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INSTITUTE OF JUDICIAL TRAINING & RESEARCH, U.P.
VINEET KHAND, GOMTINAGAR,
LUCKNOW – 226 010

Quarterly Digest

CONSTITUTIONAL, CIVIL, CRIMINAL & REVENUE LAWS
(Covering important judgments of Supreme Court and Allahabad High Court)

April – June, 2008

Volume: XIV **Issue No.: 2**

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Administrative Tribunals Act

S. 14 – Central Administrative Tribunal Act – Jurisdiction of

'Any other matter whatever' used in the S. 3(q)(v) refers to all 'service matters' used in S. 14 of the Act. The word 'whatsoever' also has its own significance and has not been used superfluously. Therefore, S. 3(q)(v) of the Tribunals Act cannot be said to be of a general nature qualifying the service conditions of service enumerated earlier in the provision. It is in itself an independent rule and is not dependent on the first four rules enumerated in S. 3(q) of the tribunals Act and is wide enough to cover every aspect of the service. Therefore, the phrase 'any other matter whatsoever' though of general nature but has been used independent of the terms used in S. 3(q)(i) to (iv) of the Act.

Thus, where the petitioners who were all employees of the Railways were asking for relief against Railways independently and not against the LIC or any agent of LIC and they want to compel the railways to make deduction of LIC premium from their monthly salary and to pay the same in lump sum to LIC as authorized by them and this burden was being thrust upon railways by petitioners only on account of their employer and employees relationship, the dispute as such would be termed as service matter and same would not be entertainable by the High Court directly in exercise of writ-jurisdiction.

The rules of 'ejusdem generis' is merely a rule of construction and not a substantive law and is hardly applicable where general words such as 'any other matter whatsoever' does not intend to take colour from the specific words used earlier. The intention of establishing Central Administrative Tribunal is also to cover all service matters arising from the employer and employees relationship and therefore it would not be apt to give any restricted meaning to the phrase 'any other matter whatsoever' and to confine the application of the Act only to recruitment and conditions of service. Therefore, it would not be proper to apply the rule of 'ejusdem generis' in the interpretation of the 'service matter' in context with the jurisdiction of

the Central Administrative Tribunals. **(Chote Lal v. Life Insurance Corporation of India; 2008 (3) ALJ 62)**

Arbitration and Conciliation Act

◆ **S.2(a) – Arbitration agreement – Mere absence of name of arbitrator in agreement does not make arbitration clause as void**

Mere absence of name of the arbitrator will not necessarily have effect of taking an agreement out of category of arbitration agreement if otherwise the intention of the parties to agree to arbitration is clear. Naming of arbitrator in the arbitration agreement is not necessary and in any case it would not make it non-existent. No particular form of arbitration agreement has been provided for either under the Act or in the Rules. It is not necessary that an agreement should use particular words. If the agreement is in writing and intention to refer the dispute, present or future to a person for arbitration is clear, it is an arbitration agreement as per definition as contained in Section 2(a) of the Arbitration Act. **(Vinod Kumar v. Sunil Kumar, 2008 (3) ALJ 174)**

◆ **S. 7 – Arbitration agreement – What constitute.**

Under the scheme of the Act only in the event there is a procedural irregularity, which vitiates the proceedings, the order could be reviewed, but a substantive review would not be available.

Where first order was passed by the Chief Justice of High Court refusing the appointment of an Arbitrator was an order on merit which stated that the claim appeared to be made for creating some sort of litigation and matter was delayed by nearly 20 years and therefore the appointment was refused, recalling or reviewing of such order merely on ground that claimant was serious about proceeding in arbitration would be improper. The claim which was clearly time barred was sought to be referred to arbitration merely by stating that the claimant was serious about the same. In the instant case except that an Arbitrator was appointed, no progress appears to have taken place before the Arbitrator. The applicant was relying upon the respondents letter to further extend the period of limitation. The decision of Arbitrator on question of limitation had attained finality

cannot be reviewed merely on the basis of applicant's submission that the letter from the respondents was genuine one. It will amount to almost repetition of overruled arguments, as it is an appeal, which is not permissible. In the circumstances, there cannot be a review of the order on either of the two grounds, namely, that the Chief Justice had ignored the import of the two letters and that he had erred in holding that the claim was time barred and secondly, that he could not have passed the order since the Arbitrator was already appointed. It amounts to seeking substantive review, which is not permissible, and even on the basis that there is error apparent, it amounts to sitting in appeal and that apart, there was no error apparent on the face of record. **(M/s Manish Engineering Enterprises v. The Managing Director, IFFCO, New Delhi. 2008(2) ALJ 481)**

Civil Procedure Code

◆ **O. 1, R. 10 - It is abundantly clear that if any defendant is impleaded subsequently, proceedings as against him shall be deemed to have begun only from the date of services of summons.**

The crucial expression in Order 1 Rule 10 is “only on the service of the summons”. It is abundantly clear that if any defendant is impleaded subsequently proceedings as against him shall be deemed to have begun only from the date of services of summons. Same of course is subject to the provisions of Section 22 of the Indian Limitation Act, 1877 (in short 'Limitation Act').

