहीं ? (देखिये– *रामेश्वर विरूद्ध राजस्थान राज्य, ए.आई.आर. 1952 एस.सी. 54*)

उक्त समाधान पर पहुंचने के लिये न्यायालय से यह अपेक्षित है कि वह ऐसी जांच बाल साक्षी से उसकी प्रश्नों को समझने और उन प्रश्नों के युक्ति संगत उत्तर देने की सामर्थ्य ज्ञात करने से आशयित समुचित प्रश्न करते हुए उनके उत्तर लेखबद्ध कर संपादित करे। हांलाकि किसी बाल साक्षी की साक्ष्य पर मात्र

इस आधार पर विपरीत प्रभाव नहीं पड़ेगा कि न्यायालय द्वारा साक्षी से औपचारिक प्रश्न नहीं पूछे गये या उसके सक्षम साक्षी होने संबंधी प्रमाण पत्र कथन में नहीं जोड़ा गया। [देखिये–*न्याय दृष्टांत रामेश्वर (उपरोक्त)*]

शपथ अधिनियम, 1969 की धारा 4 के अनुसार सभी साक्षियों को न्यायालय के समक्ष कथन के पूर्व शपथ लेना या प्रतिज्ञान करना अनिवार्य हैं एवं धारा 5 यह व्यवस्था करती है कि कोई साक्षी शपथ पर कथन देने के स्थान पर प्रतिज्ञान करते हुए भी कथन दे सकता है। तथापि धारा 4 के परन्तुक के अनुसार साक्षी की आयु 12 वर्ष से कम होने की दशा में यदि न्यायालय का यह मत है कि ऐसा साक्षी सत्य कहने का कर्त्तव्य तो समझता है किन्तु शपथ या प्रतिज्ञान की प्रकृति नहीं समझता है तब ऐसे साक्षी के कथन लिपिबद्ध किये जाने की दशा में धारा 4 और 5 के प्रावधान लागू नहीं होंगे।

अर्थात 12 वर्ष से अधिक आयु के साक्षी के कथन शपथ लिये बिना या प्रतिज्ञान किये बिना लिपिबद्ध नहीं किये जा सकते है किन्तु यदि साक्षी की आयु 12 वर्ष से कम है तब साक्षी को शपथ दिलाना या प्रतिज्ञान कराना आवश्यक नहीं है एवं यदि न्यायालय का यह समाधान हो जाए कि साक्षी यह समझता है कि उसे सत्य कथन करना है किन्तु वह शपथ या प्रतिज्ञान के अर्थ और महत्व को नहीं समझाता है तब न्यायालय बिना शपथ दिलाये या बिना प्रतिज्ञान कराये ऐसे साक्षी के कथन लेखबद्ध कर सकता है एवं ऐसा कथन शपथ या प्रतिज्ञान के अभाव में भी साक्ष्य में ग्राह्य होगा।

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**नोट**:–स्तंभ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंको में प्रकाशित किये जाएंगे – **संचालक**

The modern legislature makes laws to govern a society, which is fast moving. It is aware of the changing concepts of the emerging times. The law adapts itself to social, economic, political, scientific and other revolutionary changes.

—Dr. Ar. Lakshmanan, J.
(Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1)

## PART - II

# NOTES ON IMPORTANT JUDGMENTS

***311. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (c)**

**(i) Change of use of premises from residential to non-residential, proof of – Factum of having obtained consent is not duly proved by the tenant himself – It is not necessary for the landlord to appear in the witness box for denial of the fact, which itself has not been proved at all.**

**(ii) Inconsistent use of tenancy within the meaning of Section 12 (1) (c) of the Act, instance of – Tenant was inducted for residential purpose – He converted one of the rooms of the tenanted premises for using it for non-residential purpose i.e. STD/PCO Center – Held, the act of the tenant being inconsistent with the purpose of tenancy, the landlord is entitled to decree of ejectment on the ground mentioned in Section 12 (1) (c) of the Act.**

**Sahibram Dhingra (died) through L.R. Narendra Dhingra v. Shivshankar Goyal**

**Judgment dated 30.06.2008 passed by the High Court in S.A. No. 404 of 2008, reported in 2009 (III) MPJR 77**

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***312. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 16, 34 & 37**

**Arbitration Tribunal – Objection as to jurisdiction, adjudication of – On such an objection being raised, the Tribunal must, first of all, decide it – It may proceed further only if it finds that it has jurisdiction – If the Tribunal proceeds ahead without deciding the objection, its action would be without jurisdiction – The award is set aside and the matter remanded back to the Tribunal.**

**Lords Wear Pvt. Ltd., Nagpur v. M/s Anandkumar Devendra Kumar and another**

**Judgment dated 31.03.2008 passed by the High Court in Arbitration Appeal No. 1 of 2007, reported in 2009 (3) MPHT 533**

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***313. CIVIL PROCEDURE CODE, 1908 – Section 9**

**SAHKARI BHUMI VIKAS BANK ADHINIYAM, 1966 (M.P.) – Sections 27, 64 & 82**

**Bar of jurisdiction of Courts – Appellant purchased land after obtaining NOC from Bank – Land was auctioned for recovery of dues from other persons without issuing notice to appellant – Held, even if jurisdiction of civil court is excluded, the civil court has jurisdiction to examine into cases whether the provisions of the Act were**

complied with or the statutory tribunal had not acted in conformity with fundamental principles of judicial procedure – Civil suit, as framed and filed, was maintainable – Matter remitted back.

**Sitaram v. Cooperative Bhumi Vikas (Land Mortgage) Bank Ltd., Khandwa & ors.**

Judgment dated 06.01.2009 passed by the High Court in S.A. No. 694 of 1996, reported in I. L R. (2009) M.P. 1707

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*314. CIVIL PROCEDURE CODE, 1908 – Sections 9 & 100
LIMITATION ACT, 1963 – Section 3

(i) Challenge as to validity of sale deed – In life time of owner of property, his probable heirs do not have any right or title in his property – Owner sold his property and never challenged such transaction in his life time – Appellant had no authority to challenge the same.

(ii) Bar of limitation – Sale deed executed on 05.06.1972 – Suit challenging sale deed filed on 15.12.1986 i.e. after more than 14 years – Held, suit is barred by limitation.

**Bipta Bai (Smt.) v. Smt. Shipra Bai & Ors.**

Judgment dated 16.02.2009 passed by the High Court in S.A. No. 32 of 1994, reported in I.L.R. (2009) M.P. 1402

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*315. CIVIL PROCEDURE CODE, 1908 – Section 11 r/w Order 21 Rule 90
Objection under Order 21 Rule 90 CPC – Res judicata, applicability of – Finding given in the order of rejection of the objections would operate as *res judicata* – The objector would not be allowed to raise the questions which were earlier raised and were rejected.

**Major (Rtd.) Ranveer Singh Dhatwalia & Anr. v. The Bank of Baroda & Ors.**

Judgment dated 01.04.2009 passed by the High Court in W.P. No. 3265 of 2008, reported in 2009 (III) MPJR 31 (DB)

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316. CIVIL PROCEDURE CODE, 1908 – Section 96 and Order 23 Rule 3 Explanation
LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 21
Compromise decree when would be *void ab initio* – Whether Award (order) of Lok Adalat on the basis of unlawful compromise is appealable u/s 96 of the Code? Held, Yes.

**Mahila Bhanwari Bai v. Kashmir Singh and others**

Judgment dated 12.05.2009 passed by the High Court in M.A. No. 987 of 2006, reported in 2009 (3) MPLJ 183

Held:

The question for determination before this Court is that whether an appeal is maintainable under section 96 of Civil Procedure Code against the void order of Lok Adalat? Admittedly, before the Lok Adalat, the compromise has been entered between the parties under Order 23, Rule 3 of Civil Procedure Code.

Section 21 of the Legal Services Authorities Act, 1987 which is as follows with regard to the award of Lok Adalat :-

> "21. **Award of Lok Adalat.** – (1) Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under sub-section (1) of section 20, the court fee paid in such cases shall be refunded; in the manner provided under the Court-fees Act, 1870 (7 of 1870).
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award."

The section/prohibits the appeal against the award of the Lok Adalat, if the award has been passed by the authorities legally. The intention of legislature in prohibiting an appeal against the award of Lok Adalat is to give finality to the award so unnecessary further litigation could be saved, however, when the award is void ab initio, the parties who entered into compromise had no power to enter into the compromise and the compromise has been entered by playing a fraud, in such circumstances, that award could be said to be a void and admittedly, the compromise has been entered before the Lok Adalat in accordance with the provisions of Civil Procedure Code and when the order was void in that circumstances, an appeal could be maintainable under section 96 of the Civil Procedure Code.

In such circumstances, the appeal is maintainable under Section 96 of the Code of Civil Procedure. The Presiding Civil Judge of the Lok Adalat completely ignored the legal provisions and permitted the parties to enter into the compromise which was beyond their power.

It is also settled principle of law that any order obtained by the parties by playing fraud, is a nullity and it can be challenged in any collateral proceedings even at the stage of execution. The Hon'ble Supreme Court in the case of *A. V. Papaya Sastry and ors. v. Government of A.P. and ors.*, reported in *AIR 2007 SC 1546;* has held as under :-

> "22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or

by the final court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings."

The Hon'ble Supreme Court further in the case of *N. Khosla v. Rajlakshmi (Dead) and others,* reported in *(2006) 3 SCC 605,* has held as under :-

> "The respondents fraudulently obtained a mutation in the land records on 22-1-1977. Fraud cloaks everything. Fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court, even in collateral proceedings. Hence, it is open to the appellant to file a suit challenging the said fraudulent mutation against the legal heirs of the respondent, whose appeal has been abated. If the suit is filed within two months from today, it shall not be dismissed as being barred by limitation.'

In the present case, there was no compromise at all, because the compromise has been entered between the so-called parties by playing fraud, hence, the award passed by the Lok Adalat on the basis of compromise could not be said to be a settlement arrived at between the parties.

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**317. CIVIL PROCEDURE CODE, 1908 – Section 152**

**(i) Amendment of partition decree – Seeking change in survey number of suit plot – It is not of substitution of property – No prejudice to objector – Order allowing amendment is legal – Case law reiterated.**

**(ii) A purchaser of undivided share in a joint family property is not entitled to possession of the property what he has purchased – He has merely acquired a right to sue for partition – Legal position restated.**

**Peethani Suryanarayana & Anr. v. Repaka Venkata Ramana Kishore & Ors.**

**Judgment dated 12.02.2009 passed by the Supreme Court in Civil Appeal No. 942 of 2009, reported in AIR 2009 SC 2141**

Held:

The factual matrix involved in the matter that in the plaint suit land was described as Revisional Survey No. 165. The village became a part of the municipality, by reason whereof a new Town Survey was assigned to the suit land being Town Survey No 463. However, in the plaint and consequently in the preliminary decree as also in the final decree, Town Survey No. 462 was mistakenly mentioned, which was evidently a typographical mistake.

The power of the court to allow such an application for amendment of plaint is neither in doubt nor in dispute. Such a wide power on the part of the

court is circumscribed by three factors, viz (i) the application must be bonafide; (ii) the same should not cause injustice to the other side and (iii) it should not affect the right already accrued to the defendants.

There cannot be any doubt whatsoever that the principles of natural justice are required to be complied with. But, in a case of this nature, the same would be an empty formality. The facts are not disputed. The identity of the suit land has not been changed. It is not a case where, as submitted by Mr. Mahabir Singh, one land is being substituted by another. The fact that the town survey No. 463 is a joint family property is not in dispute. As indicated herein before, it is the same plot which was the subject matter of sale and only in respect thereof the appellants herein could claim partition. Appellants have also furthermore not been able to show as to how and in what manner they have been prejudiced.

Appellants herein are pendente lite purchaser from the Defendant Nos. 3 to 7. A preliminary decree was passed against them. It has attained finality. They were also allowed to participate in the final decree proceedings. A final decree was also drawn up. It also attained finality. The respective shares of the parties inter se in the joint family property as also the plots of the lands which were required to be allocated respectively in their favour is no longer in dispute. It is also not in dispute that the appellants, being purchasers of undivided share in a joint family property, are not entitled to possession of the land what they have purchased. They have in law merely acquired a right to sue for partition. [See *M.V.S. Manikyala Rao v. M. Narasimhaswami and others, AIR 1966 SC 470* and *Hardeo Rai v. Sakuntala Devi and others, (2008) 7 SCC 46*]

In view of the aforementioned legal position, the appellants merely could have filed a suit for partition either as a plaintiff or defendant in respect of the property which was joint family property.

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**318. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**
**ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (f) & 12 (1) (b)**

**(i) Bonafide requirement for business – By pleading change of business, it cannot be said that requirement was not bonafide.**

**(ii) Original tenant was not in possession or control of the shop – Third person, who was no more partner of the original tenant at the time when tenancy was created, was carrying on his business and was in exclusive possession of the shop – Held, sub-tenancy was created within the meaning of Section 12 (1) (b) of the Act.**

**Danpati Addhahat Bhandar v. Ghansham Das Agrawal**

**Judgment dated 20.03.2009 passed by the High Court in Second Appeal No. 45 of 2002, reported in 2009 (II) MPJR 333**

Held:

The plaintiff initially pleaded necessity to start his wholesale business of

grain but subsequently nature of the business was shown as Khali, Chuni, Bhusa and kirana [cattle food and grocery] business. This amendment was incorporated on 10.02.1986. Thereafter though various amendments were made in the plaint but without changing the necessity as was pleaded on 10.02.1986 by the plaintiff. The suit was filed long back on 26.11.1979 and if during the pendency of the suit, the plaintiff decided to start his business of cattle food and grocery, in place of grain, it cannot be said that there was some malafide on the part of the plaintiff or he was not entitled to change the nature of the business which was initially pleaded by him. A period of nearabout 30 years have elapsed since the date of filing of the suit and if during these periods, circumstances changed then the plaintiff was entitled to plead and prove such changed circumstances. After filing of the suit, if the plaintiff decided to start his business of cattle food and grocery and specifically pleaded this fact in the plaint and deleted earlier pleaded business of grain, no fault can be found. It is a settled law that the bonafide necessity should continue from the date of filing of the suit till the final decree is passed. In this case the plaintiff's necessity was to start his business in wholesale which was initially pleaded by the plaintiff in the plaint. Only by change of business from grain to cattle food and grocery, it cannot be said that necessity was not bonafide.

The factual position in the present case is that Shikharchand was getting Rs. 3000/- p.m. though by way of salary but actual control over the shop was of Sunil Kumar. After dissolution of the partnership in the year 1986, Sunil Kumar was exclusively carrying on his business and infact was in exclusive possession of the shop. Shikharchand nowhere stated in his statement that still he was in possession or control of the shop in question. The defendant ought to have produced account books of shop and the deed of dissolution of partnership between the partners showing their bonafides. Apart from this as per the statement of Sunil Kumar, the shop belongs to him and he was exclusive owner of the shop. In view of the aforesaid specific statement of Sunil Kumar in para 3 and 10 of his statement, no conclusion can be arrived except that since 1986 the possession of shop was parted with to Sunil Kumar in the capacity of sole proprietor of M/s Danpati Addhahat Bhandar. The earlier partnership of Shikharchand and Ravichand as a partner of Danpati Addhaha Bhandar came to an end.

. They retired from the partnership firm and started their own business at different places. In these circumstances, the court below erred in not granting decree under Section 12 (1) (b) of the M.P. Accommodation Act in favour of the respondents. The conclusions recorded by the court below, on the basis of the findings of the facts recorded by court below, are apparently erroneous and cannot sustained under the law. The respondent was entitled for a decree under Section 12 (1) (b) of the Act.

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**319. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 & Order 1 Rule 10**

**(i) Amendment of plaint – Plaintiffs were, in effect and substance, seeking to alter basic structure of suit – Rejection of amendment application was, therefore, proper – Position explained.**

**(ii) Third party sought to be impleaded – Not only provisions of Order 6 Rule 17 but also the provisions of Order 1 Rule 10 would come into play – Doctrine of relation back discussed.**

**Alkapuri Co-operative Housing Society Ltd. v. Jayantibhai Naginbhai (Deceased) Thr. L.Rs.**

**Judgment dated 09.01.2009 passed by the Supreme Court in Civil Appeal No. 154 of 2009, reported in AIR 2009 SC 1948**

Held:

If respondent had an independent cause of action against the Corporation either in its capacity as a town Planner or as a local authority, in our opinion, the same by itself cannot be a ground for filing an application for amendment in the suit pending between the parties wherein, inter alia, the question of possession, inter se, is required to be determined.

The High Court as also the learned counsel appearing for the respondents, as noticed hereinbefore, have strongly relied upon the decision of this Court in the case of *Pankaja & Anr. v. Yellappa (Dead) by LRs & Ors., 2004 AIR SCW 4522* wherein relying on or on the basis of a decision of this Court in the case of *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co., AIR 1957 SC 357,* this Court opined that in an application for amendment of the plaint it may have to be kept in mind that the discretionary jurisdiction in that behalf can be exercised by the court even if the suit is barred by limitation.

It is neither in doubt nor in dispute that the court's jurisdiction to consider an application for amendment of pleading is wide in nature, but, when, by reason of an amendment, a third party is sought to be impleaded not only the provisions of O.VI. R. 17, Code of Civil Procedure (C.P.C.) but also the provisions of O.I. R.10, C.P.C. would come into play. When a new party is sought of sub-rule (5) of Rule 10 of Order I, C.P.C., the question of invoking the period of limitation would come in.

The High Court, in our opinion, in a case of this nature, should not have interfered with the discretionary jurisdiction exercised by the learned 3rd Additional Sr. Civil Judge. The question as to whether an application for amendment should be allowed inspite of delay and laches in moving the same, would depend upon the facts and circumstances of each case wherefor a judicial evaluation would be necessary.

The decision in the case of *Pankaja* (supra) itself is an authority for that proposition. So far as the decision in the case of *Sampat Kumar v. Ayyakannu & Anr., 2002 AIR SCW 3925* is concerned, this Court has struck a bit different note therein as it was observed :

"10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. [See observations in *Siddalingamma v. Mamtha Shenoy, (2001) 8 SCC 561*]."

There cannot be any doubt or dispute that an application for amendment of the plaint seeking to introduce a cause of action which had arisen during the pendency of the suite stands on a different footing than the one which had arisen prior to the date of institution of the suit. We have noticed hereinbefore that the plaintiff-respondents in their application for amendment of the plaint themselves accepted the fact that the appellant herein not only had filed a suit prior in point of time to the suit filed by the deceased-respondent but had also obtained an injunction as a result whereof they did not obtain effective possession of the suit land. If that be so, in our opinion, the plaintiff-respondents in effect and substance are seeking to alter the basic structure of the suit which in the case of *Sampath Kumar* (supra) itself has been held to be impermissible.

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**320. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 6-A**

**Counter claim between defendants *inter se*, maintainability of – A counter claim between defendants *inter se* is not maintainable – However, in the interest of justice, the same may be treated as plaint in a cross suit and may be tried alongwith suit.**

**Mukund Lal and another v. Ghanshyam and others**

**Judgment dated 05.05.2009 passed by the High Court in Writ Petition No. 5535 of 2007, reported in 2009 (3) MPHT 265 (DB)**

Held:

In the plaint the plaintiff-respondent Nos. 1 and 2 have prayed that the disputed property is Joint Hindu Family property of plaintiffs & defendant Nos. 1 to 11. The plaintiffs are also having title and possession. Prayer has been made to declare the sale-deed executed by defendant Nos. 1 and 2 in favour of defendant Nos. 15 and 16 to be illegal and void as against the plaintiffs. Further prayer has been made to declare the order dated 24-9-2005 passed by the Collector, District Chhatarpur to be ineffective. Counter claim has been filed by defendant Nos. 3 to 11 for declaring the sale-deed to be illegal and void as against their interest which has been executed by defendant Nos. 1 and 2 in favour of defendant Nos. 15 and 16.

It is apparent from the bare reading of aforesaid provision that counter-claim is maintainable by defendants against the claim of the plaintiff not inter se defendants. Same is the view taken by this Court in *Udhavdas Tyagi v. Srimurti Radhakrishna Mandir, Dehrighat, 2002 (I) MPWN 31* and by High Court of Patna in *Hem Narain Thakur v. Deo Kant Mishra and others, AIR 2000 NOC 23* (Pat.). We have no hesitation to hold that counter-claim filed by defendant Nos. 3 to 11 as against defendant Nos. 1 & 2, 15 & 16 could not be said to be maintainable under Order 8, Rule 6-A of CPC.

The factual matrix which is required to be considered it going to be more or less the same, in case counter-claim is ordered to be treated as cross suit. In appropriate cases such a direction can be issued, has been settled by the Apex Court in *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11.*The Apex Court has laid down thus:-

> "11. The question has therefore to be considered on principle as to whether there is anything in law – statutory or otherwise – which precludes a Court from treating a counter-claim as a plaint in a cross suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counter-claim which is to be treated as a cross suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross suit is made part of the Written Statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the Court was not prevented from separating the Written Statement proper from what was described as a counter-claim and treating the later as a cross suit. If so much is conceded it would then become merely a matter of degree as to whether the counter-claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a Court to convert or treat the counter-claim as a plaint in a cross suit. To hold otherwise would be to erect what in substance if is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in Order VIII, Rule 6 or in any other provision of the Code which laid an embargo on a Court adopting such a course."

The Apex Court has laid down that even counter-claim is not maintainable if justice manifestly demands it can be treated as cross suit and it would be open to a Court to convert or treat the counter-claim as a plaint in a cross suit. There is no embargo in Order 8 Rule 6-A of CPC to adopt the aforesaid course. A Single Bench of this court in *Kartar Singh and others v. Kanhai Singh and others, AIR 1989 MP 322* has also held that provisions of sub-rules 6-A and 6-G inserted in Order 8, CPC in 1977 regarding 'counter-claim' were not available to defendant 15 but his claim had to be still tried otherwise in accordance with law. The written statement could have been treated as a plaint in cross suit but the Court should have permitted the plaintiff as also the contesting defendants an opportunity to present their written statements to that claim as envisaged under Rules 1 and 9 of Order 8. In *Bhamri Bai v Ram Bai, 1999 (I) MPWN 19,* also similar view was taken by this Court relying upon the decision of Supreme Court in *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others (supra),* and also the decision of High Court of Jammu & Kashmir in *Ghulam v. Ghulam Ahmad and others, 1956 J & K 38.*

In the facts and circumstances of the case, we deem it appropriate to direct Trial Court to register the counter-claim as a cross suit and to try it along with instant suit. The plaintiffs and other defendants except defendant Nos. 3 to 11 shall be permitted by the Trial Court to file the written statement. The cross suit to be tried and decided along with the suit in question.

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**321. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 98, 100 & 102**
**TRANSFER OF PROPERTY ACT, 1882 – Section 52**
**Resistance or obstruction in execution of decree for possession of immovable property – Protection not available for transferee pendente lite – Held, purchasing the property from the judgment debtor during the pendency of the suit is not independent right to property and to resist or obstruct or object to the execution of a decree – Therefore, transferee is not entitled to get his claim adjudicated.**
**Dilip Kumar v. Vijay Bahadur Singh & Ors.**
**Judgment dated 17.03.2009 passed by the High Court in S.A. No. 116 of 2008, reported in AIR 2009 MP 165**

Held:

Rules 97 to 106 of Order 21 of the code deal with "resistance or obstruction to delivery of possession to decree holder or purchaser". Rule 97 enables the decree holder or auction purchaser to complain to executing Court if he/she is resisted or obstructed in obtaining possession of such property by "any person". The Court on receipt of such application will proceed to adjudicate it.

Rule 101 requires the Court to make full-fledged inquiry and determine all questions relating to right, title and interest in the property arising between the parties to the proceeding or their representatives. The Court will then pass an order upon such adjudication (Rule 98).

Rule 99 permits any person other than the judgment debtor who is dispossessed by the decree holder or auction purchaser to make an application to executing Court complaining such dispossession. The Court, on receipt of such application, will proceed to adjudicate it (Rule 100).

Rule 103 declares that an order made under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

Rule 102 clarifies that Rules 98 and 100 of Order 21 of the Code do not apply to transferee pendente lite. That Rule is relevant and material and may be quoted in extenso:

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

Bare reading of the Rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of order 21 of the Code thus takes into account the ground reality and refuses to extend helping hand to purchases of property in respect of which litigation is pending. If unfair, inequitable of undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the Rule has been enacted.

It is thus settled law that a purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent Court. The doctrine of "lis pendens" prohibits a party from dealing with the property which is the subject matter of suit. "Lis pendens" itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Rule 102, therefore, clarifies that there should not be resistance or obstruction by a transferee pendente lite. It declares that if the resistance is caused or obstruction is offered by a transferee pendente lite of the judgment debtor, he cannot seek benefit of Rules 98 or 100 of Order 21.

The Apex Court in the case of *Silverline Forum (P) Ltd. v. Rajiv Trust, AIR 1998 SC 1754,* has held that where the resistance is caused or obstruction is offered by a transferee pendente lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the

decree was passed. Once the finding is in the affirmative, the executing Court must hold that he had no right to resist or obstruct and such person cannot seek protection from the executing Court. The Apex Court stated :

> "10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing Court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution Court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act."

Thus purchasing the property from the judgment-debtor during the pendency of the suit has no independent right to property and to resist or obstruct or object to the execution of a decree. Resistance at the instance of transferee or judgment-debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and therefore is not entitled to get his claim adjudicated.

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**322. CIVIL PROCEDURE CODE, 1908 – Order 23 Rules 1 & 3**
**LIMITATION ACT, 1963 – Article 123**

**(i) Right to withdraw a suit – Pre-conditions for applicability – Held, the right to withdraw a suit in a suitor would be unqualified if no right has been vested in any other party – Further held, if suit is to be decreed or dismissed on the basis of compromise at appellate stage – Permission to withdraw the suit may be granted – Order 23 Rule 1 of the Code may not have any application, but only with the notice to the party who had become entitled to some interest in the property by reason of a judgment and decree passed in the suit – Terms reiterated.**

(ii) **Compromise/consent decree – Connotation thereof – Held, a consent decree, is merely an agreement between the parties with the seal of the Court super added to it – A compromise decree is not binding on such person who is not a party thereto – If a compromise is to be held to be binding, it must be signed by the parties failing which Order 23 Rule 3 of the Code would not be applicable – Further held, if a compromise is entered in the absence of all the parties, the same would be void.**

(iii) **Void/voidable decree – Setting aside of – Even if a decree/order is void/voidable (passed by a Court having inherent jurisdiction) the same must be set aside – Party agrieved by the said order/decree has to approach within the prescribed period of limitation to the Court for relief of declaration that the decree/order is inoperative and not binding upon him – Case law reiterated.**

(iv) **Reckoning of limitation to set aside ex parte decree – Article 123 of the Limitation Act – Held, it is in two parts – In a case where summons have served by a party, the first part shall apply – However, in a case where summons have not been served, the second part shall apply and then limitation reckoned from the date of knowledge – Legal position explained.**

(v) **Estoppel, connotation there of – Doctrine of estoppel and/or election as also the doctrine of approbate or reprobate has exceptions one of them being that there is no estoppel of statute.**

(vi) **Doctrine of ratification, application there of – Held, if the Court had no jurisdiction to accept compromise in defiance of the mandatory provision contained in Order 23 Rule 3 of CPC, the question of invoking doctrine of ratification would not arise.**

## Sneh Gupta v. Devi Sarup and others

**Judgment dated 17.02.2009 passed by the Supreme Court in Civil Appeal No. 1085 of 2009, reported in (2009) 6 SCC 194**

Held:

It is not a case where the original plaintiff applied for withdrawal of the suit simpliciter. She did so relying on or on the basis of a compromise entered into by and between the parties. If a suit is to be decreed or dismissed on the basis of a compromise, even if permission is sought to withdraw the suit pursuant thereto, in our opinion, Order 23 Rule 1 of the Code may not have any application. Even in such a case, a permission to withdraw the suit could have been given only with notice to the respondents who had become entitled to some interest in the property by reason of judgment and decree passed in the suit. The court for

the purpose of allowing withdrawal of a suit after passing the decree viz. at the appellate stage is required to consider this aspect of the matter.

Even if Order 23 Rule 1 of the Code of Civil Procedure was applicable, in terms of Rule 1-A of the said Order, the appellant as a defendant in the suit could have applied for being transposed as a plaintiff in terms of Order 1 Rule 10 of the Code of Civil Procedure and the court was bound to pass an order having due regard to the question as to whether she had a substantial question to be decided as against any of the other defendants. The appellant, indisputably, claimed and was found to have rightly claimed a share in the suit property. Having got a decree in her favour, she was entitled to protect the same. By reason of an agreement between some of the parties or otherwise, a litigant cannot be deprived from the fruits of the decree.

Order 23 Rule 3 of the Code of Civil Procedure provides that a compromise decree is not binding on such defendants who are not parties thereto. As the appeal has been allowed by the high Court, the same would not be binding upon the appellant and, thus, by reason thereof, the suit in its entirety could not have been disposed of.

The court has also a duty to prevent injustice to any of the parties to the litigation. It cannot exercise its jurisdiction to allow the proceedings to be used to work as substantial injustice.

A consent decree as is well known, is merely an agreement between the parties with the seal of the court superadded to it [See *Baldevdas Shivlal v. Filmistan Distributiors (India) (P) Ltd., (1969) 2 SCC 201* and *Parayya Allayya Hittalamani v. Parayya Gurulingayya Poojari, (2007) 14 SCC 318.*]

If a compromise is to be held to be binding, as is well known it must be signed either by the parties or by their counsel or both, failing which Order 23 Rule 3 of the Code of Civil Procedure would not be applicable.

(See *Gurpreet Singh v. Chatur Bhuj Goel, (1988) 1 SCC 270*)

In *Dwarka Prasad Agrawal v. B.D. Agarwal, (2003) 6 SCC 230* , this Court held (SCC pp. 243-44, paras 32 and 35)

> "32. The High Court also failed and/or neglected to take into consideration the fact that the compromise having been entered into by and between the three out of four partners could not have been termed as settlement of all disputers and in that view of the matter no compromise could have been recorded by it. The effect of the order dated 29-06-1992 recording the settlement was brought to the notice of the High Court; still it failed to rectify the mistake committed by it. The effect of the said order was grave. It was found to be enforceable. It was construed to be an order of the High Court, required to be implemented by the courts and the statutory authorities.

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> "35.....Even if the provisions of Order 23 Rule 3 of the Code of Civil Procedure and/or principles analogous thereto are held to be applicable in a writ proceeding, the court cannot be permitted to record a purported compromise in a casual manner. It was suo motu required to address itself to the issue as to whether the compromise was a lawful one and, thus, had any jurisdiction to entertain the same."

(See also *K. Venkatachala Bhat v. Krishna Nayak, (2005) 4 SCC 117*)

In *R. Rathinavel Chettiar v. V. Sivaramman, (1999) 4 SCC 89* this Court opined: (SCC pp. 96-97, para 22)

> "22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."

It is also well known that a suit cannot be withdrawn by a party after it acquires a privilege. [See: *R. Ramamurthi Iyer v. Raja V. Rajeswara Rao, (1972) 2 SCC 721*]

A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. (See *Bijayananda Patnaik v. Satrughna Sabu, AIR 1963 SC 1566* and *Hulas Rai Baij Nath v. Firm K.B. Bass & Co., AIR 1968 SC 111*)

The question of estoppel and/or election as also the doctrine of approbate or reprobate, whereupon reliance has been placed, has exceptions, one of them being that there is no estoppel against statute.

If ratification has to be done, all should be parties thereto. If the court had no jurisdiction to accept the compromise in defiance of the mandatory provisions contained in Order 23 Rule 3 of the Code of Civil Procedure, the question of invoking the doctrine of ratification would not arise. The doctrine of ratification may be applicable in the realm of private law regime but not for the purpose of amendment or modification of a decree.

There cannot be any doubt that even if an order is void or voidable, the same must be set aside, as has been held by this Court in *M. Meenakshi v. Metadin Agarwal, (2006) 7 SCC 470* and *Sultan Sadik v. Sanjay Raj Subba, (2004) 2 SCC 377.*

It is not a case where the Court lacked inherent jurisdiction. It had jurisdiction with regard to subject-matter of appeal.

In *Rajasthan SRTC v. Zakir Hussain, (2005) 7 SCC 447,* this Court held: (SCC pp. 459-60, para 21)

> "21. It is a well-settled principle of law as laid down by this Court that if the court has no jurisdiction, the jurisdiction cannot be conferred by any order of court. This Court in A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, wherein it is, inter alia, held and observed as under: (SCC pp. 650-51, paras 38-40)
>
> > 38.... This Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction.
> >
> > 39.... The Power to create or enlarge jurisdiction is legislative in character.... Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal..
> >
> > 40.... But the superior court can always correct its own error brought to its notice either by way of petition or ex debito justitiae.
>
> (See *Rubinstein's Jurisdiction and Illegality*)' "

The limitation, however, in a case of this nature would not begin to run from the date of knowledge.

In *State of Punjab v. Gurdev Singh, (1991) 4 SCC 1* this Court held: (SCC p.6, para 10)

> "10. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the court within the prescribed period of limitation. If the statutory time-limit expires the court cannot give the declaration sought for."

Article 123 of the Limitation Act is in two parts. In a case where summons have been served upon a party, the first part shall apply. However, in a case where the summons have not been served, the second part shall apply.

If the compromise has been accepted in absence of all the parties, the same would be void. But if the same having resulted in grant of a decree, the decree based on compromise was required to be set aside. The compromise

may be void or voidable but it is required to be set aside by filling a suit within the period of limitation. (See *Mohd. Noorul Hoda v Bibi Raifunnisa, (1996) 7 SCC 767.*)

Limitation is a statute of repose. If a suit is not filed within the period of limitation, the remedy would be barred.

We are concerned herein with a question of limitation. The compromise decree as indicated herein before, even if void was required to be set aside. A consent decree as is well known, is as good as a contested decree. Such a decree must be set aside if it has been passed in violation of law. For the said purpose, the provisions contained in the Limitation Act, 1963 would be applicable. It is not the law that were the decree is void, no period of limitation shall be attracted at all. In *State of Rajasthan v. D.R. Laxmi, (1996) 6 SCC 445* this Court held: ( SCC p 453, para 10 )

> "10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void, the net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for; the award of the Court under Section 26 enhancing the compensation was also accepted. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4(1) and declaration under Section 6."

Yet again, in *M. Meenakshi (Supra)* this Court held: (SCC p 478, para 18)

> "18. It is a well- settled principle of law that even a void order is required to be set aside by a competent court of law inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non est. An order cannot be declared to be void in a collateral proceeding and that too in the absence of the authorities who were the authors thereof. The orders passed by the authorities were not found to be wholly without jurisdiction. They were not, thus, nullities."

Yet again, in *Sultan Sadik (Supra)* this Court held: (SCC p 390, para 39)

> "39. An order may be void for one and voidable for the other. An invalid order necessarily need not be non est; in a given situation it has to be declared as such. In an election petition, the High Court was not concerned with the said issue."

Even otherwise, we do not think that any error has been committed by the High Court in arriving at the finding that the appellant had knowledge of the passing of the compromise decree much earlier. She did not file any application for condonation of delay. She filed two more applications for recall of the order dated 6-11-2004 in other enacted appeals. Those applications were also field after expiry of the period of limitation and none of those applications were also accompanied with an application for condonation of delay. In absence of any application for condonation of delay, the Court had no jurisdiction in terms of Section 3 of the Limitation Act, 1963 to entertain the application for setting aside the decree. [See *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar, (2003) 7 SCC 66* and *Sayeda Akhtar v. Abdul Ahad, (2003) 7 SCC 52*].

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**323. CIVIL PROCEDURE CODE, 1908 – Order 32 Rule 7, Order 47 Rule 1 and Order 23 Rule 3-A**

**(i) Review, scope of – A judgment is open to be reviewed *inter alia* if there is a mistake or error apparent on the face of the record – The error which is not self–evident and has to be detected by process of reason cannot be said to be an error apparent on the face of the record justifying the Court to exercise its power for review under Order 47 Rule 1.**

**(ii) Bar to suit, scope of – Rule 3-A does not create an absolute bar against institution of a suit to set aside the compromise decree – It merely puts an embargo on the parties to dispute compromise decree on the ground that the compromise on which the decree is based was not lawful – Crucial question for the purpose of this provision is that whether a compromise may be called as not lawful within the meaning of Rule 3-A – Compromise within the meaning of this provision would not be lawful if the consideration or the object of the agreement is forbidden by law, or is of such a nature that if permitted, it would defeat the provision of law – The word "lawful" cannot be construed as wide enough to include whether the promise is voidable or not.**

**Tijauwa and others v. Rajmani and another**

**Judgment dated 15.04.2009 passed by the High Court in M.A. No. 392 of 1993, reported in 2009 (3) MPLJ 168**

Held :

As regards scope of Order 47, Rule 1, Civil Procedure Code it is almost settled that a judgment is open to be reviewed inter alia if there is a mistake or

error apparent on the face of the record. The error which is not self evident and has to be detected by process of reason can hardly be sought to be an error apparent on the face of the record justifying the Court to exercise its power for review under Order 47, Rule 1, Civil Procedure Code. In the instant case minority of Claimants Nos. 2 to 5 is on record and the absence of leave under Order 32, Rule 7 is also equally on record. It is further clear that the claims tribunal while passing the order on compromise application dated 3-12-1991 did not apply its mind to the interest of the minors who lost their father during tender age and the claim petition was brought to an end in contravention of procedure prescribed under sub-rule (1 and 2) of Rule 7 of Order 32, Civil Procedure Code.

Thus, the case for review was equally made out and the order dated 3-12-1991 is also not sustainable in law being opposed to the interest of the minor claimants.

Claims Tribunal, Rewa has passed the pervious order dated 3-12-1991 on the basis of compromise and subsequent order on 8-4-1993 on the ground that the only remedy to the minors is to avoid the compromise by way of instituting a separate suit and that no case for review has been made out. Subsequent order seems to have been passed in the light of the provisions contained in Order 23, Rule 3-A of Civil Procedure Code which reads as under :-

> **3.A. Bar to suit.** – No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

Aforesaid provision does not create an absolute bar against institution of a suit to set aside the compromise decree. It merely puts an embargo on the parties to dispute compromise decree on the ground that the compromise on which the decree is based was not lawful. Crucial question for the purpose of this provision is that whether a compromise may be called as not lawful within the meaning of Rule 3-A (supra). Compromise within the meaning of this provision would not be lawful if the consideration or the object of the agreement is forbidden by law, or is of such a nature that if permitted, it would defeat the provision of law. The word "lawful" cannot be construed as wide enough to include whether the promise is voidable or not.

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**324. CIVIL PROCEDURE CODE, 1973 – Order 39 Rules 1 & 2 r/w/s 151 and Order 43 Rule 1 (r)**

**(i) The term "party wall", connotation of – The term "party wall" may be used in different senses.**

**(ii) Rights in a party-wall – Law reiterated.**

**Prasann Kumar Jain v. Dr. Basant Baman Rao**

**Judgment dated 05.05.2009 passed by the High Court in Writ Petition No. 5581 of 2008, reported in 2009 (3) MPHT 478 (DB)**

**Facts of the case:**

The plaintiff-respondent filed a suit for declaration and injunction in respect to a party wall.

An application for issuance of temporary injunction under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure has also been filed by the plaintiff praying that till the decision of the suit, the defendant should maintain status quo in respect to the disputed party wall.

According to the plaintiff, the defendant has no right to remove the party wall or to reconstruct or raise any construction over it. If the disputed wall is dismantled or damaged, the staircase and other structures, which are embedded in the party wall, would fall down. According to the plaint, the disputed wall is quite old and, therefore, if any danger caused to it, the plaintiff will suffer irreparable loss.

The petitioner-defendant filed reply of the said application and stated that the defendant has all the right to raise and construct his house including the half portion of the disputed party wall, which is in his ownership. It has also been stated in the reply that he is not raising any construction or damaging the disputed wall of plaintiff's share. Further, it has also been stated that he is not going to damage either the staircase or the plank embedded in the party wall and even if the staircase or the plank of the plaintiff are damaged, he will get it repaired and hence it has been prayed that the application for issuance of temporary injunction filed by the plaintiff be dismissed.

The trial court rejected the application and took undertaking on behalf of the defendant to ensure interest of plaintiff. The appellate court allowed the application of the plaintiff. Hence there order is under challenge in this petition.

Held :

This Court in *Gulabchand v. Manikchand, 1960 JLJ 419,* in para 2 has held that law relating to rights in a party-wall is settled and may be stated thus:—(1) each co-owner can reasonably use it, without interfering with the enjoyment of the wall by the other but he must not do anything which will damage or weaken the wall; (2) if a co-owner builds a new piece of wall on the top of the party wall either with the consent or with the acquiescence of the other co-owner, the raised portion of the wall assumes the same character as the original party wall; (3) if one co-owner raises the wall without the consent or acquiescence of the other co-owner, he makes himself liable to an action for an injunction; (4) where a party-wall is reconstructed by one co-owner as his exclusive expense, it retains the original character of a party-wall and he cannot ask for an injunction to restrain the other co-owner from claiming ownership in it.

Applying the aforesaid principle laid down in the aforesaid decision, in the present factual scenario since, in the present case also the disputed wall is a party wall, therefore, each co-owner (plaintiff and defendant) can reasonably use it without interfering with the enjoyment of the wall by the other but he must

not do anything which may damage or weaken the wall. Further, it has been laid down in the aforesaid decision that if the co-owner builds a new piece of wall on the top of the party wall, the raised portion of the wall assumes the same character as the original party wall. So far as the factum of obtaining the consent of co-owner of the party wall (plaintiff) is concerned, it is found that the same is not being given by the plaintiff, because it is his case that he asked the defendant not to raise any construction in the party wall. Hence, according to us, the defendant/petitioner, who is an adjoining owner, is entitled to remove and replace his share in the party wall for the purpose of raising the construction of his house because the plaintiff has not given his consent. The logic behind to take consent is that smoothly and without causing any damage to the other party, construction of the party wall after dismantling it may take place. According to us, if a party does not give his consent, it would not mean that other party will never raise construction in its perpetuity and would allow the wall to be more weaken and would permit the said wall to fall down which may result in causing damage to his house.

The term "party wall" may be used in four different senses, as meaning (1) a wall of which two adjoining owners are tenants in common; (2) a wall divided vertically into two strips one belonging to each of the adjoining owners; (3) a wall which belongs entirely to one of the adjoining owners; but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; (4) a wall divided vertically into halves, each half being subject to a cross easement in favour of the owner of the other half. (See Para 889 of *Halsbury's Laws of England,* Fourth Edition Volume 4 at Page 393). According to us, the given case in hand comes in the first category and the plaintiff and the defendant are the tenants in common in respect to the disputed party wall.

Generally a party wall is a wall erected and standing on a line between two estates or tenements owned by different persons for the use in common of both estates or tenements, and each owner owns in severalty as much of the wall as stands on his own land, subject to the easement of the other owner of support for his building from the entire wall and of the maintenance of the wall as a party wall. (See para 1 of *Corpus Juris Secundum,* Volume 69, at Page 2).

According to some authorities, even though a party wall is sufficient to support existing structures and is not in dangerous condition, one of the adjoining owners may take it down and replace it with a wall sufficiently strong to support a new structure for which a stronger wall is required, if he replaces the wall within a reasonable time and exercises due care and avoid injury to the property of the other adjoining owner; as a general rule either owner may take down and replace a party wall which is in such condition as to be dangerous to life or property or insufficient to support existing structures, on giving reasonable notice to the other owner and exercising reasonable care in the operation. [See, para 16 (b) of *Corpus Juris Secundum,* Volume 69, at page 16]

According to us, the learned Trial Court, before whom the discretion vests to decide the application for issuance of temporary injunction by applying the correct principles laid down to decide the application of temporary injunction, has rightly held that although the plaintiff is having a *prima facie* case, but if the temporary injunction is issued against the defendant-petitioner restraining him not to raise construction, certainly he will suffer irreparable loss and degree of balance of convenience rather would be in favour of the defendant and therefore, by exercising its discretion rightly it was ordered by the learned Trial Court directing the defendant to give an undertaking that in case while constructing his portion including his share in the disputed party wall, any damage is caused to plaintiff's property, he will either get damaged property repaired or would pay compensation to the plaintiff.

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**325. CIVIL PROCEDURE CODE, 1908 – Order 47**

**Decree against a private company, execution of – Being a distinct legal entity, it cannot be executed against Managing Director or Directors.**

**Vimalchand v. M/s Arora Distillery Pvt. Ltd. Company, Vidisha and another**

**Judgment dated 15.04.2009 passed by the High Court in Civil Rev. No. 192 of 2008, reported in 2009 (3) MPLJ 332**

Held :

This Court in the case of *Pravinchand Parakh vs. Navratanmal Nahata and ors., 1995 MPLJ Short Note 59* has held that a duly Registered Company is a distinct legal entity than its Directors. The fact that the Directors have shares in the Company is no ground to hold that the decree obtained against the company would be binding on the Directors or that it can be executed against their personal property. High Court of Madras in the case of *K.S. Narsimhan v. Commercial Tax Officer Kuralagam Annexe, Chennai, (2008) 11 VST 283* after considering the judgments of various High Courts has held that a company is a legal entity by itself and it can be sued or can be sued as a legal entity and any dues from the company has to be recovered only from the company and not from its directors. In *Kuriakose v. P.K.V. Group Industries and another, 2002 (111) Company Cases 826* the Kerala High Court after considering the judgments of the various High Courts including the judgment in the case of *Santanu Ray v. Union of India, (1998) 3 Comp. LJ 259* in which it was observed that in certain circumstances the Court may disregard special legal entity of the company if it was formed or is used to facilitate the evasion of legal obligations where individual directors of a company were sought to be proceeded against for evasion of excise duty, the corporate veil was directed to be lifted to determine whether a particular director could be proceeded against or whether he was liable for payment of all duties, the learned Single Judge of Kerala High Court noticing the fact that such question as was involved in the case of *Santanu Ray* (supra)

does not arise in the case before it held that there in no provision in the Companies Act making the Managing Director of a private Company personally liable for recovery of duties against the company and that the company is a separate legal entity and its liability cannot be imposed on officers or directors. In the case of *H.S. Sidana v. Rajesh Enterprises, 1993 Volume 77 Punjab and Haryana 251* it was held that where there was a decree for recovery of sums due to a Bank from a company in a suit against the company and its Managing Director, the liability to discharge the decretal amount was that of the company and not of its Managing Director. The executing Court could proceed against the Managing Director of the judgment debtor company only if it came to the conclusion that the Managing Director was personally liable to discharge the decretal amount.

Having regard to the aforesaid, I am of the view that a decree passed against a private company which being a distinct legal entity it cannot be executed against its Managing Director or Directors and the Managing Director or Directors cannot be held personally liable. The non-applicant No. 1 decree holder could not have proceeded against the personal properties of applicant Managing Director of the non-applicant No. 2 Company.

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***326. CONSUMER PROTECTION ACT, 1986 – Sections 14 (1) (d), 18, 22 (1) & 23 Medical negligence – Evolution as a tort – Mere misjudgment or error in medical treatment by itself would not be decisive of negligence towards the patient – A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional – He may be held liable for negligence on one of the two findings; either he was not possessed with the requisite skill which he professed to have possessed or he did not exercise, with reasonable competence in the given case, the skill which he did possess – The test for determining medical negligence as laid down in** *Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582* **and** *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1* **restated.**

**Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka and others**

**Judgment dated 14.05.2009 passed by the Supreme Court in Civil Appeal No. 4119 of 1999, reported in (2009) 6 SCC 1**

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**327. CRIMINAL PROCEDURE CODE, 1973 – Sections 133, 138 & 144**

**(i) "Nuisance" meaning and kinds thereof and remedies available in civil and criminal law therefor explained.**

**(ii) Proceedings under Section 133 CrPC are in aid to remove public nuisance caused by discharge of effluents and air discharge causing hardship to the general public – The person against whom action is taken is not an accused within the meaning of**

**Section 133 of the Code – He can give evidence on his own behalf and may be examined on oath – Proceedings are not the proceedings in respect of offences.**

**Suhelkhan Khudyarkhan & Anr. v. State of Maharashtra & Ors. Judgment dated 15.04.2009 passed by the Supreme Court in Criminal Appeal No. 1039 of 2005, reported in AIR 2009 SC 1868 (3 Judge Bench)**

Held:

The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that:

> "even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort".

In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu, 1995 Supp 4 SCC 54,* it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc.

Nuisances are of two kinds, i.e. (i) Public: and (ii) Private. 'Public nuisance' or 'common nuisance' as defined in Section 268 of the Indian Penal Code, 1860 (in short the 'IPC') is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. 'Private nuisance' on the other hand, affects some individuals as distinguished from the public at large.

The remedies are of two kinds – civil and criminal. The remedies under the civil law are of two kinds. One is under Section 91 of the Code of Civil Procedure, 1908 (in short 'CPC'). Under it a suit les and the plaintiffs need not prove that they have sustained any special damage. The second remedy is a suit by a private individual for a special damage suffered by him. There art three remedies under the criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings under Sections 133 to 144 of the Code, and the third relates to remedies under special or local laws. Sub-section (2) of Section 133 postulates that no order duly made by a Magistrate under this Section shall be called in question in any civil Court. The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large.

Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a

right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Sections 133 and 144 of the Code shows that while the former is more specific the latter is more general. Therefore, nuisance specially provided in the former section is taken out of the general provisions of the latter section. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature.

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***328. CRIMINAL PROCEDURE CODE, 1973 – Section 154**
**EVIDENCE ACT, 1872 – Sections 3 & 60**
**Appreciation of Evidence**

**(i) Conduct of eye witness – While accused persons were attacking the deceased, it cannot be expected that a lady (widow of deceased) and a small boy of 15-16 years (son of deceased) would dare to intervene in the attack made by the two accused persons being armed with sharp edged weapons in their hands.**

**(ii) P.W. 5 Govind Singh specifically stated in his depositions that he saw the accused persons running towards the village side carrying weapons – His presence at the spot cannot be doubted as it established that he was on duty at the railway police post Kahangarh – He has also stated in his deposition that he had in fact chased two accused persons upto a certain distance but could not manage to nab them and that when he returned to the scene of occurrence, Surjit Kaur (PW 3) (widow of deceased) disclosed to him about the occurrence – This shows that he did not see the accused persons attacking the deceased but learnt about the same from an eye witness and the said information about the dead body lying at the platform was flashed by him – His information would be hearsay evidence but as the same corroborates the substantive evidence of PW2 and PW3, the same would be admissible as was held in the case of** *Pawan Kumar v. State of Haryana, 2003 AIR SCW 3671* **wherein it was observed that evidence of such nature could be used to corroborate the substantive evidence – In these circumstances also, Govind Singh PW5 cannot be called in any manner an interested witness – In fact, he was the most disinterested witness.**

**(iii) No telephone was installed at the railway station Kahangarh – Telephone installed at railway control room at the railway station was also found to be out of order – Wireless message sent**

**through nearby GRP post Bhatinda by Govind Singh posted on duty at railway station stated that the dead body is lying at railway station Kahangarh – These circumstances explain the delayed information as well as absence of detailed information regarding all material leading to the occurrence.**

**Mukhtiar Singh & Anr. v. State of Punjab**

**Judgment dated 20.01.2009 passed by the Supreme Court in Criminal Appeal No. 448 of 2007, reported in AIR 2009 SC 1854**

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**329. CRIMINAL PROCEDURE CODE, 1973 – Sections 157, 173 (8) & 166-A Investigation – Further investigation outside India – Right of accused – Accused objected on the ground that the requirements under Section 166-A has not been fulfilled – Held, the accused has no right to be heard at the stage of investigation – The accused will have full opportunity during the trial to raise the question about the validity/ admissibility of the evidence so collected.**

**Narender S. Goel v. State of Maharashtra and another**

**Judgment dated 08.05.2009 passed by the Supreme Court in Criminal Appeal No. 1058 of 2009, reported in (2009) 6 SCC 65**

Held:

The deceased was a Canadian citizen of Indian origin. She was alleged to have been murdered in Mumbai. Her dead body was sent back to Canada where second autopsy was performed and genetic material relating to her was preserved. At the request of husband of the deceased, the chief Coroner of the Province of Ontario in Canada wrote to Commissioner of Police in Mumbai that they were ready to assist Mumbai police with the help of genetic material preserved by them. Husband of the deceased also filed a criminal writ petition in the High Court seeking a direction to Mumbai Police to seek the assistance of Chief Coroner in accordance with Section 166-A CrPC. Mumbai police expressed its inclination to avail of assistance of the Chief Coroner. The High Court directed Mumbai Police to get the material collected in the course of investigation examined in Canada and report so obtained would form part of medical and forensic investigation. Such report would be filed in the trial court under Section 173 (8) CrPC. The appellant objected to the High Court order on the ground that requirements of Section 166-A had not been fulfilled.

The basic stand of the appellants is that the High Court has not kept in view the parameters of Section 166-A of the Code. It is submitted that some evidence which is already in existence but in a country outside India can be collected. But for that purpose

(1) an application is required to be made by the prosecution before the Competent Court of law i.e. the Court which is seized of the matter; and

(2) the application shall be for collecting the evidence and not for creating the evidence.

(3) On such application being allowed, an appropriate request by way of letter of authority from competent court of law to the concerned court of law or authority where such evidence is available has to be made.

It is the stand of the appellants that in the instant case neither has the application been made by the prosecution nor had any letter of request had been issued by competent court of law. Though the Court of Session at Sewree in Mumbai is seized of matter by avoiding the said court and by invoking writ jurisdiction of the Bombay High Court, consent order has been obtained between the family members of the deceased and the prosecution keeping is the accused persons completely away from the proceedings though their rights are directly affected.

The issue before the Supreme Court was whether accused persons could raise any objection at the stage of investigation.

The Supreme Court held that;

It is well settled that the accused has no right to be heard at the stage of investigation. The prosecution will however have to prove its case at the trial when the accused will have full opportunity to rebut/question the validity and authenticity of the prosecution case. In *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P., (1999) 5 SCC 740* this Court observed: (SCC p. 743, para 11)

> "11. There is nothing in Section 173 (8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard."

The accused can certainly avail himself of an opportunity to cross-examine and/or otherwise controvert the authenticity, admissibility or legal significance of material evidence gathered in the course of further investigations. Further in light of the views expressed by the investigating officer in his affidavit before the High Court, it is apparent that the investigating authorities would inevitably have conducted further investigation with the aid of CFS under Section 173(8) of the Code.

We are of the view that what is the evidentiary value can be tested during the trial. At this juncture it would not be proper to interfere in the matter.

It is stated that there was a confession by the accused persons on the basis of which recoveries were made. The bloodstained clothes of the accused (A-1) and the deceased were seized. It is pointed out as note above that a Canadian citizen was murdered and therefore the Canadian Police was involved. The dead body was taken to Canada and the genetic material was with the Canadian Coroner.

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**330. CRIMINAL PROCEDURE CODE, 1973 – Sections 167, 309 & 173 CONSTITUTION OF INDIA – Articles 32 & 226**

**(i) "Further investigation" and "re-investigation", difference therein – Held, "further investigation" and "re-investigation" stands on different footing – Special Investigation Team (SIT) was directed to conduct further investigation in the matter – Cognizance of case has already been taken and the accused persons are on bail – They could not be taken in police custody or judicial custody unless the bail is cancelled.**

**(ii) Power to remand the accused in custody – Extent and scope – Held, the pre-cognizance jurisdiction to remand is vested in the subordinate Courts, therefore, must be exercised within four corners of the Code – The power to remand in terms of Section 167 CrPC is to be exercised when investigation is not completed – Once the chargesheet is filed and cognizance of the offence is taken, the Court cannot exercise its power under Section 167 (2) CrPC – Its power of remand can be exercised in terms of Section 309 (2) CrPC – Instances followed.**

**Mithabhai Pashabhai Patel and others v. State of Gujarat**

**Judgment dated 06.05.2009 passed by the Supreme Court in Criminal Appeal No. 941 of 2009, reported in (2009) 6 SCC 332**

Held:

This Court while passing the order in exercise of its jurisdiction under Article 32 of the Constitution of India did not direct reinvestigation. This Court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of sub – section (8) of Section 173 of the Code can pray before the court and may be granted permission to investigate into the matter further. There are, however, certain situations, where such a formal request may not be insisted upon.

It is, however, beyond any cavil that "further investigation" and "reinvestigation" stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a "State" to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in *Ramachandran v. R. Udhayakumar, (2008) 5 SCC 413* opined as under: (SCC p. 415, para 7)

> "7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but no fresh investigation or reinvestigation."

A distinction, therefore, exists between a reinvestigation and further investigation.

This aspect of the matter has also been considered by this court in *Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441* wherein it has been opined: (SCC pp. 465-66, para 63)

> "63. The High Court in this case was not monitoring any investigation. It only desired that the investigation should be carried out by an independent agency. Its anxiety, as is evident from the order dated 3-4-2002, was to see that the officers of the State do not get away. If that be so, the submission of Mr. Rao that the monitoring of an investigation comes to an end after the Charge-sheet is filed, as has been held by this Court in *Vineet Narain v. Union of India, (1998) 1 SCC 226,* loses all significance."

The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code.

The power to remand, indisputably, is vested in a Magistrate in terms of sub-section (2) of Section 167 of the Code.

The power of remand in terms of the aforementioned provision is to be exercised when investigation is not complete. Once the charge- sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309.

The appellants had been granted bail. They are not in custody of the court. They could not be taken in custody ordinarily unless their bail was not (sic) cancelled. The High Court, in our opinion, was not correct in holding that as further investigation was required, sub-section (2) of Section 167 of the Code gives ample power for grant of police remand.

The distinction between the power of remand in terms of sub- section (2) of Section 167 and sub-section (2) of Section 309 of the Code is apparent. We may notice a few precedents in this behalf. In *Raghubir Singh v. State of Bihar, (1986) 4 SCC 481* this Court held: (SCC p 502, para 22)

> "22. The result of our discussion and the case law is this: An order for release on bail made under the proviso to Section 167 (2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309 (2). The order for release on bail may however be cancelled under Section 437 (5) or Section 439 (2).

Generally the grounds for cancellation of bail, broadly, are interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence, etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167 (2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

Yet again in *CBI v. Anupam J. Kulkarni, (1992) 3 SCC 141,* K. Jayachandra Reddy, J. speaking for the Bench held as under: (SCC pp. 157-58, para 11)

"11. ....We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167 (2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justices should be preferred, It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody.

But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused."

We may also notice that in *State v. Dawood Ibrahim Kashkar, (2000) 10 SCC 438* a three-Judge Bench held as under: (SCC p. 444, para 7)

"7. ..The manner in which a person arrested during investigation has to be dealt with by the investigating agency, and by the Magistrate on his production before him, is provided in Section 167 of the Code. The said section contemplates that when the investigation cannot be completed within 24 hours fixed by Section 57 and there are grounds to believe that the charge leveled against the person arrested is well founded it is obligatory on the part of the investigation officer to produce the accused before the nearest magistrate. On such production the Magistrate may authorise the detention of the accused initially for a term not exceeding 15 days either in police custody, or in judicial custody. On expiry of the said period of 15 days the magistrate may also authorize his further detention otherwise then in police custody if he is satisfied that adequate grounds exist for such detention."

This *Court in Dinesh Dalmia v. CBI, (2007) 8 SCC 770* opined: (SCC p 784, para 38)

"38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by Parliament at two stages; Pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom no such offence has been made out even when investigation is pending. So long a charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code."

In *Rama Chaudhary v. State of Bihar, (2009) 6 SCC 346* it was held: (SCC p. 349, paras 15-18)

15. The abovesaid provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to 'further' investigation under sub-section (8) of Section 173 but not 'fresh investigation 'or 'reinvestigation'. The meaning of 'further' is additional, more, or supplemental. 'Further' investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

    Sub-section (8) of Section 173 clearly envisages that on completion of further investigating agency has to forward to the magistrate a 'further' report and not a fresh report regarding the 'further' evidence obtained during such investigation."

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**331. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 (8) & 231 "Further investigation", meaning and scope – Distinction between "further investigation" and "re-investigation" or "fresh investigation" – Held, the meaning of "further investigation" is additional, more or supplemental – "Further investigation", therefore, is continuation of the earlier investigation and not fresh investigation or re-investigation to be started *ab initio* in wiping out the earlier investigation altogether – Position explained.**

**Rama Chaudhary v. State of Bihar**

**Judgment dated 02.04.2009 passed by the Supreme Court in Criminal Appeal No. 619 of 2009, reported in (2009) 6 SCC 346**

Held:

Sub-section (1) of Section 173 CrPC makes it clear that every investigation shall be completed with unnecessary delay. Sub-section (2) mandates that as soon as the investigation is completed, the officer in charge of the police station shall forward to a magistrate empowered to take cognizance of the offence on a

police report, a report in the form prescribed by the State Government mentioning the name of the parties, nature of information, name of the persons who appear to be acquainted with the circumstances of the case and further particulars such as the name of the offences that have been committed, arrest of the accused and details about his release with or without sureties.

Among the other sub-sections, we are very much concerned about sub-section (8) of Section 173 which reads as under:

> "173. (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the magistrate a further report or reports regarding such evidence in the from prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

A mere reading of the above provision makes it clear that irrespective of the report under sub-section (2) forwarded to the Magistrate, if the officer in charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the magistrate with a further report with regard to such evidence in the form prescribed. The abovesaid provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "further" is additional, more, or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

As observed in *Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347* the prime consideration of further investigation is to arrive at the truth and do

real and substantial justice. The hands of the investigating agency for further investigation should not be tied down on the ground of mere delay. In other words:

> "[t]he mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice." (SCC p. 351, para 13)
>
> The law does not mandate taking prior permission from the magistrate for further investigation. It is settled law that carrying out further investigation even after filing of the charge sheet is a statutory right of the police (vide *K. Chandrasekhar v. State of Kerala, (1998) 5 SCC 223*). The material collected in further investigation cannot be rejected only because it has been filed at the stage of the trial. The facts and circumstances show that the trial court is fully justified to summon witnesses examined in the course of further investigation. It is also clear from Section 231 CrPC that the prosecution is entitled to produce any person as witness even though such person is not named in the earlier charge sheet.

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**332. CRIMINAL PROCEDURE CODE, 1973 – Sections 197 & 464**

**(i) Protection under Section 197 of CrPC – Scope of operation – Protection available if the offence alleged to have been committed was in discharge of official duty – Use of the expression "official duty" implies that the act or omission must have been done by a public servant in the course of his service and that it should have been in discharge of his duty – Provision does not extend its protective cover to every act or omission done by a Public Servant in service – Case law reiterated.**

**(ii) Framing of charge – Error therein – Effect thereof – Held, no finding of sentence or order by the Court of competent jurisdiction becomes invalid because of any error in the charge unless it is so that the failure of justice is infact been occasioned – Obviously, the burden is on the accused to show that in fact the failure of justice has been occasioned.**

**State of Uttar Pradesh v. Paras Nath Singh**

**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 499 of 2004, reported in (2009) 6 SCC 372 (3 Judge bench)**

Held:

Prior to examining [whether] the courts below committed any error of law in discharging the accused, it may not be out of place to examine the nature of power exercised by the court under Section 197 of the Code and the extent of

protection it affords to public servants, who, apart from various hazards in discharge of their duties, in absence of a provision like the one may be exposed to vexatious prosecution.

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

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

> 17. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197 (1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for "it is no part of an official

duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision.'

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

It has been widened further by extending protection to even those acts or omissions, which are done in purported exercise of official duty. That is under the color of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which, further must have been official in nature. The section has thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance, a public servant is not entitled to indulge in crimnal activities. To that extent, the Section has to be construed narrowly and in a restricted manner. But once it is established that that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits and act in course of service but not in discharge of his duty then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official, was explained by this Court in *Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44* thus: (AIR p. 49, paras 17 & 19)

'17. ....The offence alleged to have been committed [by the accused] must have something to do, or must be related in some manner, with the discharge of official duty.....

19. ... There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty ; that the accused could lay a reasonable [claim], but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.'

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

In *S. A. Venkataraman v. State, AIR 1958 SC 107* and in *C.R. Bansi v. State of Maharashtra, (1970) 3 SCC 537* this Court has held that (Venkataraman case (supra), AIR p. 111, para 14)

> '14. ....There is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed.

That apart, the contention of the respondent that for offences under Sections 406 and 409 read with Section 120-B IPC sanction under Section 197 of the Code is a condition precedent for launching the prosecution is equally fallacious. This Court has stated the legal position in *Shreekantiah Ramayya Munipalli v. State of Bombay, AIR 1955 SC 287 and also in Amrik Singh v. State of Pepsu, AIR 1955 SC 309,* that it is not every offence committed by a public servant which requires sanction for prosecution under Section 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position it was held in *Harihar Prasad v. State of Bihar, (1972) 3 SCC 89* as follows: (SCC p. 115, para 66)

> 66. As far as the offence of criminal conspiracy punishable under Section 120-B, read with Section 409 of the Penal Code is concerned and also Section 5 (2) of the Prevention of Corruption Act is concerned, they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is therefore, no bar.'

Above views are reiterated in *State of Kerala v. Padmanabhan Nair, (1999) 5 SCC 690.* Both *Amrik Singh, (Supra)* and *S.R. Munipalli, (Supra)* were noted in that case. Sections 467, 468 and 471 IPC relate to forgery of valuable security, will, etc; forgery for the purpose of cheating and using as genuine a forged document respectively. It is no part of the duty of a public servant while discharging his official duties to commit forgery of the type covered by the aforesaid offences. Want of sanction under Section 197 of the Code is, therefore, no bar.

[This position was highlighted in *State of H.P. v. M.P. Gupta, (2004) 2 SCC 349,* (at SCC pp. 357-62, 10-14 & 21-22)].

Further, so far as the alleged error in framing the charge is concerned the effect of Section 464 of the Code has not been considered.

As the provision itself mandates that no finding, sentence or order by a court of competent jurisdiction becomes invalid unless it is so that a failure of justice has in fact been occasioned because of any error, omission or irregularity in the charge including in misjoinder of charge, obviously, the burden is on the accused to show that in fact a failure of justice has been occasioned.

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**333. CRIMINAL PROCEDURE CODE, 1973 – Section 300 (1)**
**CONSTITUTION OF INDIA – Article 20 (2)**
**N.D.P.S. ACT, 1985 – Section 23**
**Double jeopardy – The accused was tried and convicted in the foreign country USA in respect of a charge of conspiracy to posses a controlled substance with the intention of distributing the same whereas the accused is now being tried in India for offence relating to the importation of the contraband article from foreign country, Nepal, and exporting the same for sale in USA – Hence, the offence for which the accused was tried and convicted in USA and for which he is now being tried in India are distinct and separate and do not, therefore, attract the provisions of Section 300 (1) CrPC or Article 20 (2) of the Constitution.**

**Jitendra Panchal v. Intelligence Officer, NCB & Anr.**

**Judgment dated 03.02.2009 passed by the Supreme Court in Criminal Appeal No. 1660 of 2007, reported in AIR 2009 SC 1938**

Held:

In order to appreciate the questions which have been posed in this appeal, it will be necessary to briefly set out the factual background in which they arise.

On 17th October 2002, officers of the US Drug Enforcement Agency, alongwith officers of the Narcotics Bureau, India, seized a consignment of 1243 pounds equivalent to 565.2 Kgs. of Hashish in Newark, USA. During the investigation, it appears to have transpired that one Niranjan Shah and the appellant were engaged in trafficking Hashish out of India into the USA and Europe and that the seized contraband had been smuggled out of India by the

appellant and the said Niranjan Shah alongwith one Kishore. The appellant was arrested in Vienna in Austria by officers of the Drug Enforcement Agency, USA on 5th December, 2002 and was extradited to the USA. Soon, thereafter, on 25th March, 2003, the Deputy Director General of the Narcotics Control Bureau, hereinafter referred as 'the NCB', visited the USA and recorded the appellant's statement. Subsequently, on 9th April, 2003, officers of the NCB arrested Niranjan Shah, Kishore Joshi and Irfan Gazali in India and prosecution was launched against them in India. On 5th September, 2003, a complaint was filed by the NCB before the learned Special Judge, Mumbai, against Niranjan Shah, Kishore Joshi and two others under Sections 29/20/23/27A/24 read with Section 8(c)/12 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as the NDPS Act', in connection with the above-mentioned incident. While the said Niranjan Shah and others were being proceeded with before the learned Special Judge in Mumbai, the appellant, who had been extradited to the USA, was tried before the District Court at Michigan, USA, in Case No. 04 CR 80571-1. On pleading guilty of the charge of conspiracy to possess with intention to distribute controlled substances, which is an offence under Section 846 of Title 21, United States Code (USC) Controlled Substances Act, the appellant was sentenced to imprisonment on 27th June, 2006, for a total term of 54 months. After serving out the aforesaid sentence, the appellant was deported to India on 5th April, 2007, and on his arrival at New Delhi, he was arrested by officers of the NCB and was taken to Mumbai and on 10th April, 2007, he was produced before the learned Chief Metropolitan Magistrate and was remanded to judicial custody.

At this juncture, it may be indicated that although the appellant could have been prosecuted for other offences under Title 21 USC, the other charges against the appellant were dropped, as he had pleaded guilty to the offence of conspiring to possess controlled substances.

On 25th April, 2007, on the appellant's application that the proceedings against the appellant in India would amount to double jeopardy, the learned Special Judge, Mumbai, rejected the appellant's contention upon holding that the charges which had been dropped against the appellant in the proceedings in the USA had not been dealt with while imposing sentence against him in the District Court of Michigan, USA. The Special Judge extended the judicial custody of the appellant and subsequently rejected his prayer for bail on 17th May, 2007.

The appellant then approached the Bombay High Court. The Court rejected the plea of appellant.

It is against the rejection of such plea of double jeopardy by the High Court that the present appeal has been filed.

We have carefully considered the submissions made on behalf of the respective parties and we are not inclined to interfere with the order of the High Court rejecting the appellant's prayer for quashing the proceedings initiated by the NCB and the prayer for interim bail on the ground of double jeopardy.

In our view, the offence for which the appellant was convicted in the USA is quite distinct and separate from the offence for which he is being tried in India. As was pointed out by Mr. Naphade, the offence for which the appellant was tried in the USA was in respect of a charge of conspiracy to possess a controlled substance with the intention of distributing the same, whereas the appellant is being tried in India for offences relating to the importation of the contraband article from Nepal into India and exporting the same for sale in the USA. While the first part of the charges would attract the provisions of Section 846 read with Section 841 of Title 21 USC Controlled Substances Act, the latter part, being offences under the NDPS Act, 1985, would be triable and punishable in India, having particular regard to the provisions of Sections 3 and 4 of the Indian Penal Code read with Section 8(38) of the General Clauses Act, which has been made applicable in similar cases by virtue of Article 367 of the Constitution. The offences for which the appellant was tried' and convicted in the USA and for which he is now being tried in India, are distinct and separate and do not, therefore, attract either the provisions of Section 300(1) of the Code or Article 20(2) of the Constitution.

We are unable to agree with Mr. Tulsi that apart from the offence for which the appellant had been tried and convicted in the USA, he could also have been tried in the U.S.A. for commission of offences which were also triable under the NDPS Act, 1985, as the contents thereof are different from the provisions of Title 21 USC Controlled Substances Act which deal with possession and distribution of controlled substances within the USA. On the other hand, in our view, the provisions of Sections 3 and 4 of the Indian Penal Code would be apt in a situation such as the present one. For the sake of reference, Sections 3 and 4 of the Indian Penal Code are extracted herein below:-

> **"3. Punishment of offences committed beyond, but which by law may be tried within, India. –** Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond. India in the same manner as if such act had been committed within India.
>
> **4. Extension of Code to extra-territorial offences. –** The provisions of this Code apply also to any offence committed by –
>
> (1) any citizen of India in any place without and beyond India;
>
> (2) any person on any ship or aircraft registered in India wherever it may be."

It will be evident from the above that a person liable by any Indian law to be tried for any offence committed beyond India is to be dealt with under the provisions of the Code, having regard to the fact that the provisions of the Code

would also apply to any offence committed by any citizen of India in any place within and beyond India.

In that view of the matter, we see no reason to interfere with the order of the High Court impugned in this appeal. The appeal is accordingly dismissed.

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**334. CRIMINAL PROCEDURE CODE, 1973 – Sections 320 & 239**
**EVIDENCE ACT, 1872 – Section 43**

**(i) Composition of an offence, scope of – Settlement arrived at between parties i.e. complainant/creditor and accused/debtor in respect of the civil dispute, the offence committed as such does not come to an end – Further held, the offence alleged against the accused, being an offence against the society and the allegation contained in the FIR having been investigated by CBI, the Bank could not have entered into any settlement at all – Case law distinguished. [*Nikhil Merchant v. CBI, (2008) 9 SCC 677* referred and *CBI v. Duncans Agro Industries Ltd., (1996) 5 SCC 591* distinguished]**

**(ii) Civil Proceedings – Relevancy in a criminal proceeding, extent – The judgment of a civil proceeding and that too when it is rendered on the basis of settlement entered into by and between parties, would not be of much relevance in a criminal proceeding having regard to provisions contained in Section 43 of the Evidence Act – The judgment in the civil proceedings will be admissible in evidence only for a limited purpose.**

**(iii) Discharge – Legal requirements – Held, while considering an application for discharge filed in terms of Section 239 of CrPC, it was for the Judge to go into the details of allegations made against the accused person so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirement of law.**

**Rumi Dhar (Smt.) v. State of West Bengal and another**
**Judgment dated 08.04.2009 passed by the Supreme Court in Criminal Appeal No. 661 of 2009, reported in (2009) 6 SCC 364**

Held:

Sub-section (1) of Section 320 of the Code specifies the offences which are compoundable in nature; sub-section (2) providing for the offences which are compoundable with the permission of the court.

The appellant is said to have taken part in conspiracy in defrauding the Bank. Serious charges of falsification of accounts and forgery of records have also been alleged. Although no charge against the appellant under the Prevention of Corruption Act has been framed, indisputably, the officers of the Bank are facing the said charges.

It is now a well-settled principle of law that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the persons accused thereof including the officers of the Bank, criminal proceedings would also indisputably be maintainable.

When a settlement is arrived at by and between the creditor and the debtor, the offence committed as such does not come to an end. The judgment of a tribunal in a civil proceeding and that too when it is rendered on the basis of settlement entered into by and between the parties, would not be of much relevance in a criminal proceeding having regard to the provisions contained in Section 43 of the Evidence Act, 1872. The judgment in the civil proceedings will be admissible in evidence only for a limited purpose.

It is not a case where the parties have entered into a compromise in relation to the criminal charges. In fact, the offence alleged against the accused being an offence against the society and the allegations contained in the first information report having been investigated by the Central Bureau of Investigation, the Bank could not have entered into any settlement at all. CBI has not filed any application for withdrawal of the case. Not only a charge sheet has been filed, charges have also been framed.

At the stage of framing the charge, the appellant filed an application for discharge. One of the main accused is the husband of the appellant. The complicity of the accused persons was, thus, required to be taken into consideration for the purpose of determining the application for discharge upon taking a realistic view of the matter. While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details o the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law.

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**335. CRIMINAL PROCEDURE CODE, 1973 – Sections 357 (3), 421 & 431 r/w/s 64 IPC**

**The provisions of Sections 357 (3) and 431 CrPC, when read with Section 64 IPC, empower the Court, while making an order for payment of compensation, to also include a default sentence of imprisonment in case of non-payment of the same.**

**While awarding compensation under Section 357 (3) CrPC, the Court is within its jurisdiction to add a default sentence of imprisonment. If recourse can only be had to Section 421 CrPC for enforcing the same, the very object of sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory.**

**Vijayan v. Sadanandan K. and another**
**Judgment dated 05.05.2009 passed by the Supreme Court in SLP (Crl.) No. 3220 of 2008, reported in (2009) 6 SCC 652**

Held:

Since a decision on the question raised in this petition is still in a nebulous state, there appear to be two views as to whether a default sentence of imprisonment can be imposed in cases where compensation is awarded to the complainant under Section 357 (3) CrPC. As pointed out by by the learned counsel for respondent in *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528,* the distinction between a fine and compensation as understood under Section 357(1) (b) and Section 357 (3) CrPC had been explained, but the question as to whether a default sentence clause could be made in respect of compensation payable under Section 357(3) CrPC, which is central to the decision in this case, had not been considered.

In our view, the provision for grant of compensation under Section 357(3) CrPC and the recovery thereof makes it necessary for the imposition of a default sentence as was held by this Court firstly, in *Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551,* and thereafter, in *Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420.* In our view, the law has been correctly stated in the said two decisions.

Section 357 CrPC bears the heading "Order to pay compensation". It includes in sub-section (1) the power of the court to utilise a portion of the fine imposed for the purpose of compensating any person for any loss or injury caused by the offence. In addition, sub-section (3) provides that when a sentence is imposed by the court, 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 the order to the person who suffers any loss or injury by reason of the act for which the accused person has been so sentenced. It is true that the said provision does not include the power to impose a default sentence, but read with Section 431 CrPC the said difficulty can be overcome by the Magistrate imposing the sentence.

Section 431 makes it clear that any money other than a fine payable on account of an order passed under the Code shall be recoverable as if it were a fine which takes us to Section 64 IPC.

Section 64 IPC makes it clear that while imposing a sentence of fine, the court would be competent to include a default sentence to ensure payment of the same.

The provisions of Sections 357 (3) and 431 CrPC, when read with Section 64 IPC, empower the court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same.

The observations made by this Court in *Hari Singh case* (supra) are as important today as they were when they were made and if, recourse can only be had to Section 421 CrPC for enforcing the same, the very object of sub-

section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory.

Having regard to the view expressed hereinabove, we hold that while awarding compensation under Section 357 (3) CrPC, the Court is within its jurisdiction to add a default sentence of imprisonment as was held in *Hari Singh case* (supra).

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***336. CRIMINAL PROCEDURE CODE, 1973 – Section 446 (2) Proviso**

**Recovery of penalty of forfeited bond, mode thereof – Initially the Court should proceed to recover it as if it were a fine – It is only where it cannot be so recovered, the Court may pass an order of imprisonment in Civil Jail.**

**Sumiran Choudhary v. State of Madhya Pradesh**

**Judgment dated 30.03.2009 passed by the High Court in Criminal Revision No. 254 of 2009, reported in 2009 (3) MPHT 201**

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***337. CRIMINAL TRIAL:**

**Appreciation in case of related witness/inference of chance witness.**

**(i) Dying declaration found doubtful – Even conviction can be made on other cogent and trustworthy direct evidence.**

**(ii) Related witness – As normal human conduct, relative witnesses would not rope someone else as the murderers of their relative and give up the actual accused, rather they would make all endeavour to see that the actual culprits are punished.**

**(iii) Interested/chance witness – The date of incident was a "market day" at Gauriganj and therefore, it was natural, the persons from the nearby areas would go to the market place – In these circumstances, such persons cannot be termed as chance witnesses.**

**State of Uttar Pradesh v. Shobhanath and others**

**Judgment dated 08.05.2009 passed by the Supreme Court in Criminal Appeal No. 276 of 2002, reported in (2009) 6 SCC 600**

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**338. CRIMINAL TRIAL:**

**Reasonable doubt, standard of proof beyond reasonable doubt is a higher standard but there is no absolute standard.**

**State of Rajasthan v. Mohan Lal**

**Judgment dated 16.04.2009 passed by the Supreme Court in Criminal Appeal No. 85 of 2003, reported in AIR 2009 SC 1872**

Held:

A person has, no doubt, a profound right not to be convicted of an offence

which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case, Referring to the interdependence of evidence and the confirmation of one piece of evidence by another, a learned author says [see "The Mathematics of Proof II": Glanville Williams, Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342)]:

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent, Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice,. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P. v. Krishna Gopal, (1988) 4 SCC 302.*

The above position was highlighted in *Krishnan and Anr. v. State represented by Inspector of Police, (2003) 7 SCC 56.*

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***339. ESSENTIAL COMMODITIES ACT, 1955 – Sections 6-A & 6-B**

**Confiscation of essential commodity – Held, u/s 6-A of the Act, before passing any order of confiscation, Collector has to give an option to the owner of the vehicle to pay, in lieu of its confiscation, a fine not exceeding the market price of the essential commodity sought to be carried by said vehicle and not to the price of the vehicle concerned – U/s 6-B of the Act, no order for confiscation of vehicle etc. can be passed by the Collector, if the owner of the vehicle etc. proves to the satisfaction of the Collector that vehicle etc. was used in carrying the essential commodity without his knowledge or connivance by his agent.**

**Rajmohan Kapoor v. State of M.P. & Ors.**

**Judgment dated 19.03.2009 passed by the High Court in Crimina Revision No. 422 of 2003, reported in I.L.R. (2009) M.P. 1497**

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

**Appreciation of evidence.**

**(i) Principles of** *falsus in uno falsus in omnibus* **has no application in India – Attempt has to be made to separate truth from falsehood – Where it is not feasible, the only available course to be made is to discard the evidence in toto.**

**(ii) Discrepancies in evidence – Normal or material – Court has to level them and decide the credibility thereof.**

**Jayaseelan v. State of Tamil Nadu**

**Judgment dated 11.02.2009 passed by the Supreme Court in Criminal Appeal No. 456 of 2002, reported in AIR 2009 SC 1901**

Held:

In essence prayer is to apply the principle of *"falsus in uno falsus in omnibus"* (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of duty of the Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fat that evidence has been found to be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim *"falsus in uno falsus in omnibus"* has no application in India and the witness or witnesses cannot be branded as liar(s). The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence' [See *Nisar Alli v. The State of Uttar Pradesh, AIR 1957 SC 366*]. In a

given case, it is always open to a Court to differentiate accused who had been acquitted from those who were convicted where there are a number of accused persons. [See *Gurucharan Singh and Anr. v. State of Punjab, AIR 1956 SC 460*]. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason what one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. [See *Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh, (1972) 3 SCC 751* and *Ugar Ahir and Ors. v. The State of Bihar, AIR 1965 SC 277*]

An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. [See *Zwinglee Ariel v. State of Madhya Pradesh, AIR 1954 SC 15* and *Balaka Singh and others v. The State of Punjab, (1975) 4 SCC 511*]

(ii) As observed by this Court in *State of Rajasthan v. Smt. Kalki and Anr., (1981) 2 SCC 752,* normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do no corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in *Krishna Mochi and Ors. v. State of Bihar (2002) 6 SCC 81* and *in Sucha Singh v. State of Punjab, (2003) 7 SCC 643.* It was further illuminated in the *Zahira H. Sheikh v. State of Gujarat, (2004) 4 SCC 158, Ram Udgar Singh v. State of Bihar, (2004) 10 SCC 443, Gorle S. Naidu v. State of Andhra, (2003) 12 SCC 449, Gubbala Venugopalaswamy v. State of Andhra Pradesh, (2004) 10 SCC 120* and *in Syed Ibrahim v. State of A.P., (2006) 10 SCC 601.*

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

**Custodial death – The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable – In the ultimate analysis the society suffers and a criminal gets encouraged – Tortures in police custody which of late are on the increase receive encouragement by this type of an unrealistic approach at times by the Court as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture – The Courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society – The Court must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which, if it happens, will be a sad day, for any one to reckon with.**

**Dalbir Singh v. State of U.P. & Ors.**

**Judgment dated 03.02.2009 passed by the Supreme Court in Writ Petition (Cri) No. 193 of 2006, reported in AIR 2009 SC 1674**

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**342. EVIDENCE ACT, 1872 – Sections 3 & 45**

**(i) Medical evidence at variance with ocular evidence – When the eyewitnesses account is found credible and trustworthy, medical opinion pointing to alternative possibility is not accepted as conclusive – Position explained.**

**(ii) Reasonable doubt – To constitute it, it must be free from an over emotional response – It is not an imaginary, trivial or merely a possible doubt but a fair doubt based upon reasons and common sense – Legal position explained.**

**Chhotanney & Ors. v. State of Uttar Pradesh & Ors.**

**Judgment dated 18.02.2009 passed by the Supreme Court in Criminal Appeal No. 441 of 2002, reported in AIR 2009 SC 2013**

Held:

Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

It is trite that where the eyewitnesses account is found credible and trustworthy medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit worthy; consistency with the undisputed facts; the credit of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

A person has, no doubt, a profound right not to be convicted of an offence, which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to proof is an exercise particular to each case? Referring to what degree of probability amounts to proof is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another, a learned author says; (See *"The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)*)

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other".

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust commonsense and, ultimately on the trained intuitions of the judge, While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by *Venkata Chaliah, J.* (as His Lordship then was) in *State of U.P. v. Krishna Gopal and Anr., AIR 1988 SC 2154* and *State of Madhya Pradesh v. Dharkole @ Govind Singh & Ors. (2004) 11 SCC 308.* Apparently, there was no conflict between the ocular evidence and the medical evidence as contended by learned counsel for the appellant.

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**343. EVIDENCE ACT, 1872 – Sections 4 & 112**

**(i) Presumption as to legitimacy u/s 112 of Evidence Act, is conclusive – Can only be rebutted by a strong preponderance of evidence and not by a mere balance of probabilities regarding non access.**

**(ii) Blood test to prove paternity –When permissible – Law reiterated.**

**Poorti @ Usha v. Vinay Kumar**

**Judgment dated 09.07.2009 passed by the High Court in F.A. No. 136 of 2008, reported in 2009 (3) MPLJ 421 (DB)**

Held:

It appears that there is conclusive presumption that a child born during the wedlock is the son of the husband. The presumption can be dispelled only by proof of non-access. Section 112, Evidence Act requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation. In *Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana, reported in AIR 1954 SC 176,* the term access has been defined by the Apex Court and it has been held that access does not imply actual cohabitation. It means no more than "opportunity of intercourse". It is a rebuttable presumption of law under Section112, Evidence Act that a child born during the lawful wedlock is legitimate., and that access occurred between the parents. This presumption can only be displaced strong preponderance of evidence and not by a mere balance of probabilities. Thus, following is the position as to permissibility of blood test to prove paternity: (1) That Courts in India cannot order blood-test as a matter of course, (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained, (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the

presumption arising under section 112 of the Evidence Act, (4) The Court must carefully examine as to what would be consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman, (5) No one can be compelled to give sample sample of blood for analysis. *Gautam Kuntu v. State of West Bengal and another reported in AIR 1993 SC 2295.*

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***344. EVIDENCE ACT, 1872 – Section 9**

**Identification for the first time in Court – Permissibility – Held, although it is permissible in law, but the principle should be applied having regard to the facts and circumstances of each case – Courts, ordinarily do not give much credence to identification made in the Court for the first time and that too after a long time – Case law reiterated.**

**Hem Singh alias Hemu v. State of Haryana**

**Judgment dated 06.05.2009 passed by the Supreme Court in Criminal Appeal No. 495 of 2008, reported in (2009) 6 SCC 748**

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**345. EVIDENCE ACT, 1872 – Section 9**

**INDIAN PENAL CODE, 1860 – Sections 395 r/w/s 397, 396, 307 r/w/s 34 & 376**

**(i) Test identification parade – Object of test identification parade restated.**

**(ii) Five members of a family were of tender age, they were defenceless and the attack was without provocation – Some of them were so young that they could not resist the attack of the accused – A minor girl of about 15 years was dragged in the open filed, gang raped and done to death – Three accused persons were convicted for dacoity with murder and attempt to murder while another three accused persons were convicted for above as well as for the of gang rape – Held, the case falls under the rarest of rare category – All the six accused persons were awarded death sentence.**

**Ankush Maruti Shinde and others v. State of Maharashtra**

**Judgment dated 30.04.2009 passed by the Supreme Court in Criminal Appeal No. 1008 of 2007, reported in (2009) 6 SCC 667**

Held:

**(i)** If potholes were to be ferreted out from the proceedings of the Magistrate holding such parades possibly no TI parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every TI parade would become unusable. TI parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting TI parade is twofold. First is to enable the witnesses to satisfy

themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

**(ii)** Prosecution version in a nutshell was as under.

On 05.06.2003 Trambak and all his family members as well as guest Bharat More were chit-chatting after dinner. At about 10.30 pm, 7 to 8 unknown person including accused persons A1 to A6 entered in their hut and threatened family members demanding money and valuables from them. Some of the gang members forcibly took away the ornaments worn by women. Thereafter they went out to the house and consumed liquor. After sometime they re-entered the hut, armed variously to robe the house members and started beating the family members. They tied the hands and legs of all family members except Manoj and Vimla Bai. As a result of assault five male members became unconscious. Three of the dacoits dragged Savita (aged about 15 years) out of the hut to a guava garden and gang raped her. She was brought back dead in naked condition with injuries on her body. Another woman PW 8 was also dragged towards the well and raped by one. She was brought back grievously injured. In the occurrence four male persons were murdered and one Savita was murdered and rest two victims survived.

PW1 and PW8 are the two eye witnesses of the occurrence. Few discrepancies of trivial and minor nature cannot be a reason to discard their evidence.

The evidence of PWs 1 and 8 have been analysed in great detail by the trial court and the High Court to find their evidence to be cogent and credible. Apart from that, the evidence of medical officer, PWs 9 and 15 clearly established the allegation of rape.

It is stated that Savita had suffered bleeding injury on her private parts and her hymen was ruptured. She was found to be of the age of 15 year and Vimalabai stated that she (Savita) was dragged out of the hut by three accused and was brought back naked and dead by the very same accused and thrown in the hut. The injuries externally noted on the body of Savita provide further sustenance to the prosecution version that she was subjected to sexual assault by the accused when she would fall a victim to their hunger of flesh and the empowerment exercised by all of them, multiple blows were given on and around her skull.

Injuries were sustained by PWs 1 and 8. It is to be noted that Manoj (PW 1) regained his consciousness around 7.30 a.m. while Vimalabai (PW 8) regained consciousness at about 9.30 a.m. on 6-6-2003. It is clear from the evidence that had the medical treatment not been provided, both of them would have died. They had suffered grievous injuries and were under medical treatment for 1 and 1½ months. They had suffered several injuries which were caused by blunt and hard objects.

After referring the legal position about the death sentence in *State of M.P. v. Munna Choubey, (2005) 2 SCC 710 and Union of India v. Devendra Nath Rai, (2006) 2 SCC 243,* it was observed that:

Lord Justice Denning, Master of the Rolls of the Court of Appeal in England said to the Royal Commission of Capital Punishment in 1950.

> 'Punishment is the way in which society expresses its denunciation of wrongdoing; and, in order of maintain respect for the law, it is essential that the punishment inflected for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being a deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'

In J.J. Rousseau's *The Social Contract* written in 1762, he says the following:

Again, every rogue who criminously attacks social rights becomes, by his wrong, a rebel and traitor to his fatherland. By contravening its laws, he ceases to be one of its citizens: he even wages war against it. In such circumstances, the State and he cannot both be saved: one or the other must perish. In killing the criminal, we destroy not so much a citizen as an enemy. The trial and judgments are proofs that he has broken the social contract, and so is no longer a member of the State."

The above position was highlighted in *Bantu v. State of U.P., (2008) 11 SCC 113,* at SCC p. 128, para 23.

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

The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape of and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1,2 and 4; but held that in the case of others it was to be altered to life sentence.

The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenceless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged to the open field, gang-raped and done to death.

There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick for A-2, A-3 and A-

5. In fact, A-3 was the main person. He assaulted PW 1 and took the money from the deceased.

Above being the position, the appeals filed by the accused persons deserve dismissal, which we direct and the State's appeals deserve to be allowed. A-2, A-3 and A-5 are also awarded death sentence. In essence all the six accused persons deserve death sentence.

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**346. EVIDENCE ACT, 1872 – Section 24**

**Confession and Extra-judicial Confession.**

**(i) 'Confession' is a statement made by an accused which must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence – The word 'statement' includes both oral and written statement – Communication to another is not however an essential component to constitute a 'statement' – An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence – He might have also uttered something in soliloquy – He might also keep a note in writing – All the aforesaid nevertheless, constitute a statement – If such a statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. [See** *Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40*]

**(ii) Conviction can be founded on extra judicial confession if it is clear, specific and unambiguous and Court believes witness before whom confession is made and is satisfied that confession was voluntary and without any coercion and undue influence – Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference – It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given – It will depend on circumstances of the case – If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated – Human mind is not a tape recorder which records what has been spoken word by word – The witness should be able to say as nearly as possible actual words spoken by the accused – That would rule out possibility of erroneous interpretation of any ambiguous statement – If word by word repetition of statement of the case is insisted upon, more often than not, evidentiary value of extra-judicial confession has to be thrown out as unreliable and not useful – That cannot be a requirement in law – There can be some persons who have a good memory**

**and may be able to repost exact words and there may be many who are in possession of normal memory and do so – It is for the Court to judge credibility of the witness's capacity and thereafter, to decide whether his or her evidence has to be accepted or not – If Court believes witnesses before whom confession is made and is satisfied that confession as voluntary basing on such evidence, conviction can be founded – Such confession should be clear, specific and unambiguous.**

**Shiva Karam Payaswami Tewar v. State of Maharashtra**

**Judgment dated 21.01.2009 passed by the Supreme Court in Criminal Appeal No. 117 of 2009, reported in AIR 2009 SC 1692**

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**347. EVIDENCE ACT, 1872 – Section 118**
**CRIMINAL TRIAL:**
**CRIMINAL PROCEDURE CODE, 1973 – Section 378**

**(i) Criminal justice system in our country is beset with major issues – Factors which inhibit the proper conduct of proceedings in a trial highlighted by the Supreme Court.**

**(ii) Child witness – Competency to testify – Held, the only test that is applicable is as to whether witness understand the sanctity of an oath and the import of the questions that were being put to him – Case law reiterated.**

**(iii) Related or interested witness – Evolution of evidence – Legal principles restated.**

**(iv) Inconsistent, exaggerated or embellished statements of witnesses – Their appreciation – Position explained.**

**(v) Appeal against acquittal – Re-appreciation of the evidence – Inference by the Appellate Court – Held, the evidence in the case suggests that the judgment of the Additional Sessions Judge was unjustified in the facts of extremely credible evidence and based on a complete misconception as to the evidence on record – Therefore, the Appellate Court was justified in interfering in the matter on a re-appreciation of the evidence.**

**Himmat Sukhadeo Wahurwagh and others v. State of Maharashtra**

**Judgment dated 01.05.2009 passed by the Supreme Court in Criminal Appeal No. 1641 of 2007, reported in (2009) 6 SCC 712 (3 Judge Bench)**

Held:

Before, we embark on an appreciation of the evidence some thoughts come to mind. The criminal justice system as we understand it as of today in our country is beset with major issues, sometimes unrelated to what happens in court, particularly in cases involving more than one accused. Fudged and dishonest first information reports, tardy and misdirected investigations and

witnesses committing perjury with not the slightest qualm or a quibble make the decision of even the most diligent and focused of judges particularly galling and difficult. Several other factors inhibit the proper conduct of proceedings in a trial.

As per *Crimes in India* – 1998 a total of 5,42,345 cases under the Penal Code, 1860 including those carried over from the previous years, and another 6,37,345 criminal cases under special and local laws making a backlog of 11,79,690 cases were pending investigation. It has also been found that the delay in the investigation and disposal of a criminal case makes the possibility of acquittal that much higher as witnesses tend to turn hostile.

The Fourth Report of the National Police Commission (1980), Chapter 28 gives some alarming statistics inasmuch that a sample study of sessions cases in a crime infested district revealed that out of 320 cases disposed of in the Sessions Court concerned during the 8 month's working period in a year, only 29 ended in conviction while 291 ended in acquittal. In conclusion, the Commission observed:

> "As many as 130 cases, which included 21 murders, 58 attempts at murder, 17 dacoities and 9 robberies, took more than 3 years for disposal, reckoning the time from the date of registration of first information report. It was also noticed that the longer a case took for disposal the more were the chances of its acquittal, Protracted proceedings in courts followed by acquittal in such heinous crimes tend to generate a feeling of confidence among the hardened criminals that they can continue to commit crimes with impunity and ultimately get away with it all at the end of leisurely and long-drawn legal battles in courts which they can allow their defence counsel to take care of. Such a situation is hardly assuring to the law-abiding citizens and needs to be immediately corrected by appropriate measures even if they should appear drastic and radical."

We hasten to add that these alarming figures are not universally applicable to all districts, but they are undoubtedly indicative of the malaise that afflicts our criminal justice system and paint a grim picture. The Commission also found that one of the primary reasons for the failure of the prosecution was the propensity of prosecution witnesses to turn hostile and several reasons for this trend have been spelt out.

The Commission also quoted with approval from a letter of a senior Session Judge in which he wrote that:

> "A prisoner suffers for some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time 'foolish' enough to remain there till the arrival of the police. It is for these

> reasons that people do not take the victim of a road accident to hospital or come to the help of a lady whose purse or gold chain is being snatched in front of her eyes. If some person offers help in such cases he is to appear as a witness in a court and has to suffer not only indignities and inconveniences but also has to spend time and money for doing so. Sometimes the witnesses incur the wrath of hardened criminals and are deprived of their lives or limbs."

In this pernicious state of affairs, the Judge, gravely handicapped, has to apply his knowledge of the law and his assessment of normal human behavior to the facts of the case, his sixth sense based on his vast experience as to what must have happened, and then trust to God and good luck that he strikes home to come to a right conclusion. To our mind, the last two are undoubtedly imponderables but they do come into play in negotiating the judicial minefield. This is an undeniable fact whether we admit it or not.

Section 118 of the Evidence Act does not preclude a child from being a witness and the only test that is applicable is as to whether the witness understood the sanctity of an oath and the import of the questions that were being put to him. In *Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565,* it has been observed that Section 118 of the Evidence Act envisages that all persons shall be competent to testify unless the court thinks otherwise.

In summing up the various judgments on this issue, this is what this Court had to say (*Nivrutti case* (supra), SCC pp. 567-68, para 10)

> "10. '...7....The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.' " *[Ratan Sinh Dalsukh Bhai Nayak v. State of Gujarat, (2004) 1 SCC 64]*

Some observations in the judgment of this Court in *Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270,* with respect to the evaluation of the evidence of an interested or related witnesses. They are (SCC p. 273, para 12)

> "12, ..... When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically deposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

It is true, as contented, that a transformation has indeed taken place within the last three or four decades and from the query "why should an interested witness be believed" to "why should such a witness be disbelieved as he is not likely to leave out the real culprits", reflects the anxiety and utter helplessness of criminal courts as independent witnesses tend to turn hostile.

We are also aware of the fact that the evidence in most of these cases is recorded after some delay and that in any case if every witness were to give an identical and parrot-like statement, it would smack of tutoring and would lose credibility. Some inconsistencies are thus bound to arise particularly where a large number of victims, witnesses and accused are involved and the incident itself is spread out over a distance and period of time, as in the present case.

There can be no quarrel with these basic propositions, but we are of the opinion that the evidence in the case suggests that the judgment of the Additional Sessions Judge was unjustified in the face of extremely credible evidence and was based on a complete misconception as to the evidence on record. We are, therefore, of the opinion that the High Court was justified in interfering in the matter on a re-appreciation of the evidence.

In this connection, we refer to the judgment in *Chandrappa v. State of Karnataka, (2007) 4 SCC 415,* wherein it has been observed that an appellate court has full authority to re-appreciate and reconsider the evidence in a case of acquittal barring a case where two views are possible on the evidence and one favouring the accused has been taken. However, where the judgment of the trial court is based on a complete misreading of the evidence and a view in favour of the accused was not justified and only one view with regard to the culpability of the accused was possible, the High Court would be failing in its duty if it did not interfere, similar views have been expressed in *Swami Prasad v. State of M.P., (2007) 13 SCC 25* and a plethora of other judgments. We are, therefore, of the opinion that interference by the High Court was called for in the circumstances.

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***348. GUARDIANS AND WARDS ACT, 1890 – Sections 7 & 8**

**Minor child, custody of – Minor girl child was living with her grandmother – Father of the child was no more due to incurable ailment – Before his death he had executed a Will in favour of his mother and bequeathed all movable and immovable properties as he had no faith in his wife who was residing with her parents – It was also alleged that she is habituated to lead an independent life and had no concern and attachment for the minor child – She was also desirous to enter into a second wedlock – He also expressed his desire in the Will that his mother would look after and take care of his daughter – Held, although mother is the natural guardian but the welfare of child is paramount consideration – Child was ordered to be given to her grandmother and not to her mother.**

**Chhotibai (Smt.) v. Smt. Sunita Kushwah**

**Judgment dated 04.05.2009 passed by the High Court in First Appeal No. 52 of 2008, reported in 2009 (II) MPJR 412 (DB)**

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**349. HINDU LAW:**

**HINDU SUCCESSION ACT, 1956 – Section 6 (1) proviso**

**(i) Partition of ancestral (family) property by father – When may be challenged by the sons? Father of a joint Hindu family has the power to divide the family property at any moment during his lifetime, provided he gives his sons equal shares over his ancestral property – If the partition is unequal and unfair, it is open to the sons to challenge the same.**

**(ii) Decree of partition passed before 20.12.2004 – Daughters of coparcener held, not entitled to get any share in the property.**

**Choudhary Chhatarsingh (dead) and others v. Smt. Harsh Kumar and others**

**Judgment dated 16.04.2009 passed by the High Court in F.A. No. 43 of 1992, reported in 2009 (3) MPLJ 174**

Held:

The father of a joint Hindu family has the power to divide the family property at any moment during his lifetime, provided he gives his sons equal shares over his ancestral property. If the partition is unequal and unfair it is open to the sons to challenge the same. In the case of *Apoorva v. Income Tax Commissioner, AIR 1983 SC 409* the Apex Court has held that if the father does not act bona fide in the matter when he effects partition of joint family property between himself and his minor sons, whether wholly or partially, the sons on attaining majority may challenge the partition and ask for appropriate relief including a proper partition. In appropriate cases even during the minority the minor sons through proper guardian may impeach the validity of the partition created by father either in entirety of the joint family properties or only in respect of part thereof, if the

partition had been effected by the father to the detriment of the minor sons and to the prejudice of their ancestors. Para 23 is relevant which reads as under:

> "23. We must, therefore, hold that partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu Law and must be held to be valid and binding. We wish to make it clear that this right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as patria potestas has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just."

The Apex Court further observed the following in para 27 which reads as under :

> "27..... In our opinion, a partial partition of any joint family property by the father between himself and his sons does not become invalid on the ground that there has been no equal distribution amongst the co-sharers. It is expected that the father who seeks to bring about a partial partition of joint family properties will act bona fide in the interest of the joint family and its members, bearing in mind in particular the interests of the minor sons. If, however, any such partial partition causes any prejudice to any of the minor sons and if any minor son feels aggrieved by any such partial partition, he can always challenge the validity of such partial partition in an appropriate proceeding and the validity of such partial partition will necessarily have to be adjudicated upon in the proceeding on a proper consideration of all the facts and circumstances of the case. Till such partial partition has been held to be invalid by any competent Court, the partial partition must be held to be valid. It is not open to the Income Tax Authorities to consider a partial partition to be invalid on the ground that shares have not been equally divided and to refuse to recognise the same."

Para 328 of *Mulla's Hindu Law* 17th Edition at page 530 and 531 reads as under :-

> **328. Partial partition.** – (1) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it.
>
> After a partition is affected, if some of the properties are treated as common properties, it cannot be held that such properties continued to be joint properties since there was

a division of title but such properties were not actually divided.

(2) *Partial as to property.* – It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family. However, where there is evidence to show that the parties intended to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. When a partition is admitted or proved, the presumption is that all the property was divided and a person alleging that family property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case."

From the perusal of the above, it is clear that when under a partition by a father unequal shares are given to the sons and if the partition is unequal and unfair, it is open to the sons if they are majors to repudiate the partition. Here in the present case, respondents No. 1 and 2 finds that partition was just and fair or unequal they rightly challenged the same by filing a suit for partition.

As per new provision of section 6 of Hindu Succession Act, 1956, which came into force on 9-9-2005, a daughter of a co-parcener in a joint Hindu family governed by the Mitakshara Law now becomes a co-parcener and thus enjoys right as hitherto enjoyed by a son as co-parcener. The legislature has added a proviso to sub-section (1), providing that any disposition or alienation, including a partition or testamentary disposition entered into before 20-12-2004 are not affected.

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**350. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i)**

**(i) Petition for divorce by husband against his wife on ground of adultery – Whether alleged adulterer is necessary party? Held, No – Further held, in the absence of any rule framed by M.P. High Court in this regard, petition is maintainable without impleading the adulterer as co-respondent.**

**(ii) Adultery, degree of proof therefor –There is no necessity to prove that the offending spouse is living in adultery – Any single act of sexual intercourse with any person other than the spouse is sufficient – It is not necessary to prove the allegation beyond all reasonable doubt – However the evidence must carry a high degree of probability.**

**Neelam Tiwari v. Sunil Tiwari**
**Judgment dated 18.04.2009 passed by the High Court in First Appeal No. 158 of 2007, reported in 2009 (3) MPHT 215**

Held:

Learned Counsel for the appellant has submitted that allegation against present appellant was that she is living in adultery with one Anurag Mishra but he was not impleaded as co-respondent in the petition which is mandatory. In support of the said contention, he drew my attention to the Division Bench decision of *Kerala High* Court in *M.K. Kunhiraman v. Santha alias Devaki, AIR 1998 Kerala 189,* in which High Court of Kerala in exercise of the powers conferred under Sections 14 and 21 of the Hindu Marriage Act, 1955 and Article 227 of the Constitution of India framed the rules with the previous approval of the Governor to regulate proceedings under the said Act. Rule 7 (4) of the said Rules states that in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons, the petitioner shall implead the person or persons as co-respondent in the petition by stating the name, occupation and place of residence of such person or persons so far as they can be ascertained. Here in the present case, there is no such provision in the Act or Rules framed therein by this Court and, therefore. The decision cited by the learned Counsel for the appellant in the case of *M.K. Kunhiraman* (supra), will not be applicable in the present facts and circumstances of the case nor on that ground the impugned judgment can be set aside. Similar is the view of the Division Bench decision of Andhra Pradesh High Court in the case of *Mirapala Venkata Ramana v. Mirapala Peddiraju, AIR 2000 AP 328,* wherein the alleged adulterer was not impeaded as party and, therefore, the Division Bench of Andhra Pradesh High Court set aside the order granting divorce on the ground of adultery.

It is settled law that the marriage bond shall not be set aside lightly or without strict enquiry. The general standard and degree of proof required in such cases need not reach certainty, but it must carry a high degree of probability, because of the gravity of issue. In the case of *Dr. N.G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534,* it was pointed out that as the proceedings under the Hindu Marriage Act, 1955, are of civil nature, the test of criminal proceedings need not be applied and it is not necessary to prove the allegations beyond all reasonable doubt, the reason being that a criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities and it would be wrong to input such a consideration into trial of civil nature. The word 'satisfied' in Section 23 of the Act must mean satisfied on preponderance of probabilities and not satisfaction beyond reasonable doubt; which requires proof of higher standard in criminal or quasi-criminal trials. Proof beyond reasonable doubt is not postulated where human relationship is involved and eye-witnesses are difficult to obtain. Similar proposition was laid down in *Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121.*

The law as it now stands, there is no necessity to prove that the offending spouse is living in adultery and any single act of sexual intercourse with any person other than the spouse is not sufficient for the aggrieved spouse to obtain a divorce under clause (1) (i) of Section 13 of the Act.

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**351. HINDU SUCCESSION ACT, 1956 – Sections 6 & 23 (Prior to amendment of 2005)**
**HINDU SUCCESSION (AMENDMENT) ACT, 2005 – Sections 3 & 4**
**GENERAL CLAUSES ACT, 1897 – Section 6 (c)**

**(i) Rights of a female in respect of dwelling house – Section 23 (prior to its deletion, w.e.f. 09.09.2005) carves out an exception in regard to obtaining a decree for possession *inter alia* in a case where the dwelling house was possessed by a male heir – Section 23, however, recognized the right of residence of the class of females who come within the purview of proviso thereof and such right of residence does not depend on the date on which the suit has been instituted but can also be subsequently enforced by the female – This section imposes restriction on a right of female heir to obtain a decree for partition of a dwelling house possessed by a male heir – Legal position explained.**

**(ii) Object and reasons of the Amendment Act, 2005 – Section 23 – Deletion – It has been omitted so as to remove the disability on female heirs – Report of the Law Commission relied on.**

**(iii) Amendment Act, 2005 – Effect – Whether retrospective or prospective? Held, neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession has already taken place – The operation of the said statute is no doubt prospective in nature – Further, retrospective right contained in Section 23 of the Act cannot be held to remain continuing despite the 2005 Act.**

**G. Sekar v. Geetha and others**

**Judgment dated 15.04.2009 passed by the Supreme Court in Civil Appeal No. 2535 of 2009, reported in (2009) 6 SCC 99**

Held:

Section 23 of the Hindu Succession Act, 1956, however, curtails the rights of the daughters to obtain a decree for partition in respect of dwelling houses, stating:

> "23. Special provision respecting dwelling houses. — Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house

shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The proviso appended to Section 23 of the Act confers right of the daughter who is separate from her husband and giving the right to the widow in spite of the fact that her husband has left a dwelling house. The right of a female heir to claim partition of the family dwelling house although restricted so long as the male heirs do not choose to affect partition of the same but it expressly recognizes her right to reside therein.

Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who has died intestate is equal to her brother. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognizes the right of residence in respect of the class of females who come within the purview of the proviso thereof. Such a right of residence does not depend upon the date on which the suit has been instituted but can also be subsequently enforced by a female, if she comes within the purview of the proviso appended to Section 23 of the Act.

We have been taken through the 174th Report of the Law Commission which recommended omission of Section 23 of the Act in view of amendment in Section 6 of the Act. The Report of the Law Commission although may be looked into for the purpose of construction of a statute but, it is trite that the same would not prevail over a clear and unambiguous provision contained therein.

We may, however, notice Clause 3.2.9 of the Report of the Law Commission, to which our attention has been drawn to, which reads as under:

"3.2.9 It is further felt that once a daughter is made a coparcener on the same footing as a son then her right as a coparcener should be real in spirit and content. In that event Section 23 of HSA should be deleted. Section 23 provides that on the death of a Hindu intestate, in case of a dwelling house wholly occupied by members of the joint family, a female heir is not entitled to demand partition unless the male heirs choose to do so; it further curtails the right of residence of a daughter unless she is unmarried or has been deserted by or has separated from her husband or is a widow. Section 23 of HSA needs to be deleted altogether and there is great support for this from various sections of society while replying to the questionnaire."

The last sentence of the said paragraph clearly shows that it was thought necessary to delete the said provision as there was a great support therefor from various sections of the society. Indisputably, the amending Act was not enacted in total consonance of the recommendations of the Law Commission..

We may in the aforementioned backdrop notice the relevant portion of the Statement of Objects and Reasons of the 2005 Act, which reads as under:

> "3. It is proposed to remove the discrimination as contained in Section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section."

It is, therefore, evident that Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property in concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto.

Restrictions imposed on a right must be construed strictly. In the context of the restrictive right as contained in Section 23 of the Act, it must be held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds, as grant of a preliminary decree would be dependent on the right of a co-sharer in the joint property.

We may notice sub-section (5) of section 6 of the Act, which reads as under:

> "6. (5) nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.
>
> *Explanation.*- For the purposes of this section 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908(16 of 1908) or partition effected by a decree of a court."

Thus, where a partition has not taken place, the said provision shall apply.

Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference, What should have been held was that although it is not retrospective in nature, its application is prospective.

It is now a well-settled principle of law that the question as to whether a statute having prospective operation will affect the pending proceedings would depend upon the nature as also the text and context of the statute. Whether a litigant has obtained a vested right as on the date of institution of the suit which is sought to be taken away by operation of a subsequent statute will be a question which must be posed and answered.

It is trite that although omission of a provision operates as an amendment to the statute but then Section 6 of General Clauses Act, whereupon reliance has been placed by Mr. Viswanathan, could have been applied provided it takes away somebody's vested right. Restrictive right contained in Section 23 of the Act, in view of our aforementioned discussions, cannot be held to remain continuing despite the 2005 Act.

Indisputably, the question as to whether an amendment is prospective or retrospective in nature, will depend upon its construction.

It is merely a disabling provision. Such a right could be enforced if a cause of action therefor arose subsequently. A right of the son to keep the right of the daughters of the last male owner to seek for partition of a dwelling house being a right of the male owner to keep the same in abeyance till the division takes place is not a right of enduring nature. It cannot be said to be an accrued right or a vested right. Such a right indisputably can be taken away by operation of the statute and/or by removing the disablement clause.

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**352. INDIAN PENAL CODE, 1860 – Sections 120-A & 120-B**

**Meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* for the criminal conspiracy – Mere knowledge or discussion thereof would not be sufficient – Principles to prove criminal conspiracy reiterated.**

**Baldev Singh v. State of Punjab**

**Judgment dated 06.05.2009 passed by the Supreme Court in Criminal Appeal No. 553 of 2008, reported in (2009) 6 SCC 564**

Held:

An offence of conspiracy which is a separate and distinct offence, thus, would require the involvement of more than one person. Criminal conspiracy is an independent offence. It is punishable separately, its ingredients being:

(i) An agreement between two or more persons;

(ii) The agreement must relate to doing or causing to be done either

(a) An illegal act;

(b) An act which is not illegal in itself but is done by illegal means.

It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. While however doing so, it must be borne in mind that meeting of the mind is essential, mere knowledge or discussion would not be sufficient.

Adverting to the said question once again, we may, however, notice that recently in *Yogesh v. State Maharashtra, (2008) 10 SCC 394* a Division Bench of this Court held: (SCC p. 402, para 25)

> "25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement."

Yet again in *Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441* this Court following *Ram Lal Narang v. State (Delhi Admn.), (1979) 2 SCC 322* held that a conspiracy may be a general one and a separate one meaning thereby a larger conspiracy and a smaller conspiracy which may develop in successive stages. For the aforementioned purpose, the conduct of the parties also assumes some relevance.

In *K.R. Purushothaman v. State of Kerala, (2005) 12 SCC 631,* this Court held: (SCC pp. 636-38, paras 11 & 13)

> "11. Section 120-A IPC defines 'criminal conspiracy'. According to this section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. In *Major E.G. Barsay v. State of Bombay, AIR 1961 SC 1762,* Subba Rao, J., speaking for the Court has said: (AIR p. 1778, para 31)

'31. The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all parties should agree to do a single illegal act. It may comprise the commission of a number of acts.'

To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not *per se* constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

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***353. INDIAN PENAL CODE, 1860 – Section 302**
**EVIDENCE ACT, 1872 – Section 3**

**(i) Intention to murder can be inferred by the nature of injuries, manner in which they were inflicted, the weapons of offence used and the vital part of the body of the deceased selected by the accused persons for causing the fatal injuries – Conviction under Section 302 IPC held, proper.**

(ii) The evidence of eye witness found to be concise, precise and satisfactory without any embellishment – Simply because the eyewitnesses did not make any attempt to save the life of the deceased from the clutches of the accused persons, their abnormal conduct by itself cannot be taken as a ground to disbelieve and discard their testimony in regard to the genesis of the occurrence and the part played by the appellant and the other convicted persons in the commission of the offence.

**Satvir v. State of Uttar Pradesh**

Judgment dated 21.01.2009 passed by the Supreme Court in Criminal Appeal No. 551 of 2005, reported in AIR 2009 SC 1741

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*354. INDIAN PENAL CODE, 1860 – Sections 302, 379, 449 & 201
CRIMINAL PROCEDURE CODE, 1973 – Sections 158, 164 & 463

(i) Circumstantial evidence – Completion of chain of circumstances – Motive – Accused was in dire and urgent need of money, thus he had a motive of keeping the said amount of money – Presence of the accused in the house of the deceased on the night of occurrence and his absence from his own residence during the corresponding period, his finger prints on door steps of deceased's house and presence of scalp hair of the accused on deceased's body, recovery of blood stained clothes and judicial confession and extra judicial confession made by the accused – Having regard to the chain of circumstances, the Apex Court upheld conviction and death sentence.

(ii) Provisions of Section 164 (2) of Cr.P.C. were complied with fully – Confessional statement made voluntarily by the accused who was on bail – Held, mere use of the expression 'evidence' in place of the word 'confession' by the Magistrate while warning the accused is no ground to reject the confessional statement.

**M.A. Antony alias Antappan v. State of Kerala**

Judgment dated 22.04.2009 passed by the Supreme Court in Crimina Appeal No. 811 of 2009, reported in (2009) 6 SCC 220

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*355. INDIAN PENAL CODE, 1860 – Sections 304-B, 498-A & 116 Illustration (a)
EVIDENCE ACT, 1872 – Section 32

(i) Husband or relative of husband of a woman subjecting her to cruelty – No charge u/s 498-A was framed – Appellant acquitted of charge u/s 304-B and convicted u/s 498-A – Held, No impediment in convicting appellant u/s 498-A, who was charged with and acquitted of the offence u/s 304-B.

(ii) Dying declaration – More than one dying declarations – If some inconsistencies are noticed between one dying declaration and

**the other, the Court has to examine the nature of inconsistencies, namely whether they are material or not.**

**Bharat Singh v. State of M.P.**

**Judgment dated 13.01.2009 passed by the High Court in Criminal Appeal No. 1270 of 1994, reported in I.L.R. (2009) M.P. 1427**

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**356. INDIAN PENAL CODE, 1860 – Sections 339 & 341**
**CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 239, 245 & 482**

**(i) Wrongful restraint – Essential element to constitute offence – The obstruction must be a restriction on the normal movement of a person – It should be a physical one – Legal position explained.**

**(ii) Summoning of an accused on the basis of vicarious liability – Held, the Penal Code, 1860, save and except in some matters, does not contemplate any vicarious liability on the part of a person – Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated – Case law reiterated.**

**Keki Hormusji Gharda and others v. Mehervan Rustom Irani and another**

**Judgment dated 13.05.2009 passed by the Supreme Court in Criminal Appeal No. 1015 of 2009, reported in (2009) 6 SCC 475**

Held:

The statement made by the first respondent that Accused 1 to 5 were managing the affairs of the Company and had instigated Accused 6 to construct the road must be viewed. It is one thing to say that the Company had asked Accused 6 to make construction but only because Accused 1 to 5 were its Directors, the same, in our opinion would not be sufficient to fasten any criminal liability on them for commission of an offence under Section 341 IPC or otherwise.

"Wrongful restraint" has been defined under Section 339 IPC.

The essential ingredients of the provision are:

(1) Accused obstructs voluntarily;

(2) The victim is prevented from proceeding in any direction;

(3) Such victim has every right to proceed in that direction.

The word "voluntary" is significant. It connotes that obstruction should be direct. The obstructions must be a restriction on the normal movement of a person. It should be a physical one. They should have common intention to cause obstruction.

The appellants herein were not at the site. They did not carry out any work. No overt act or physical obstruction on their part has been attributed. Only because legal proceedings were pending between the Company and Bombay Municipal

Corporation and/or with the first respondent herein, the same would not by itself mean that the appellants were in any way concerned with commission of a criminal offence of causing obstructions to the first respondent and his parents.

We have noticed hereinbefore that despite of the said road being under construction, the first respondent went to the police station thrice. He, therefore, was not obstructed from going to the police station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 IPC.

The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

In *Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749,* this Court held as under: (SCC p. 760, para 28)

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

Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in the

complaint petition even if given face value and taken to be correct in its entirely, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure,

Indisputably, there might have been some delay on the part of the appellants in approaching the High Court but while adjusting equity the High Court was required to take into consideration the fact that in a case of this nature the appellants would face harassment although the allegations contained in the complaint petition even assuming to be correct were trivial in nature. The High Court furthermore has failed to take into consideration the fact that in the first information report no allegation in regard to acts of common intention or common object on the part of the appellants was made out. The appellants were not named as accused therein. It is, therefore, really difficult to appreciate as to on what basis the complaint petition was filed. The orders summoning the appellant is quashed.

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**357. INDIAN PENAL CODE, 1860 – Sections 375 & 376**

**Rape of a minor girl aged about eleven years – Delay in lodging the FIR in a case of this nature is a normal phenomenon – Medical evidence, being a part of the prosecution evidence, is required to be appreciated in the context of ocular evidence and other circumstances surrounding thereto – For the purpose of satisfaction of the ingredients of rape, it is not necessary that there should be complete penetration.**

**Satyapal v. State of Haryana**

**Judgment dated 08.04.2009 passed by the Supreme Court in Criminal Appeal No. 664 of 2009, reported in (2009) 6 SCC 635**

Held:

Facts of the prosecution case was as under:

The prosecutrix was a minor. She was aged about 11 years. The appellant was a co-villager. As per the first information report, on 5-2-1993 at about 8.00 a.m., she went to the fields to bring fodder. When she reached near the fields of one Nihala, the appellant came near her and forcibly lifted her. She raised an alarm but the appellant gagged her mouth and started sexually assaulting her. After hearing the voice of her aunt, the appellant left her and ran away.

A case of this nature should be viewed having regard to the materials brought on record in their entirety. We have noticed hereinbefore the prosecution case. Indisputably, the prosecutrix was medically examined after a long time. The explanation offered by PW 5 in this behalf, in our opinion, is clear and sufficient. Not only the father of the prosecutrix was not in the village, he had to be sent for and came back to the village only on the next day. Evidently, for good reasons, they did not want to lodge a first information report immediately.

A panchayat was convened and only when it did not yield any fruitful result, the first information report was lodged.

The evidence of the doctor appears to be wholly insufficient. Even she could not complete the medical examination. Despite passage of a long time, an injury on the private parts of the prosecutrix was found. The doctor at least testified that there had been an attempt to commit rape. While saying so, she found the hymen absent which having regard to the medical jurisprudence is of some significance.

In *Modi's Medical Jurisprudence,* 23rd Edn., at pp. 897 and 928, it is stated:

> "To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains.
>
> In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum."

The prosecution case must be considered having regard to the evidence of PW 5. She detected the accused while committing the offence. It was not complete. The appellant is said to have fled away, hearing her voice. The prosecutrix, therefore, may not be correct when she made her statements that she did not change her garments which does not appear to be probable as sufficient time had elapsed and it is unthinkable that a little girl would continue to wear her clothes for 80 hours, or she would not wash herself.

Furthermore, for the purpose of satisfaction of the ingredients of rape, it is not necessary that there should be complete penetration. [See *Aman Kumar v. State of Haryana, (2004) 4 SCC 379*]

This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the first information report in a case of this nature is a normal phenomenon. Both the courts below apart from relying on a part of the testimony of the prosecutrix found the evidence of PW 5 to be absolutely reliable. The medical evidence itself being a part of the evidence is required to be appreciated in the context of ocular evidence and other circumstances surrounding thereto. There was some time gap between the occurrence and the examination of the witnesses. Some lapse of memory on the part of the child witness, therefore, is possible.

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**358. INDIAN PENAL CODE, 1860 – Sections 415, 420, 405, 409 & 120-B Offence of cheating – Ingredients thereof – One of the ingredients is existence of an intention to cheat at the time of making initial promise or existence thereof from the very beginning of formation of contract – Case law reiterated.**

**S.V.L. Murthy v. State represented by CBI, Hyderabad**

**Judgment dated 06.05.2009 passed by the Supreme Court in Criminal Appeal No. 942 of 2009, reported in (2009) 6 SCC 77**

Held:

Appellant accused was a Branch Manager of State Bank of India. He and some of his colleagues were prosecuted under Sections 415 and 420 read with Section 120-B IPC and Section 13 (1) (d) of the Prevention of Corruption Act, 1988 for permitting discounting of local cheques to some customers of the Bank. The issues involved were whether the bank officials and the customers had entered into criminal conspiracy to commit the offence of cheating against the Bank. Trial Court convicted the accused persons. The High Court upheld their conviction. The Supreme Court however took note of the fact that there was no evidence on record to prove that there was an intention to cheat the bank. Advertently there was evidence on record that the accused had stopped cheque discounting facility and he had resumed it only after verbal instructions from a superior officer. Moreover, the accused (bank officials) ppeared to have acted in the overall interest of the bank for the purpose of promoting its business though there may have been some irregularity in doing so.

On allowing the appeal the Supreme Court held that for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out.

We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Penal Code is existence of an intention to cheat at the time of making initial promise or existence thereof from the very beginning of formation of contract. In *Hira Lal Bhagwati v. CBI, (2003) 5 SCC 257* this Court held: (SCC p. 280, para 40)

> "40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the

exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption."

(See also *Indian Oil Corpn. v. NEPC India Ltd. (2006) 6 SCC 736 at SCC p. 757,* para 33.)

The upshot of our discussions is:-

(a) The prosecution did not lay down any foundational facts to arrive at a finding of dishonest intention on the part of the appellants, nor any such finding has been arrived at by the trial Court or the High Court.

(b) The circumstances which were considered sufficient to bring home the charges against the appellant were: the cheques of accused Nos. 1, 2 and 3 were discounted after purchasing cheques; cheques were deposited after a gap of 1 to 4 days; only later the amounts were deposited in the account which circumstances, in our opinion, are not sufficient to hold the appellants guilty for commission of offence under Section 420 of the IPC as all the actions on the part of the bank officers were in consonance with the long standing banking practice.

(c) Accused No. 4 had taken care of having adequate security to ensure that the bank does not suffer any loss, the gain if any was caused to the Bank.

(d) Appellants acted on instructions by the higher authority.

(e) The prosecution evidence does not establish any conspiracy on their part

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**359. INDIAN PENAL CODE, 1860 – Section 498-A**

**(i) Words "relative of the husband", occurring in Section 498-A – Whether the word "relative" includes girlfriend or concubine? Held, No – By no stretch of imagination would a girlfriend or even a concubine in any etymological sense be a relative – The word "relative" principally includes a person related by blood, marriage or adoption – Principles laid down in various decisions applied.** *Reema Aggarawal v. Anupam, (2004) 3 SCC 199,* **distinguished.**

**(ii) "Cruelty", meaning of – Living with another woman may be an act of cruelty on the part of the husband for the purpose of judicial separation or dissolution of marriage but the same would not attract the wrath of Section 498-A IPC – Position explained.**

**U. Suvetha v. State by Inspector of Police and another**

**Judgment dated 06.05.2009 passed by the Supreme Court in Criminal Appeal No. 938 of 2009, reported in (2009) 6 SCC 757**

Held:

In the absence of any statutory definition, the term "relative" must be assigned a meaning as is commonly understood, ordinarily it would include father, mother husband or wife, son, daughter, brother, sister, nephew or niece, grandson or granddaughter of an individual or the spouse of any person. The meaning of the word "relative" would depend upon the nature of the statute. It principally includes a person related by blood, marriage or adoption.

Herein, as noticed hereinbefore, relationship of the appellant with the husband of the first information is said to have been existing from before the marriage. Indisputably they lived separately. For all intent and purport the husband was also living at a separate place. The purported torture is said to have been inflicted by the husband upon the first informant either at her in law's place or at her parents' place. There is no allegation that the appellant had any role to play in that regard.

By no stretch of imagination would a girlfriend or even a concubine in an etymological sense be a "relative". The word "relative" brings within its purview a status. Such a status must be conferred either by blood or marriage or adoption. It no marriage has taken place, the question of one being relative of another would not arise.

The word " cruelty" has also been defined in the Explanation appended thereto. It is in two parts. Clause (a) of the said Explanation refers to a conduct, which is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or health (whether mental or physical); Clause (b) provides for harassment of the woman, where such harassment, is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security. It is not the case of the first informant that the appellant had any role to play with regard to demand of dowry.

The word "cruelty" having been defined in terms of the aforesaid Explanation, no other meaning can be attributed thereto. Living with another woman may be an act of cruelty on the part of the husband for the purpose of judicial separation or dissolution of marriage but the same, in our opinion, would not attract the wrath of Section 498-A of the Penal Code. An offence in terms of the said provision is committed by the persons specified therein. They have to the "husband" or his "relative". Either the husband of the woman or his relative must have subjected her to cruelty within the aforementioned provision. It the appellant had not (sic) been instigations the husband of the first informant to

torture her, as has been noticed by the High Court, the husband would be committing some offence punishable under the other provisions of the Penal Code and the appellant may be held guilty for abetment of commission of such an offence but not an offence under Section 498-A of the Penal Code.

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**360. INDIAN PENAL CODE, 1860 – Sections 498-A & 302**
**EVIDENCE ACT, 1872 – Section 106**
**CRIMINAL TRIAL:**

**(i) Murder of bride in matrimonial home – Such offences are generally committed in complete secrecy inside the house – Therefore, it would be extremely difficult for the prosecution to lead evidence to establish the guilt of accused, if the strict principle of circumstantial evidence is insisted upon by the Court – While appreciating the evidence, this aspect should be kept in the mind by the Court.**

**(ii) Plea of alibi – Falsity of alibi is an additional link to the circumstance.**

## Narendra v. State of Karnataka

**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 1502 of 2007, reported in (2009) 6 SCC 61**

Held:

In the present case there are certain material aspects which were lost sight of by the trial court but have been noted by the High Court. The dead body was detected in the morning of 14-2-1994. The parents of the deceased informed the police and not the inmates. The parents were informed by the neighbours and not by the inmates. DW 2 has been disbelieved as he was nearly 70 years of age. It was highly improbable that he was in employment as a watchman.

> The trial court had held that the evidence of PWs 6 to 8 regarding pressing mark on the neck and injuries on the forearms of the deceased are not corroborated by the medical opinion. This is factually incorrect. The doctor (PW 2) had categorically stated that he was of the opinion that death was due to result of compression of the neck, and the post-mortem report was accordingly issued. PW 6 has stated that second opinion was sought for and then the report was given. The falsity of alibi is an additional link.
>
> In *Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681,* it has been noted as follows (SCC pp. 689-90, paras13-14)
>
> The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the courts, where the husband or in-laws have gone to the extent of

killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions 1944 AC 315,* quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh, (2003) 11 SCC 271.* The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

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***361. INTERPRETATION OF STATUTES :**

**(i) "Comma", significance of – "Comma" used in between two words has its signification and each word is to be treated as separate word and thereby a separate category.**

**(ii) "Or", effect of – The word "or" is normally disjunctive but at times it is read vice versa to give effect to the intention of the legislature – Words have to be understood in the context of their use.**

**Akhil Bhartiya Upbhokta Congress, Bhopal v. State of M.P. & Ors.**
**Judgment dated 26.03.2009 passed by the High Court in W.P. No. 14719 of 2006, reported in 2009 (II) MPJR 418 (DB)**

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***362. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 7 & 7-A**
**EVIDENCE ACT, 1872 – Section 35**
**JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2001 – Rule 22**

**(i) Determination of age – Rule 22 provides for the procedure to be followed in respect of determination of age of a person – It indicates that the opinion of the Medical Board is to be preferred only when a date of birth certificate from the school first attended, is not available or where dispute regarding genuineness of such certificate has arisen and Juvenile Justice Board seeks the opinion of the duly constituted Medical Board for ascertaining the age of an accused for declaring him juvenile.**

**(ii) The conditions, laid down in Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register, are to be considered for the purpose of determining the relevance thereof – An entry in a school register may not be a public document and, thus, must be proved in accordance with law.**

**[See** *Birad Mal Singhvi v. Anand Purohit, 1988 Supp SCC 604***]**

**(iii) The same standard is required to be applied, for the purpose of Section 35 of the Evidence Act, both in civil as also in criminal proceedings.**

**[See** *Ravinder Singh Gorkhi v. State of U.P., (2006) 5 SCC 584***]**

**Ram Suresh Singh v. Prabhat Singh alias Chhotu Singh and another**
**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 909 of 2009, reported in (2009) 6 SCC 681**

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**363. KRISHI UPAJ MANDI ADHINIYAM, 1973 – Section 67**
**CIVIL PROCEDURE CODE, 1908 – Section 80 (2)**
**Suit against the Board or Market Committee – Notice u/s 67 of the Adhiniyan is mandatory – Provisions u/s 80 (2) of the Code cannot be invoked to seek permission to file a suit without notice being served.**

**M.P. Krishi Upaj Mandi Samiti, Banapur, Tehsil, Seoni Malwa, District-Hoshangabad v. Chandra Shekhar Raghuvanshi and others**
**Judgment dated 28.04.2009 passed by the High Court in Civil Rev. No. 238 of 2008 and W.P. No. 17381 of 2007, reported in 2009 (3) MPLJ 411 (DB)**

Held:

Notice under section 67 is mandatory and suit without serving a notice is not maintainable has been laid down by this Court in *Bhagwandas Goyal v. Krishi Upaj Mandi Samiti, Datia and another, 1992 MPLJ 998.* This Court has laid down that the language used in section 67 of the Adhiniyam leaves no manner of doubt that provision is mandatory. It takes away the right of anyone to institute a suit against "the Board" or "Market Committee" until the expiration of two months from the delivery of the notice. The question with respect to plea being technical has also been considered by this Court in *Bhagwandas Goyal* (supra). This Court has laid down that provision beingh mandatory obliges the Court to hold the suit not maintainable, if it is filed before expiry of statutory period of two months, the decision of *Bihari Chowdhary and another vs. State of Bihar and others, AIR 1984 SC 1034* has also been considered in which section 80, Civil Procedure Code came for consideration as it stood prior to its amendment by Act No. 104 of 1976. This Court has laid down thus:-

> "5 In *Bihari Chowdhary and another v. State of Bihar and others, AIR 1984 SC 1034,* Their Lordships held:-
>
> "A suit against the Government or a public officer, to which the requirement of a prior notice under section 80, Civil Procedure Code is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned n the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."
>
> The language used in section 67 of the Adhiniyamleaves no manner of doubt that the provision is mandatory. It takes away the right of any one to institute a suit against "the Board" or "Market Committee" until the expiration of two months from the delivery of the notice. Bihari Chowdhary's case applies to section 67 of the Adhiniyam, with all force in view of similarity in the language employed in section 80, Civil Procedure Code and section 67 of the Adhiniyam.
>
> 6.The learned counsel for the appellant submitted that the defendant should not have been permitted to take shelter behind the plea under section 67 of the Adhiniyam. Firstly, because it is a technical plea and secondly, because the defendant/respondent having refuted the claim of the plaintiff within the period of 2 months and them filing the suit. Reliance was placed on *Mahabir Kishore v. State of M.P.,1990 JLJ 1 (SC)and State of M.P. vs. Ramrao krisharao Paliskar, 1990 JLJ 315 (DB)* in both the decisions. The Apex Court and this Court have held that State should not rely

on technical plea of limitation to defeat the legitimate claim of the citizens. It is for the defendant/respondent to read and act on the law so laid down while learning moral there from. However, two cases relied upon by the learned counsel for the appellant do not help him in the present case for the simple reason that section 67 of the Adhiniyam is mandatory in character and obliges the Court to hold the suit not maintainable, if it is filed before expiry of statutory period of two months as is the law laid down in *Bihari Chowdhary's case* (supra).

Section 80 has been amended later on. Sub-section (2) has been added. However, section 67 does not contemplate permission to institute a suit which is provided in section 80 (2), Civil Procedure Code, thus, grant of permission under section 80, Civil Procedure Code could not have been used by the trial Court to protect the suit instituted without serving a notice under section 67 of the Adhiniyam. In the instant case, no notice was n fact issued under section 67 of the Adhiniyam. In the instant case, no notice was in fact issued under section 67 of the Adhiniyam. None of the act of the Collector was assailed, thus, permission granted under section 80 (2), Civil Procedure Code was superfluous and could not inure to the benefit of plaintiff so as to hold that suit is maintainable as no such permission is contemplated under section 67 of the Adhiniyam.

Division Bench of this Court has distinguished the provisions of section 319 of M.P. Municipalities Act and section 80 (2) of Civil Procedure Code in *Municipality, through Chief Municipal Officer, Raghogarh vs. Gas Authority of India Ltd. and others, 2005 (3) MPLJ 530.* It has been held that benefit of section 80 (2) of Civil Procedure Code cannot be extended to suits against Municipal Council and the suit without serving statutory notice under the Municipalities Act is not maintainable. Division Bench of this Court has laid down thus:-

"19. It appears that the trial Court in a haste to decide the suit has not considered the material objections. When specific plea as to valuation was raised, it was the duty of the trial Court to examine the question of valuation from bare reading of the plaint. Trial Court committed error in holding that the Court fee paid is proper. Plaintiffs themselves have valued their suits and they have sought injunction to avoid their monetary liability of Rs. Two crorer and above. Loss which was going to cause to the plaintiffs was of two crore and two crore fifty three lac in two suits respectively. Therefore, the trial Court ought to have directed the plaintiffs to pay ad valorem Court fee. In the absence of any such direction, suit as filed itself was not maintainable. There is no notice under section 80, Civil Procedure Code according to law. Plaintiffs have neither

mentioned the date on which cause of action has accrued and the reliefs intended to be claimed by the plaintiffs in the notice. There is nothing in the pleadings that the said notice has been delivered at the office or place of residence of the concerned officer and to whom notice has been served. Therefore, in view of such technical flaws suit as filed itself was not maintainable. Even otherwise, suit against the Municipal Council without serving statutory notice under section 319 of the M.P. Municipalities Act is not maintainable. The benefit of section 80(2) Civil procedure Code cannot be extended to suits against Municipal Council and the suit without serving statutory notice under the Municipalities Act is not maintainable."

The provision of section 67 is pari materia to section 319 of M.P. Municipalities Act is also not in dispute.

In *Harmesh Chandra Dua and another v. Nagar Palika Nigam, Gwalior, 2005 (4) MPLJ 38,* division Bench of this Court has laid down that notice under section 401 of M.P. Municipal Corporation Act is mandatory. Plaint was ordered to be returned to plaintiff with liberty to present after complying with provisions of notice, if it is within limitation and permissible under the law.

In view of the aforesaid, we hold that notice under section 67 of the Adhiniyam to be mandatory, the suit could not be said to be maintainable. As prayed, plaint is ordered to be returned which was also the recourse adopted to in *Harmesh Chandra Dua and* (supra). We direct the plaint to be returned to the plaintiff with liberty to present it after complying with provisions of notice and to present it, if it is within limitation and permissible under the law.

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***364. LAND REVENUE CODE, 1959 (M.P.) – Sections 107 & 257 (f)**

**Suit for correction in the revenue map – Is not maintainable – Civil Courts have no jurisdiction to try and decide such suits – Section 107 (5) of the Land Revenue Code confers jurisdiction on the Settlement Officer and the Collector, as the case may be, alone to prepare or revise the map – Section 257 of MPLRC excludes the jurisdiction of Civil Court in such matters.**

**Nagar Panchayat, Aron, Dist, Guna v. Shanti Bai and others**

**Judgment dated 30.06.2009 passed by the High Court in S.A. No. 30 of 2006, reported in 2009 (3) MPLJ 418**

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***365. LIMITATION ACT, 1963 – Articles 19 & 28**

**By agreement, money was lent for one year and was to be repaid within one year with interest – Held, Article 28 of the Act will be applicable for suit for recovery – Cause of action to file suit accrued**

**after expiry of one year of money lent – Suit could be filed within 3 years of cause of action – Judgment and decree dismissing suit as barred by limitation set aside – Revision allowed.**

**Omprakash v. Krishnalal**

**Judgment dated 07.05.2009 passed by the High Court in Civil Revision No. 19 of 2009, reported in I. L. R. (2009) M.P. 1794**

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**366. MOTOR VEHICLES ACT, 1988 – Sections 2 (1), 2 (14), 2 (21), 10 (14) & 147**

**(i) Distinction between an effective driving licence granted for transport vehicle and passenger motor vehicle – Transport vehicle may be a light motor vehicle but for the purpose of driving the same, a distinct licence is required to be obtained – Legal position explained.**

**(ii) The transport vehicle was driven without driving licence to drive transport vehicle by the driver who had licence to drive light motor vehicle – Breach of condition of insurance is apparent.**

**Oriental Insurance Co. Ltd. v. Angad Kol & Ors.**

**Judgment dated 18.02.2009 passed by the Supreme Court in Civil Appeal No. 1102 of 2009, reported in AIR 2009 SC 2151**

Held:

Motor Vehicles Act, 1988 (hereinafter called as 'the Act') was enacted to consolidate and amend the law relating to motor vehicles. 'Driving licence' has been defined in Section 2 (10) to mean the licence issued by a competent authority under Chapter II authorizing the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description. "Goods carriage" has been defined in Section 2 (14) to mean any motor vehicle constructed or adapted for use solely for the carriage of goods. Or any motor vehicle not so constructed or adapted when used for the carriage of goods. The said Act also defines 'heavy goods vehicle', 'heavy passenger motor vehicle', 'medium goods vehicle' and 'medium passenger motor vehicle' as well as a 'light motor vehicle' in Section 2 (21) of the Act to mean:

> " 'Light motor vehicle' means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms"

Although the definition of the "light motor vehicle' brings within its umbrage both 'transport vehicle' or 'omnibus', indisputably, as would be noticed infra, a distinction between a effective licence granted for transport vehicle and passenger motor vehicle exists.

Section 3 provides for the necessity of driving licence, stating:

> "3. Necessity for driving licence.- (1) No person shall drive a motor vehicle in any public place unless he holds an

effective driving licence issued to him authorizing him to drive the vehicle: and no person shall so drive a transport vehicle other that a motor car or motor cycle hired for his own use or rented under any scheme made under subsection (2) of Section 75 unless his driving licence specifically entitles him so to do.

(2) ...."

Section 9 provides for grant of driving licence. Section 10 prescribes the form and contents of licences to drive which is to the following effect :

"10. Form and contents of licences to drive- (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one of more of the following classes namely: -

(a) to (c)...

(d) light Motor vehicle;

(e) transport vehicle;

(i) road Roller;

(j) motor vehicle of a specified description."

The distinction between a 'light motor vehicle' and a 'transport vehicle' is, therefore, evident. A transport vehicle may be a light motor vehicle but for the purpose of driving the same, a distinct licence is required to be obtained. The distinction between a 'transport vehicle' and a passenger vehicle' can also be noticed from Section 14 of the Act. Sub-section (2) of Section 14 provides for duration of a period of three years in case of an effective licence to drive a 'transport vehicle' whereas in case of any other licence, it may remain effective for a period of 20 years.

The Central Government had framed Rules known as "Central Motor Vehicle Rules'. Form 4 prescribed therein provided for different columns for grant of a licence of light motor vehicle, medium goods vehicle or heavy goods vehicle. Rule 14 prescribes for filing of an application in Form 4 for a licence to drive a motor vehicle. An amendment was carried out on or about 28.3.2001 being JSR No. 221 (E) in terms whereof, inter alia, licence which is to be granted in Form 6 requires specific authorization to drive a 'transport vehicle'.

The licence was granted to Respondent No.6, Umesh, in 2003, i.e., after the said amendment came into force. The accident, as noticed hereinbefore, took place on 31.10.2004.

From the discussions made hereinbefore, it is thus, evident that it is proved that respondent No.6 did not hold a valid and effective driving licence for driving a goods vehicle. Breach of conditions of the insurance is, therefore, apparent on the face of the records.

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**367. MOTOR VEHICLES ACT, 1988 – Sections 163-A, 166, 168, 140 & Schedule II**
**WORKMEN'S COMPENSATION ACT, 1923 – Sections 2 (1), 3, 4, 4-A (3), 20 & 23**

**(i) Workmen's Compensation Act, 1923 and Motor Vehicles Act, 1988, object and construction – Held, both the Workmen's Compensation Act, 1923 and the Motor Vehicles Act, 1988 are beneficent legislation in so far as they provide for payment of compensation to the workmen employed by employers and/or by use of motor vehicle by the owner thereof and/or the insurer to the claimants suffering permanent disability – Both the Acts aim at providing expeditious relief to the victims of accident – Statutes, therefore, deserve liberal construction – The legislative intent contained therein is required to be interpreted with a view to give effect thereto.**

**(ii) Workmen's Compensation Act, 1923 – Amount of compensation, determination of – It depends upon extent of disability – Motor Vehicles Act, 1988, determination of compensation – Applicability to provisions of 1923 Act – Held, where claim is under Motor Vehicles Act, 1988, but the claimant suffers from disability coming within the purview of the Workmen's Compensation Act, 1923, provisions of the 1923 Act would be applicable for the purpose of determination of compensation – Legal position explained.**

**(iii) Distinction between "permanent total disability" and "permanent partial disability" – Held, the distinction between "permanent total disability" and "permanent partial disability" is that where as in the former category disablement is 100% but in the latter, it is only to the extent specified in the Schedule.**

**(iv) Statutory interest under the 1923 Act, grant of – Provision is penal in nature – How to be imposed? Position explained.**

**(v) Compensation amount – Whether excess of the amount claimed can be directed? Held, Yes – Statutory duty of the Commission and/or Tribunal underlined.**

**Oriental Insurance Company Limited v. Mohd. Nasir and another**
**Judgment dated 12.05.2009 passed by the Supreme Court in Civil Appeal No. 3486 of 2009, reported in (2009) 6 SCC 280**

Held:

The 1923 Act was enacted to provide for the payment by certain classes

of employers to their workmen of compensation for injury by accident. "Compensation" has been defined in Section 2 (1) (c) of the 1923 Act to mean "compensation as provided therein". "Partial disability has been defined in Section 2 (1) (g).

"Qualified medical practitioner" has been defined in Section 2 (1) (i).

Section 3 provides for the employer's liability for compensation and Section 4 deals with the amount of compensation.

We may notice that the First Schedule specified under Section 2 (1) (g) and Section 4 is in two parts. Part I specifies the list of injuries deemed to result in permanent total disablement and Part II specifies the list of injuries deemed to result in permanent partial disablement. The note appended thereto reads as under:

> "*Note.* – Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent of the loss of that limb or member."

The Fourth Schedule appended to the 1923 Act provides for the factors for working out lump sum equivalent of compensation amount in case of permanent disablement and death.

The 1988 Act was enacted to consolidate and amend the law relating to motor vehicles. Chapter X provides for liability without fault in certain cases.

Chapter XI deals with insurance of motor vehicles against third-party risks. Chapter XII of the Act provides for constitution of Claims Tribunal. Explanation appended to sub-section (1) of Section 165 provides that the expression "claims for compensation in respect of accidents involving death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under Section 140 and Section 163-A of the 1988 Act. The Second Schedule appended thereto framed in terms of Section 163-A thereof provides for compensation for third-party fatal accidents/injury cases claims. It specifies the amount of compensation in case of death on the basis of income of the deceased as also the age group. It also provides for applicability of multiplier.

> The Note appended to the Second Schedule reads as under:
>
> "5. Disability in non-fatal accidents:
>
> The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:
>
> Loss of income, if any, for actual period of disablement not exceeding fifty-two weeks.
>
> PLUS either of the following —
>
> (a) in case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the multiplier applicable to the age on the date of determining the compensation, or

(b) in case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under Item (a) above.

Injuries deemed to result in permanent total disablement/ permanent partial disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923.

6. Notional income for compensation to those who had no income prior to accident–

Fatal and disability in non-fatal accidents-

(a) Non-earning persons – Rs 15,000 p.a.

(b) Spouse – Rs 1/3rd of income of the earning surviving spouse.

In case of other injuries only 'General Damages' as applicable."

Both the 1923 Act and the 1988 Act are beneficent legislation insofar as they provide for payment of compensation to the workmen employed by the employers and/or by use of motor vehicle by the owner thereof and/or the insurer to the claimants suffering permanent disability. The amount of compensation is to be determined in terms of the provisions of the respective Acts. Whereas in terms of the 1923 Act, the Commissioner who is a quasi-judicial authority, is bound to apply the principles and the factors laid down in the Act for the purpose of determining the compensation, Section 168 of the 1988 Act enjoins the Tribunal to make an award determining the amount of compensation which appears to be just.

Both the Acts aim at providing for expeditious relief to the victims of accident. In these cases, the accidents took place by reason of use of motor vehicles. Both the statutes are beneficial ones for the workmen as also the third parties. The benefits thereof are available only to the persons specified under the act besides under the contract of insurance. The statutes, therefore, deserve liberal construction. The legislative intent contained therein is required to be interpreted with a view to give effect thereto.

Both the statutes provide for the mode and manner in which the percentage of loss of earning capacity is required to be calculated. They provide that the amount of compensation in cases of this nature would be directly relatable to the percentage of physical disability suffered by the injured vis-à-vis the injuries specified in the First Schedule of the 1923 Act. Indisputably where injuries are specified in the First Schedule the mode and manner provided for the purpose of calculating the amount of compensation would be applicable.

The statutes provide for the determination of the extent of physical disability suffered by a qualified medical practitioner so as to enable him to assess the

loss of earning capacity. Explanation 1 appended to clause (c) of sub-section (1) of Section 4 provides that where there are more injuries than one, the aggregate amount of compensation has to be taken but the same should not exceed the amount which would have been payable in case of permanent total disablement. It is also beyond any doubt or dispute that while determining the amount of loss of earning capacity, the Tribunal or the High Court must record reasons for arriving at their conclusion.

The 1923 Act would also be applicable to the claims applications arising out of the use of motor vehicles in terms of the provisions of the 1988 Act for the purpose of determination of the amount of compensation where the victim of the accident suffers from disability in the cases coming within the purview thereof. The note appended to the Second Schedule of the 1988 Act raises a legal fiction, stating that "injuries deemed to result in permanent total disablement/ permanent partial disablement and percentage of loss of earning capacity shall be as per Schedule I under the Workmen's Compensation Act, 1923". Permanent disability, therefore, for certain purposes have been co-related with functional disability.

As to what, therefore, in our opinion, would be relevant is to find out the nature of injuries and as to whether the same falls within the purview of Part I or Part II thereof. We have noticed herein before that whereas Part I specifies the injuries which would deem to result in permanent total disablement, Part II specifies injuries which would be deemed to result in permanent partial disablement.

The distinction between the "permanent total disablement" and "permanent partial disablement" is that whereas in the former it is 100% disablement, in the latter it is only the disablement to the extent specified in the Schedule. Similar terms have been used in clauses (a) and (b) of Para 5 of the Second Schedule of the Motor Vehicles Act. It by reference incorporates the provisions of the First Schedule of the 1923 Act. Indisputable, therefore, the Note appended thereto would not only be applicable to the cases failing under the 1923 Act but apply to the cases which fall under the 1988 Act as well.

Our attention, however, has been drawn to a decision of this Court in *National Insurance Co. Ltd. v. Mubasir Ahmed, (2007) 2 SCC 349,* wherein it was held: (SCC p. 354, para 8)

> "8. Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot

be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the fact situation. Coming to the question of liability to pay interest, Section 4-A (3) deals with that question.

In determining the amount of compensation, several factors are required to be taken into consideration having regard to the Note. Functional disability, thus, has a direct relationship with the loss of limb.

The second question which arises for consideration is with regard to the payment of interest. There cannot be any doubt whatsoever that interest would be from the date of default and not from the date of award of compensation – Section 4-A (3) of the 1923 Act, deals with that question.

However, in the cases determined under the Motor Vehicles Act, interest stipulated therein shall become payable.

The third question which had been raised is as to whether any amount could be directed to be paid in excess of the amount claimed. We have noticed hereinbefore that the Act is a beneficent legislation. It imposes a statutory duty upon the Commissioner and/or the Tribunal.

The function of the Commissioner is to determine the amount of compensation as laid down under the Act. Even if no amount is claimed, the Commissioner must determine the amount which is found payable to the workman. Even in the cases arising out of the 1988 Act, it is the duty of the Tribunal to arrive at a just compensation having regard to the provisions contained in Section 168 thereof.

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**368. MOTOR VEHICLES ACT, 1988 – Sections 166, 168 & 163-A read with Schedule II**

**(i) Assessment of "just compensation" – Requirement of maintaining uniformity and consistency in determining compensation – The Apex Court has given direction to Tribunals to determine compensation by following the well-settled steps enunciated in the judgment.**

**(ii) Facts needed to be established by the claimants for assessing compensation in the case of death and the issues to be determined by the Tribunal to arrive at the loss of dependency observed.**

**(iii) Addition to income for future prospects, deduction for personal and living expenses of the deceased and selection of multiplier to be applied as determinants have been standardized by the Supreme Court.**

**Sarla Verma (Smt) and others v. Delhi Transport Corporation and another**

**Judgment dated 15.04.2009 passed by the Supreme Court in Civil Appeal No. 3483 of 2008, reported in (2009) 6 SCC 121**

Held:

The lack of uniformity and consistency in awarding compensation has been a matter of grave concern. Every district has one or more Motor Accidents Claims Tribunal (s). If different Tribunals calculated compensation differently on the same facts, the claimant, the litigant, the common man will be confused, perplexed and bewildered. If there is significant divergence among the Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system.

Compensation awarded does not become "just compensation" merely because the Tribunal considers it to be just. For example, if on the same or similar facts (say the deceased aged 40 years having annual income of Rs 45,000 leaving his surviving wife and child), one Tribunal awards Rs 10,00,000 another awards Rs 5,00,000, and yet another awards Rs 1,00,000, all believing that the amount is just, it cannot be said that what is awarded in the first case and the last case is just compensation. "Just compensation" is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit.

Assessment of compensation though involving certain hypothetical considerations, should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation.

Basically only three facts need to be established by the claimants for assessing compensation in the case of death:

(a) age of the deceased;

(b) income of the deceased; and

(c) the number of dependants.

The issues to be determined by the Tribunal to arrive at the loss of dependency are:

(i) additions/deductions to be made for arriving at the income;

(ii) the deduction to be made towards the personal living expenses of the deceased; and

(iii) the multiplier to be applied with reference to the age of the deceased.

If these determinants are standardised, there will be uniformity and consistency in the decisions. There will be lesser need for detailed evidence. It

will also be easier for the insurance companies to settle accident claims without delay.

To have uniformity and consistency, the Tribunals should determine compensation in cases of death, by the following well-settled steps:

*Step 1 (Ascertaining the multiplicand)*

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

*Step 2 (Ascertaining the multiplier)*

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this court. The multiplier should be chosen from the said table with reference to the age of the deceased.

*Step 3 (Actual calculation)*

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the "loss of dependency" to the family.

Thereafter, a conventional amount in the range of Rs 5000 to Rs 10,000 may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range of 5000 to 10,000 should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also be added.

*Addition to income for future prospects*:

Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects.

In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of

increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

*Deduction for personal and living expenses*:

No evidence need be led to show the actual expenses of the deceased. In fact, any evidence in that behalf will be wholly unverifiable and likely to be unreliable. The claimants will obviously tend to claim that the deceased was very frugal and did not have any expensive habits and was spending virtually the entire income on the family. In some cases, it may be so. No claimant would admit that the deceased was a spendthrift, even if he was one.

It is also very difficult for the respondents in a claim petition to produce evidence to show that the deceased was spending a considerable part of the income on himself or that he was contributing only a small part of the income on his family. Therefore, it became necessary to standardise the deductions to be made under the head of personal and living expenses of the deceased. This lead to the practice of deducting towards personal and living expenses of the deceased, one-third of the income if the deceased was married, and one-half (50%) of the income if the deceased was a bachelor. This practice was evolved out of experience, logic and convenience. In fact one-third deduction got statutory recognition under the Second Schedule to the Act, in respect of claims under Section 163-A of the Motor Vehicles Act, 1988 ("the MV Act", for short). But, such percentage of deduction is not an inflexible rule and offers merely a guideline.

Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd ) where the number of dependent family members is 2 to 3, one-fourth (1/4th ) where the number of dependent family members is 4 to 6, and one-fifth (1/5th ) where the number of dependent family members exceeds six.

Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

*Selection of Multiplier:*

In cases falling under Section 166 of the MV Act, Davies method enunciated in *Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601* is applicable.

We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table (prepared by applying *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176, U.P. SRTC v. Trilok Chandra, (1996) 4 SCC 362 and New India Assurance Co. Ltd. v. Charlie, (2005) 10 SCC 720 )*, which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.

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**369. MUSLIM LAW:**

**Will under Mohammedan Law – Effectivity of – In case of Will by testator in favour of some heirs only, the Will would not confer right after death of the testator on the heirs in favour of whom the Will was made unless consent is given by other heirs.**

**Kallobai and another v. Babukhan and others**

**Judgment dated 06.04.2009 passed by the High Court in Second Appeal No. 37 of 1994, reported in 2009 (3) MPLJ 231**

Held:

Section 117 of Mulla's *Principles of Mohammedan Law* deals with bequest to an heir and provides as under :-

> **"117. Bequests to heirs –** A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share".
>
> *Explanation* – In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the Will, but to the time of the testator's death.

Section 118 deals with limit of testamentary power, which reads as under :-

> **"118. Limit of testamentary power.–** A Mohammedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator".

A perusal of Sections 117 and 118 indicate that the two Sections operate in different fields. Section 117 is attracted when bequests is to an heir, whereas, section 118 operates and deals with bequests in general. Section 117 which specifically deals with the bequests to heir does not provide that a Mohammedan can bequest to an heir up to legal third without consent of his other heirs.

The above view is supported by the Division Bench judgment of Karnataka High Court reported in the matter of *Narunnisa v. Sheik Abdul Hamid, AIR 1987 Karnataka 222* wherein the Karnataka High Court relying upon the earlier judgment of Privy council, held that :-

> "8. The legal position is made clear by the judgment of the Privy council in *Salayjee vs. Fatimabi, AIR 1922 PC 391.*
>
> > "The Mohammedan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and the burden of proving the consent of a particular heir is upon the legatee". (head note). To the same effect is the decision in *Ghulam Mohammad vs. Ghulam Hussain, AIR 1932 PC 81.*
> >
> > "Under the Hanafi law a bequest to an heir is invalid unless consented to by the other heirs after the testator's death."
>
> "9. Mr. A.A.A. Fayzee, in his book "Cases in the Mohammedan Law of India and Pakistan" in the Chapter "Gifted Will Compared" has extracted the following passage from the judgment in *Ranee Khujooroonissa vs. Mussammut Roushun Jehan, (1986) 3 Ind. App 291.*
>
> > "The Policy of the Mohammedan Law appears to be to prevent a testator interfering by Will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger". (Page 308).
>
> "10. In *Mahomed Ata Hussain Khan vs. Hussain Ali Khan, AIR 1944 Oudh 139* it is held; "Under the Mohammedan Law one of the heirs may consent to a Will and as far as he is concerned it will be held to be valid and none of his heirs can challenge it subsequently". (Head note-d)

"11. In *Rahummuth Amal vs. Mohammed Mydeen Rowther, (1978) 2 Mad LJ 499* the Court was dealing with a case, where the bequest was to an heir coupled with a bequest to a non-heir; after quoting a few decisions on that point, the Court observed thus:

> "13. xxx xxx xxx
>
> No doubt, as had already been pointed out, the bequest to an heir coupled with a bequest to a non-heir has to be reconciled as far as possible and the totality of the instrument cannot on a hypertechnical ground be rejected in toto. If this is the method by which such an instrument has to be understood and interpreted then it should be held that the bequest to the first defendant who is an heir in this case is not valid, because it is against the personal law, but insofar as the bequest to a non-heir, namely the second defendant is concerned, it would be operative to the extent of a third of the estate of Seeni Rowther." (underlining is ours).

"12. The well established position, in our opinion, is that a bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosever consents, the bequest is valid to that extent only and binds his or her share. That it is so is clear from the following enunciation in *Mahaboobi vs. Kempaiah (Second Appeal No. 99/150-51); AIR 1955 Mys NUC 705;*

> "A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. But a bequest of more than the legal third can be validated by the consent of the heirs; and similarly a bequest to an heir may be rendered valid by the consent of the other heirs. The limits of testamentary power exist solely for the benefit of the heirs and they may if they like forego the benefit by giving their consent". (Head note-C). (Underlining is ours).

Learned counsel for the appellants has placed reliance upon the judgment of *E.C. Jeeva v. H.H. Yacoob Ally and another, AIR 1928 Rangoon 307,* but the said judgment does not help him, but it supports the view taken by this Court above. In the matter of *E.C. Jeeva* (supra), it has been held that:-

"It is quite clear that the right of adult Mahomedan heirs to the unrestricted enjoyment of the property they inherit is unassailable. A Mahomedan testator cannot by a testamentary disposition reduce or enlarge the shares of those who are entitled to inherit. Here the will, not only purports to limit the right to enjoyment of the outside one-third, devoted to charity, but deals with the right to the unrestricted enjoyment of the remainder of the estate. The principle of the unrestricted enjoyment of heirs of the property they inherit was specifically recognized by the Privy Council in the case of *Ranee Khujoornnissa vs. Mt. Roushan Jehan (2)*. The Privy Council there said:

"The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion as much as a third to a stranger."

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**370. MUSLIM LAW:**

**LIMITATION ACT, 1963 – Article 59**

**(i) Gift – Connotation thereof – A gift indisputably becomes complete when a person transfers with immediate effect ownership of his movable or immovable property to another person and that other person himself or someone else with his consent takes possession of the property gifted.**

**(ii) Gift (*hiba*) under Mohammedan Law – For making valid and complete gift, conditions enumerated.**

**(iii) Transfer of possession as one of the conditions of gift (*hiba*) – Held, in case of gift of a property let out to tenants – Transfer of constructive possession would be sufficient.**

**(iv) Limitation for filing suit for cancellation of transaction – Held, a suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act.**

**Abdul Rahim and others v. Sk. Abdul Zabar and others**

**Judgment dated 06.03.2009 passed by the Supreme Court in Civil Appeal No. 1573 of 2009, reported in (2009) 6 SCC 160 (3 Judge Bench)**

Held:

A gift indisputably becomes complete when a person transfers with immediate effect the ownership of his movable or immovable property to another person, and that other person himself or someone else with his consent takes possession of the property gifted. Under Mohammedan law it is a contract which takes effect through offer and acceptance.

The conditions to make a valid and complete gift under the Mohammedan law are as under:

(a) The donor should be sane and major and must be the owner of the property which he is gifting.

(b) The thing gifted should be in existence at the time of hiba.

(c) If the thing gifted is divisible, it should be separated and made distinct.

(d) The thing gifted should be such property to benefit from which is lawful under the Shariat.

(e) The thing gifted should not be accompanied by things not gifted i.e. should be free from things which have not been gifted.

(f) The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor.

It is also well settled that if by reason of a valid gift the thing gifted has gone out of the donee's ownership, the same cannot be revoked. The donor may lawfully make a gift of a property in the possession of a lessee or a mortgagee. For effecting a valid gift, the delivery of constructive possession of the property to the donee would serve the purpose. Even a gift of a property in possession of trespasser is permissible in law provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

We may notice the definition of gift as contained in various textbooks. In Mulla's Principles of Mohammadan Law the "hiba" is defined as a transfer of property made immediately without any exchange by one person to another and accepted by or on behalf of later (sic latter). A.A.A. Fyzee in his Outlines of Muhammadan Law defined "gift" in the following terms:

> "A MAN may lawfully make a gift of his property to another during his lifetime; or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will."

Syed Ameer Ali in his *Commentary on Mohammedan Law* has amplified the definition of "hiba" in the following terms:

> "In other words the 'hiba' is a voluntary gift without consideration of a property or the substance of a thing by

one person to another so as to constitute the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions viz. (a) a manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee either impliedly or constructively; and (c) taking possession of the subject-matter of gift by the donee either actually or constructively."

In *Maqbool Alam Khan v. Khodaija, AIR 1966 SC 1194,* it was held: (AIR pp. 1196-97, paras 6-7)

> "6. The Prophet has said: 'A gift is not valid without seisin.' The rule of law is: 'Gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary 'because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract, without seisin.' [See Hamilton's Hedaya (Grady's Edn.), p. 482.]
>
> Previously, the rule of law was thought to be so strict that it was said that land in the possession of a usurper (or wrongdoer) or of a lessee or a mortgagee cannot be given away, see Dorrul Mokhtar, *Book on Gift,* p. 635 cited in *Mullick Abdool Guffoor v. Muleka, ILR (1884) 10 Cal 1112.* But the view now prevails that there can be a valid gift of property in the possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to us to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession."

(See also *Mullick Abdool Guffor* (supra)]

Faiz Badruddin Tyabji in his Muslim Law – The Personal Law of Muslims in India and Pakistan states the law thus:

> "395.(1) The declaration and acceptance of a gift do not transfer the ownership of the subject of gift, until the donor transfers to the donee such seisin or possession as the

subject of the gift permits viz. until the donor (a) puts it within the power of the donee to take possession of the subject of gift, if he so chooses, or (b) does everything that, according to the nature of the property forming the subject of the gift, is necessary to be done for transferring the ownership of the property, and rendering the gift complete and binding upon himself.

(2) Imam Malik holds that the right to the subject of gift relates back to the time of the declaration."

Transfer of possession under the Muslim law is necessary for transferring complete ownership. The learned author Tyabji states:

"Transfer of possession in hiba is not merely a matter of form, nor something merely supplying evidence of the intention to make a gift. The necessity for the transfer of possession is expressly insisted upon as part of the substantive law, since transfer of possession effectuates that which the gift is intended to bring about viz. the transfer of the ownership of the property from the donor to the donee. It may be said that transfer of possession is no more a matter of form than the necessity for consideration for the validity of a contract is a matter of form. The law does not ask, did the donor really intend to give the subject of gift i.e. did he really intend to transfer the ownership of the subject of gift from himself to the donee? What the law asks is, has the donor actually given away? or Has the ownership been actually transferred from the donor to the donee?"

In regard to contracts it has been well expressed:

"It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter, or is an absolute contract; and the adoption of a form removes the difficulty. So that what may have been considered a mere matter of form becomes incorporated in substantive law. What has to be determined is not whether the donor had finally resolved to make a gift, but whether he had actually transferred away the property – and even where the transfer is for consideration, possession has, in most systems of law, an important bearing on the rights of the parties and others claiming through them, since (under Muslim law) the owner's right ceases on his death, and devolves upon his heirs, it follows that where the owner dies without transferring the property to another, the person to whom a voluntary transfer was intended to be made, has no claim against the heirs."

In *Munni Bai v. Abdul Gani, AIR 1959 MP 225,* it was held: (AIR p. 226, para 6)

> "6. However, delivery of possession can be made in such manner as the subject of the gift is susceptible of: see *Sadik Husain Khan v. Hashim Ali Khan,* (1915-16) 43 IA 212, at p. 221. In a case of gift of the equity of redemption when the mortgage is usufructuary, there can be no delivery of physical possession of the property. In these circumstances, execution of Ext. P-1 by Mst Dhapli, by which, after making an oral declaration of gift, she recognized the respondent as owner of the house and delivered the document to him in token thereof, is sufficient delivery of possession."

A learned Single Judge of the Orissa High Court in *Abu Khan v. Moriam Bibi, (1974) 40 Cut LT 1306,* held:

> "...delivery of possession may be either actual or constructive. 'Possession' has been defined in Section 394 of Muslim Law by Tyabji. The definition runs thus:
>
> 'A person is said to be in possession of a thing, or of immovable property, when he is so placed with reference to it that he can exercise exclusive control over it, for the purpose of deriving from it such benefit as it is capable of rendering, or as is usually derived from it.'
>
> Thus, possession can be shown not only by acts of enjoyment of the land itself but also by ascertaining as to in whom the actual control of the thing is to be attributed or the advantages of possession are to be credited, even though some other person is in apparent occupation of the land. In one case, it would be actual possession and in the other case, it would be constructive possession."

In that case, handing over of the deed of gift coupled with the declaration made in the document was held to be sufficient for constituting a valid gift. (See also *Valia Peedikakkandi Katheessa Umma v. Pathakkalan Narayanath Kunhamu, AIR 1964 SC 275*) We agree with the ratio laid down therein.

Indisputably, the deed of gift is a registered one. It contains a clear and unambiguous declaration of total divestment of property. A registered document carries with it a presumption that it was validly executed. It is for the party questioning the genuineness of the transaction to show that in law the transaction was not valid.

We have noticed hereinbefore that Razak had been receiving rent from the tenants. In fact, Respondent 1 in his suit claimed a decree for apportionment of rent. We would presume that Razak had been collecting rent from the tenants during the lifetime of his father. The agency to collect rent, however, come to

end as soon as an order of mutation was passed in his favour. Apart from the fact that the Razak was allowed to continue to collect rent which having regard to the declaration made in the deed of gift must be held to be on his own behalf and not on behalf of the donor. Constructive possession of the suit premises must be held to have been handed over by the donor as he had himself prayed for mutation of Razak's name in the revenue record. The High Court, in our opinion, misconstrued the order of the Revenue Authority. It having failed to take into consideration the import and purport of the donor's application before the Tahsildar committed a manifest error in holding that the order of mutation on that basis was not decisive.

In a case of this nature, thus, the transfer of constructive possession would subserve the requirements of law.

Limitation for filing a suit in a case of this nature is governed by Article 59 of the Schedule appended to the Limitation Act, which reads as under:

| "Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|
| 59. To cancel or set aside an instrument or decree or for the rescission of a contract. | Three years | When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him. |

Respondent 1 in his suit prayed for cancellation of and setting aside of the deed of gift dated 21-2-1973. He became aware of the deed of gift in the proceedings before the Tahisladar. He had filed objections on Razak's application for grant of lease in his name in respect of the small patch of land which was being used for ingress to and egress from the property in question. In that proceeding itself, the donor himself had prayed for mutation of Razak's name in respect of the property in question.

A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The suit having not been filed within a period of three years, the suit has rightly been held to be barred by limitation.

In *Mohd. Noorul Hoda v. Bibi Raifunnisa, (1996) 7 SCC 767,* this Court held: (SCC p. 771, para 6)

> "6.....There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 gets attracted? As stated earlier, Article

59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

(See also *Sneh Gupta v. Devi Sarup, (2009) 6 SCC 194*)

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***371. N.D.P.S. ACT, 1985 – Section 21**

**Determination of quantity – The total weight of the narcotic drug or psychotropic substance recovered from the accused is not relevant to determination of 'small quantity' or 'commercial quantity' but it is the percentage of the narcotic drug or psychotropic substance translated into weight or found in the mixture is relevant for the purpose of imposition of sentence – Legal position restated.**

**State of NCT of Delhi v. Ashif Khan @ Kalu**

**Judgment dated 03.03.2009 passed by the Supreme Court in Criminal Appeal No. 428 of 2009, reported in AIR 2009 SC 1977**

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**372. N.D.P.S. ACT, 1985 – Section 21 (c) (as amended by Act of 2005) & Section 41 (1)**

**INTERPRETATION OF STATUTES:**

**Imposition of sentence – Effect of amendment by Act of 2005 – Held, quantum of punishment to be inflicted on an accused upon conviction would be as per the law which was prevailing at the relevant time, as on the date of commission of the offence and/or the date of conviction by trial Court – The said amendment shall not have any effect to pending appeals – There was no distinction between a small quantity and a commercial quantity – Question of infliction of a lesser sentence by reason of the provisions of the amending Act would not arise – Position explained.**

**Interprectation of Statutes – Substantive provision, unless specifically provided for, should be held to have prospective operation –** *Basheer v. State of Kerala, (2004) 3 SCC 609* **relied on.**

**Jawahar Singh alias Bhagat Ji v. State of GNCT of Delhi**

**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 910 of 2009, reported in (2009) 6 SCC 490**

Held:

The offence indisputably took place on 26.09.1999. The appellant was convicted by a judgment dated 05.11.2000. The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (for short the Amending Act) came into effect from 02.10.2001.

By reason of the said amendment, "commercial quantity" and "small quantity" were defined as under:

> "2. (vii-a) 'commercial quantity', in relation to narcotic drugs and psychotropic substances means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;
>
> ★ ★ ★
>
> (xxiii-a) 'small quantity', in relation to narcotic drugs and psychotropic substances means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;"

Section 21 of the Act, which was also amended by Section 8 of the said amending Act, reads as under:

> "21. Punishment for contravention in relation to manufactured drugs and preparations. – Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactures drug or any

preparation containing any manufactured drug shall be punishable,–

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(c) where any contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

It is now beyond any doubt or dispute that the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of conviction, thee was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending Act, in our considered opinion, would not arise.

It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only.

Act 9 of 2001 did not bring about any significant or material changes in the parent Act. Parliament had given effect thereto with effect from a particular date viz. 02.10.2001. If the amending Act was to be given a retrospective effect, the amendments carried out in regard to the provisions for holding of trial would have been required to be complied with warranting a retrial in terms thereof.

One of the objectives of a criminal trial is that delay should be avoided. The proviso appended to Section 41 (1) of the amending Act categorically provides that the said amendment shall not have any effect to the pending appeals. It is, therefore, an indicator to show that the concluded trial should not be reopened. In *Basheer v. State of Kerala, (2004) 3 SCC 609* this Court took notice of the decision of this Court in *State v. Gian Singh, (1999) 9 SCC 312* stating: (*Basheer case* (supra) SCC pp. 616-17, paras 22-23)

"22. Inasmuch as Act 9 of 2001 introduced significant and material changes in the parent Act, which would affect the trial itself, application of the amended Act to cases where the trials had concluded and appeals were pending on the date of its commencement could possibly result in the trials being vitiated, leading to retrials, thereby defeating at least the first objective of avoiding delay in trials. The accused, who had been tried and convicted before 02.10.2001 (i.e. as per the unamended 1985 Act) could possibly urge in the pending appeals, that as their trials were not held in accordance with the amended provisions of the Act, their trials must be held to be vitiated and that they should be retried in accordance with the amended provisions of the Act. This could be direct and deleterious consequence of applying the amended provisions of the Act to trials which had concluded and in which appeals were filed prior to the date of the amending Act coming into force. This would certainly defeat the first objective of avoiding delay in such trials. Hence, Parliament appears to have removed this class of cases from the ambit of the amendments and excluded them from the scope of the amending Act so that the pending appeals could be disposed of expeditiously by applying the unamended Act without the possibility of reopening the concluded trials.

23. Thus, in our view, the Rubicon indicated by Parliament is the conclusion of the trial and pendency of appeal. In the cases of pending trials and cases pending investigation, the trial is yet to conclude; hence, the retrospective mollification of the rigour of punishment has been made applicable. In the cases where the trials are concluded and appeals are pending, the application of the amended Act appears to have been excluded so as to preclude the possible contingency of reopening concluded trials. In our judgment, the classification is very much rational and based on clearly intelligible differentia, which as rational nexus with one of the objectives to be achieved by the classification. There is one exceptional situation, however, which may produce an anomalous result. If the trial had just concluded before 02.10.2001, but the appeal is filed after 02.10.2001, it cannot be said that the appeal was pending as on the date of the coming into force of the amending Act, and the amendment would be applicable even in such cases. The observations of this Court in *State of A.P. v. Nallamilli Rami Reddi, (2001) 7 SCC 708* would

apply to such a case. The possibility of such a fortuitous case would not be a strong enough reason to attract the wrath of Article 14 and its constitutional consequences. Hence, we are unable to accept the contention that the proviso to Section 41 of the amending Act is hit by Article 14."

In *Amarsingh Ramjibhai Barot v. State of Gujarat, (2005) 7 SCC 550,* this Court noticed that the minimum punishment under Section 21 (c) of the Act is of ten years with a fine of Rs. 1,00,000. If the said provision is applicable, we do not see as to why the minimum sentence prescribed therein can be held to be not applicable.

This Court in *Narcotic Control Bureau v. Parash Singh, (2008) 13 SCC 499* followed *Basheer* (supra) opining that by reason of the amending Act, no new offence was created.

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***373. N.D.P.S. ACT, 1985 – Section 52-A**
**N.D.P.S. RULES, 1985 – Rule 2 (c)**
**Sample of alleged narcotic substance – Application for reanalysis, not maintainable – Further held, there is no provision for second examination or re-examination of sample by other authority.**
**Muzaffar Ali v. Central Narcotic Bureau, Neemuch**
**Judgment dated 20.03.2009 passed by the High Court in Criminal Revision No. 187 of 2009, reported in 2009 (3) MPHT 490**

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**374. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
**Cheque reported to police and bank as lost – Dishonoured on that account – Legal fiction under Section 138 does not extend to such cheque – The offence not made out.**
**Raj Kumar Khurana v. State of (NCT of Delhi) and another**
**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 913 of 2009, reported in (2009) 6 SCC 72**

Held:

Accused who was drawer of cheque in question, reported to police as well as to the bank that two unfilled cheques which had been signed by him, were lost. When the cheque in question was presented for payment, the bank returned it with remarks, "Said cheque reported lost by the drawer". The issue was whether dishonour of cheque on this ground constituted an offence under Section 138.

A bare perusal of Section 138 of the Act would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute

itself. In *State of A.P. v. A.P. Pensioners' Assn., (2005) 13 SCC 161,* this Court held: (SCC p. 169, para 30)

> "30 In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr Lalit."

Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. (See *R. Kalyani v. Janak C. Mehta, (2009) 1 SCC 516* and *DCM Financial Services Ltd. v. J.N. Sareen, (2008) 8 SCC 1.* Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be:

(i) Because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or

(ii) It exceeds the amount arranged to be paid from that account by an agreement made with that bank.

Before a proceeding thereunder is initiated, all the legal requirements therefore must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act.

The court while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by Respondent 2 or the closer report filed by the Superintendent of police in the first information report lodged by the appellant against him.

Before us a contention has been raised that the appellant did not have sufficient funds in his bank account. Such an allegation has not been made in the complaint petition. In any event, it was for the Bank only to say so, as the complainant is not supposed to have knowledge in regard to the amount available in the account of the appellant.

Keeping in view the facts and circumstances of the case, we are of the opinion that the complaint petition does not disclose an offence punishable under Section 138 of the Act.

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

Constructive liability of Director of a Company – Essentials to fasten liability – In this case as contended, there is no evidence to show that the appellant/accused (General Manager of the Company) was incharge and responsible for the conduct of the business of the Company – Notice was not given in his name, no specific role attributed to him in the complaint petition – The Apex Court upon considering the factual background of the case in the light of the principles referred to in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89* and *N.K. Wahi v. Shekhar Singh, (2007) 9 SCC 481* allowed the appeal against conviction.

**Ramrajsingh v. State of Madhya Pradesh and another**

Judgment dated 15.04.2009 passed by the Supreme Court in Criminal Appeal No. 1103 of 2003, reported in (2009) 6 SCC 729 (3 Judge Bench)

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*376. OFFICIAL LANGUAGE ACT, 1957 (M.P.) – Section 4

Hindi is the authorized language for the use of Bills and Rules passed in Madhya Pradesh – If the English version is not happily worded and is ambiguous, the Hindi version can be read to resolve the ambiguity and for proper interpretation.

**M.P. Nagar Nigam/Nagar Palika Karamchari Sangh, Katni and another v. State of Madhya Pradesh and another**

Judgment dated 24.06.2008 passed by the High Court in Writ Petition No. 4196 of 2005, reported in 2009 (3) MPHT 233

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*377. PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 (1) (d) & 20

Primary requisite of an offence under Section 13 (1) (d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant – In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13 (1) (d) cannot be held to be established.

In this case on account of non-examination of complainant and other witnesses on the point there was no substantive evidence to prove the factum of demand – Undoubtedly, provision relating to presumption about demand u/s 20 (1) of Prevention of Corruption Act provides that in any trial of an offence punishable u/s 7 or Section 11 or clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept

**or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or as the case may be, without consideration or for a consideration which he knows to be inadequate.**

**However, according to the provision of sub-section (3) of Section 20 of the Act where the gratification is trivial and the Court is of the opinion that no inference of corruption may fairly be drawn, it may decline to draw the presumption as referred above in sub-section (1) of Section 20 of the Act – In other words, the Court is not bound to draw presumption u/s 20 (1) of the Act where the alleged gratification is too trivial – In this case amount of gratification is Rs. 25/- – Therefore, an inference of corruption may not be fairly drawn as the alleged demand was too trivial.**

**A. Subair v. State of Kerala**

**Judgment dated 26.05.2009 passed by the Supreme Court in Criminal Appeal No. 639 of 2004, reported in (2009) 6 SCC 587**

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**378. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 12, 18 & 28**

**PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE RULES, 2006 – Rules 6 (5) & 15 (6)**

**CRIMINAL PROCEDURE CODE, 1973 – Section 126**

**Application under Section 12 of the Act, procedure therefor – The application is to be dealt with and order enforced in the same manner as laid down under Section 125 of CrPC – A Magistrate must provide opportunity of hearing to the parties – It is also expected from him to record the evidence of the parties – Further held, before passing a protection order under Section 18 of the Act, a Magistrate is required to *prima facie* satisfy himself as to the fact that domestic violence is likely to happen.**

**Madhusudan Bhardwaj & Ors. v. Mamta Bhardwaj**

**Judgment dated 31.03.2009 passed by the High Court in Cr.R. No. 826 of 2007, reported in 2009 (III) MPJR 47**

Held:

It is true that nowhere in the Act any direction with regard to receiving or recording of evidence of the parties has specifically been mentioned. While inserting the provision with regard to procedure, subsection (1) of Section 28 of the Act a general and wide mandate has been given that all the proceedings under Sections 12,18,19,20,21,22 and 23 of the Act (including Section 12 of the Act also) shall be governed by the provisions of Code of Criminal Procedure, 1973. The word 'shall' gives a mandate that the procedure as laid down in Cr. P.C. shall have to be followed. It is also true that in Cr. P.C. for various type of cases different procedures have been mentioned e.g. in; (1) Chapter VIII, which

deals with security for keeping the peace and for good behavior, (2) Chapter IX, which deals with order for maintenance of wives, children and parents, (3) Chapter X, which deals with maintenance of public order and tranquility, and (4) Chapter XVIII to Chapter XXIA, which provide different procedures for trial of different offences. But, at the same time the Legislature in its wisdom has inserted Section 37 in the Act vesting powers with the Central Government to make Rules for carrying out different provisions of the Act. Sub-section (2) of Section 37 indicates that the Rule making power of the Central Government is very wide, in which it is provided that – in particular and without prejudice to the generality of the foregoing powers, such Rules may provide for all or any of the following matters, namely, (a) to (m...)

Thus, although in clause (a) to (1) some subjects have been enumerated on which the Rules may be framed by the Central Government,. But at the same time it is also mentioned that this illustration of the subjects will not prejudice the generality of the powers given to the Central Government for framing Rules to carry out the provisions of the Act. This intention of the Legislature is further visible by perusing clause (m) which provides that – rules may be framed on any other matter which has to be, or may be prescribed. Under Section 37 of the Act, the Rules are framed which been published in the Gazette of India, Extra Pt. II, Sec 3 (i), dated 17th October, 2006, vide G.S.R. No. 644 (E), dated 17th October, 2006. Thus, these Rules framed by the Central Government are having statutory force and shall require to be given effect to. Although vide sub-section (3) of Section 37 of the Act the parliament can amend or disagree with the Rules, yet unless such amendment or disagreement comes in existence, the operation of these Rules will remain in force and have to be effective. Perhaps considering the ambiguous situation, that in Section 28 (1) of the Act the Legislature has given a mandate to follow the procedure as laid down in Cr. P.C., but the same has not been clarified as to what procedure will be adopted in dealing with the application under Section 12 of the Act, the Rule 6(5) has been framed. It appears that now the ambiguity has been removed by Rule 6 (5) in further mandatory words by mentioning, that the application under Section 12 shall be dealt with and order enforced in the same manner as laid down under Section 125 of Cr. P.C.

As observed by the three different Benches of High Court in the cases of *Het Ram v. Smt. Ram Kumari, 1975 Cri. L.J 656, Sankarasetty Pompanna v. State of Karnataka & Anr., 1977 Cri.L.J 2072* and *Pendiyala Sureshkumar Ramarao v. Sompally Arunbindu & Anr., 2005 Cri.L.J. 1455* without providing opportunity of leading evidence such application cannot be disposed of. Similar is the procedure required to be adopted to deal with an application under Section 12 of the Act to comply the direction under Section 28 (1) of the Act read with Rules 6 (5) of the Rules.

In view of the aforementioned mandate, the learned magistrate was required to comply with the provisions of this sub-rule read with Section 28(1) of the Act and was required to follow the procedure as laid down in the Code of

Criminal Procedure for the application under Section 125 of Cr. P.C. Admittedly, that has not been followed. On this ground, the impugned order appears erroneous.

It is also true, that sub-section (2) of Section 28 provides, that nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 of the Act. By cumulative reading of Section 28 sub-sections (1) and (2) of the Act and Rule 6 (5) of the Rules, it appears that sub-section (2) of Section 28 of the Act appears to have been enacted looking to the peculiar nature of the Act and also the existence of aforementioned ambiguity with regard to the provisions of Section 28 (1) of the Act, but now that ambiguity has been removed by the Central Government under its powers given by Section 37 of the Act.

Without coming to a certain and justified conclusion, passing a protection order under Section 18 of the Act in favour of the applicant may some time cause injustice to the opposite party/respondent who may be not at fault, but in reality a victim of the misdeed or misbehavior of the applicant. That is not and cannot be the intention, of the Legislature in enacting the Act. No doubt the intention of the Legislature behind enacting the Act is to provide more protection to the rights of women guaranteed under the Constitution who are victims of violence of any kind within the family and for matters connected therewith or incidental therewith. It is clear that the Act has been enacted for safeguarding the rights of a woman guaranteed under the Constitution and to provide protection against her victimization from domestic violence, interpretation of the provisions keeping this pious principle in mind is required. However, this principle cannot be accepted that in domestic violence always a woman is a victim or suffer party. There may be cases where by misusing the sympathetic and favourable attitude of the society or law framers, male partners may be harassed and thereafter if Court of law gives a second push to the male partner, it may cause disorder in the society. In my considered opinion, at the time of administering such laws the Courts are required to be vigilant enough in deciding the dispute as to which part of the family is a victim of the domestic violence. In view of this also, passing orders merely on the basis of the documents, without their formal proof and upon hearing the arguments has not been permitted by the law and in judicial process it ought not to be permitted and leaning attitude towards one party of the lis is required to be avoided.

It is true that the opening words of the Section 18 are that-'the Magistrate may, after giving the aggrieved person and respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place pass a protection order in favour of the aggrieved person and prohibit the respondent from .....' On perusal, two things are required before passing an order in favour of the aggrieved person; (1) opportunity of hearing to the parties, and (2) on being prima facie satisfied with regard to happening of

the domestic violence or likely to happen thereof. For being prima facie satisfied some material is required. As observed hereinabove and as provided in Rule 6 (5) evidence is required as the same is required for disposal of an application under Section 125 of Cr. P.C. It cannot be accepted that only upon providing an opportunity of hearing such orders are required to be passed.

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***379. PUBLIC TRUSTS ACT, 1951 (M.P.) – Sections 4 & 32**
**CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
**Stay of suit – Plaintiffs filed suit under Section 92 CPC alongwith some other reliefs seeking relief of declaration that they are trustees of the Madarsa Talimmal Kuran Trust and issuance of direction to the Registrar, Public Trusts to declare the Trust as Public Charitable Trust and plaintiffs as its trustee – On appearance, the defendants filed an application under Order 7 Rule 11 on the ground that proceedings for same relief are pending before the Registrar – Trial Court instead of rejecting the plaint, stayed the suit – Held, order of the Trial Court is in accordance with law and needs no interference.**
**Fatimabi and others v. Madarsa Talimmul Kuran Trust and others**
**Judgment dated 13.01.2009 passed by the High Court in Civil Revision No. 95 of 2007, reported in 2009 (3) MPHT 353**

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***380. SERVICE LAW:**
**Misconduct – Detention in police custody for more than 48 hours whether amounts to misconduct and can be made a ground for termination of service? Held, No.**
**State of M.P. and others v. Ram Kumar Pathak and another**
**Judgment dated 10.02.2009 passed by the High Court in W.P. 12269 of 2008, reported in 2009 (3) MPLJ 408 (DB)**

Held:

It is not disputed that both the workmen were involved in the criminal case. It appears that due to their involvement in the criminal case, they absented themselves on 7-9-1999, they submitted the joining on 7-12-1999 or 8-12-1999, the bail was granted to them on 7-12-1999, they were arrested on 4-12-1999, for about 4 days they remained in police custody, however, the fact remains that they have been ultimately acquitted in the criminal case and their services were terminated on the ground that they remained in police custody for more that 48 hours. Mere remaining in the police custody could not be said to be misconduct particularly when they have been acquitted. No departmental enquiry has been held.

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*381. **SPECIFIC RELIEF ACT, 1963 – Sections 16 & 20**

**A suit for specific performance of a contract by one of the co-purchaser (P) against the vendor (D1) can be filed as a matter of right if other co-purchaser has refused to join him – Of course, it is essential in such a case that all the parties to the contract should be before the Court – Proper and the only course in such case would be to join such co-purchaser (D2) in a suit as a proforma defendant. But where co-purchases (D2) has entered into compromise in a suit of the same subject-matter with vendor (D1), with the knowledge of another co-purchaser (P) and such another co-purchaser (P) has not objected thereon and consent decree has been passed, then such contract would stand rescinded so far as the co-purchaser (D2) is concerned and a suit for specific performance of contract by another co-purchaser (P) is not tenable, as the agreement of sale in the original form would not be enforced and it is not open to such co-purchaser (P) to plead that the other co-purchaser's (D2) right should be separated from that of the co-purchaser (P).**

**G. Jayashree & Ors. v. Bhagwandas S. Patel & Ors.**

**Judgment dated 19.12.2008 passed by the Supreme Court in Civil Appeal No. 4451 of 2008, reported in AIR 2009 SC 1749**

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382. **SPECIFIC RELIEF ACT, 1963 – Section 16 (c)**

(i) **Readiness and willingness to perform contract, connotation of – Held, it is not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof – Further held, it is also well settled principle of law that not only the original vendor but also a subsequent purchaser shall be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of the contract.**

(ii) **Decree for specific performance of contract is discretionary – The Court is entitled to take into consideration as to whether the suit has been filed within reasonable time – However, reasonability would depend upon the facts and circumstances of each case.**

**Azhar Sultana v. B. Rajamani & Ors.**

**Judgment dated 17.02.2009 passed by the Supreme Court in Civil Appeal No. 1077 of 2009, reported in AIR 2009 SC 2157**

Held:

Section 16 (c) of the Specific Relief Act, 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract. The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a

reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard and fast law can be laid down therefor.

The conduct of the parties in this behalf would also assume significance.

In *Veerayee Ammal v. Seeni Ammal, (2009) 1 SCC 134,* it was observed :

> "11. When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in *Chand Rani v. Kamal Rani* held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the condition are (i) from the express terms of the contract; (ii) from the nature of the property; and (ii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."
>
> "13. The Word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean :
>
> 'A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and property, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

It is also a well settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract. [See *Ram Awadh (Dead) by LRs. & Ors. v. Achhaibar Dubey & Anr., (2000) 2 SCC 428 para 6*]

We are, however, in agreement with Mr. Lalit that for the aforementioned purpose it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would lead to a conclusion that she was not ready and willing to perform her part of contract.

Furthermore, grant of decree for specific performance of contract is discretionary. The contesting respondents herein are living in the property since 1981 in their own right. There is absolutely no reason as to why they should be forced to vacate the said property at this juncture.

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**383. STAMP ACT, 1899 – Section 2 (10) & Schedule I-A Article 23 (M.P. Amendment)**

**Stamp duty and penalty to be paid on an agreement to sell immovable property as conveyance – Necessity therefor is that the possession must be delivered under such instrument – If a person is already in possession of the property proposed to be sold in some different capacity, then it cannot be held that the possession was transferred under the agreement to sell – Therefore, the stamp duty is not payable as conveyance deed – Position explained.**

**Smt. Ashabai Krishna Badole v. Dhannalal & Ors.**

**Judgment dated 08.04.2009 passed by the High Court in Writ Petition No. 1568 of 2002, reported in AIR 2009 MP 157 (DB)**

Held:

Section 2 (1) defines 'Conveyance'. It reads:

> " 'Conveyance' includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I or Schedule I-A as the case may be."

Article 23 of Schedule I-A appended to the Indian Stamp Act relates to conveyance and provides that seven and half per cent of such market value is to be paid on conveyance. However, the explanation appended to Article 23 provides that for the purpose of the Article 23, wherein the case of agreement to sell immovable property, the possession of any immovable property is

transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly. It further provides that the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance under that Section.

A fair reading and understanding of the explanation would make it clear the there has to be an agreement to sell immovable property. The possession of the immovable property should be transferred to the purchaser before or after execution of such agreement. The possession, therefore, should be transferred either in anticipation of the agreement to sell or at the time of the execution of the sale agreement or after the sale agreement is executed. In any case, the possession must be delivered under the agreement to sell. If a person is already in possession of the property proposed to be sold in some different capacity then by no stretch of imagination it can be held that the possession was handed over to such person/holder of the agreement, under the agreement.

Assuming in the case of a tenant, who enters into an agreement to purchase the property from the landlord, the suit filed by the said tenant for specific performance is dismissed then he cannot be dispossessed because he was in possession of the property as tenant and would continue in possession of the property as a tenant.

In the present case, the plaintiff is shown to be in possession under some earlier agreement of profit/Aadh battai and it is clearly mentioned in paragraphs 5 and 7 of the agreement that the possession would be handed over to the petitioner/plaintiff as an owner after execution of the sale deed.

The recitals contained in paragraphs 5 and 7 of the agreement would make it clear that the parties were alive to the fact that the plaintiff was in possession of the property in different capacity and was to receive possession as the owner on execution of the sale deed.

If this is the legal position on basis of the interpretation of the agreement then the order passed by the learned Court below cannot be approved.

The order deserves to and is accordingly quashed. The agreement would be admissible in evidence as an agreement provided it is on appropriate stamps as are required on an agreement.

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**384. STAMP ACT, 1899 – Schedule I Article 35, Exemption (a)**

**(i) Lease deed of agricultural land – Exemption from payment of Stamp duty under Article 35 of Schedule I-A, Indian Stamp Act, requirements for applicability thereof – Either lease should be for a definite term not exceeding one year or average annual**

**rent reserved does not exceed one hundred rupees – Both the requirements are not cumulative.**

**(ii) Lease deed of agricultural land for one year – payment of stamp duty – It cannot be impounded on ground of non-payment of stamp duty.**

## Ramlakhan v. Rambahadur

**Judgment dated 30.04.2009 passed by the High Court in W.P. No. 321 of 2003, reported in 2009 (3) MPLJ 259 (DB)**

Held:

We have perused the document Ex.P-1. It is an agricultural lease for a period of one year though 19 quintal of wheat was agreed to be paid, in lieu of cultivating land for a period of one year, however, considering the exemption clause of Article 35 contained in Schedule I(a) of Indian Stamp Act, it is apparent that lease for a period of one year is exempted from payment of stamp duty. Exemption Clause of Article 35 is quoted below :-

| **Description of Instrument** | **Proper Stamp-duty** |
|---|---|
| **Exemption** | |
| *Lease* – Executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink) without the payment or delivery of any fine or premium when a definite term is expressed and such term does not exceed one year or when the average annual rent reserved does not exceed one hundred rupees. | |

It is apparent in the instant case that lease was given for the purpose of cultivation for a definite term i.e. for a period of one year, hence the lease in question is exempt from payment of stamp duty. The later requirement for exemption is that when the average annual rent reserved does not exceed one hundred rupees. Both the requirements should not be read together. In case lease does not exceed one year, may be that average annual rent reserved exceed Rs. 100/-, lease would be exempted from payment of stamp duty as period does not exceed one year. The average annual rent does not exceed Rs. 100/- has to be read in alternative, these requirements cannot be said to be cumulative requirements. This Court in *Dharamadas v. Babulal, 1961 MPLJ Note 90* has taken the similar view that the lease for one year by cultivator of land for cultivation, does not require stamp duty. This Court has relied upon the decision rendered In *re. Bhavan Badhar, ILR 6 Bom. 691* by Full Bench of the High Court of Bombay in which following decision has been rendered : -

*Per Curiam.* – We think that the language of clause (b), Article 13, of Schedule II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever there served or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100.

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**385. SUCCESSION ACT, 1925 – Section 302**

**Power of Court – Under Section 302 of the Act, direction to executor of Will, the Court can enforce only the terms of the Will and not the terms of the agreement between executor and third party and such agreement cannot form the part of a decree granting probate.**

**Chandrabhai K. Bhoir & Ors v. Krishna Arjun Bhoir & Ors.**

**Judgment dated 07.11.2008 passed by the Supreme Court in Civil Appeal No. 6575 of 2008, reported in AIR 2009 SC 1645**

Held:

Section 302 of the Succession Act, 1925 reads as under:

> **"302.– Directions to executor or administrator:** Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof."

A probate is granted in respect of a Will. An Executor is appointed to administer the estate of the testator in terms thereof. The Will ordinarily should be administered having regard to the last wishes of the testator himself.

A probate when granted binds the whole world. It is a judgment in rem. The Executor, therefore, has to administer the estate of the testator in terms of the Will and not on the basis of the settlement arrived at by and between the parties which would be inconsistent with the terms of the Will. In case of any conflict between the terms of the Will and the settlement, the former will prevail.

The agreement although formed part of the terms of settlement, but it may only be held to be a collateral document. A purported agreement of family arrangement which in effect and substance is a development agreement cannot form the part of a decree granting probate.

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Note : Asterisk (*) denotes short notes