In sub-rule (5), words “Indian Limitation Act, 1877” are substituted by Legislature as “Limitation Act, 1963” and “Section 22” by “Section 21”. Said provision does not in any way dilute the significance of the expression “shall be deemed to have begun only on the service of the summons. **(Seenivasan v. Peter Jebaraj v. 2008 (2) supreme 847)**

◆ **O. 3, R. 2 – Power of Attorney – He can appeal, plead and act on behalf of principal but he cannot be witness on behalf of principal and depose in place of and instead of principal.**

The power of attorney holder can appear, plead and act on behalf of the Principal but he cannot be a witness on behalf of the principal and depose in place of and instead of them. In other words, power of attorney holder can only appear in his own capacity but not as a witness on behalf of the principal in the capacity of the principal. However, if the power-of-attorney holder had rendered some "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for them in respect of acts done by them and not him. Similarly, he cannot depose for the principal in respect of the matters of which only they can have a personal knowledge and in respect of which they are liable to be cross examined. **(Ajay Kiritakant Ghelani & ors. v. Mathureshnagar Co-operative Housing Society Ltd. & anr.; 2008 (2) ALJ (NOC) 517)**

◆ **O. 6, R. 17 – Rejection of amendment of plaint – It cannot be rejected on ground that amendment application had not been filed in same language and script in which original plaint was drafted.**

The first ground on which amendment application has been rejected is that the original petition is drafted in Hindi (Devnagri Script) while the amendment application has been filed in English. In view of the court below is not correct. It would have been more appropriate if amendment application had been field in same language and script in which plaint was drafted, however, on this technical ground amendment could not be rejected. (**(Sanjeev Kumar Sinha v. State of U.P., 2008 (2) ALJ 687)**

◆ **O. 6, R.17 – Amendment of plaint – Since amendment completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession; could not have been allowed.**

Amendment of the pleadings could not have at all been allowed if completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance

of an agreement of sale entered into between its assignee and the vendors of the assignees. Along with that the other question, which very often raises its head in suits for specific performance, that is, whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963. The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of "parties to the agreement" .The appellant also does not come within the ambit of Section 19 of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in Kasturi's case (2005) 6 SCC 733. While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession. Their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character. **(Bharat Karsondas Thakkar v. M/s Kiran Construction Co., (2008) 20 Supreme 919)**

◆ **Provision of O. 8, R. 1 including the proviso are not mandatory but directly.**

Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, the court is not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to O,8, R.1 of the CPC. After reading the provisions, in particular the proviso to O.8, R.1 of the CPC, we are unable to hold that the provisions under O. 8 R. 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353, it has been clearly held that the provisions including proviso to O. 8, R. 1 of the CPC are not mandatory but directly. It has been held in that decision that the delay can be condoned and written statement can be accepted even

after expiry of 90 days from the date of service of summons in exceptionally hard cases. Therefore following the principles laid down in the decision as noted herein above it would be open to the court to permit the appellant to file is written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. **(Zolba v. Keshao and ors., 2008 (2) Supreme 787)**

◈ O. 8, R. 17- Filing of counter-claim – Whether counter-claim can be filed after filing of written statement – A belated counter claim must be discourage by the court.

The provision of Order VIII, Rule 6 must be considered having regard to the aforementioned provisions. A right to file counter-claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefore, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. Respondent in his application for amendment of written statement categorically raised the plea that the appellants had trespassed on the lands, in question, in the summer of 1998. Cause of action for filing the counter-claim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application was, thus, clearly not maintainable. The decision of Sri Ryaz Ahmed (supra) is based on the decision of this Court in Baldev Singh and others v. Manohar Singh and another, (2006) 6 SCC 498 : 2006 (3) SCC 1140 : 2006 (3) A WC 2939 (SC).

Further, the facts of the instant case are distinguishable from those of the Sri Ryaz Ahmed (supra). In that case, the proposed amendment by the defendant was allowed to be filed as he wanted to make a counter-claim by way of a decree for grant of mandatory injunction to remove the built up area on the disputed portion of land. It was therein held that instead of driving the defendant to file a separate suit therefor, it was more appropriate to allow the counter-claim keeping in mind the prayer of a negative declaration in the plaint. However, in the instant case, the counter-claim was purported

to have been filed for passing of a decree for recovery of possession of the disputed land after the suit had been filed.

Baldev Singh (supra) is not an authority for the proposition that the Court while allowing an application for amendment will permit the defendant to raise a counter-claim although the same would run counter to the statutory interdicts contained in Order VIII, Rule 6A. Some of the decisions of this Court in no uncertain terms held it to be impermissible. **(Bollepanda P. Poonacha v. K.M. Madapa, 2008 (2) AWC 1817 (SC)**

◆ **O. 9, R.1 - Setting aside ex parte decree**

Party prevented from appearing in court due to his illness would constitute sufficient cause for non-appearance – Decree liable to be set aside. **(Nanhey Lal Dubey v. Additional District Judge 15th Kanpur Nagar, 2008(2) ALJ (NOC) 562 (ALL)**

◆ **S. 11 – Trial Court not framing an issue as to possession of respondent no. 1 in terms of oral agreement for sale although granting injunction on the basis of his possession – A competent court dismissing specific performance of the said oral agreement holding it not to be proved.**

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

A competent court of law has dismissed the suit for specific performance of contract filed by the first respondent opining that the respondent had failed to prove the existence of an oral agreement. If the suit for specific performance of contract had not been decreed in

favour of the first respondent, the question of his continuing to remain in possession in part performance of contract would not arise. Appellant herein filed a suit for declaration of title and recovery of possession. He proceeded on the basis that the first respondent was in possession. **(Williams v. Lourdusamy, 2008 (3) Supreme 165)**

◆ **O. 21 –Execution of Decree – Auction sale of the mortgaged property – Auction sale shall stand as set aside on payment to Bank and auction purchaser.**

Keeping all these facts and considering the entire materials on record, the view that when the High court had passed an order setting aside the auction sale on deposit of the amount mentioned in the said order which was complied with by the appellant by making some delay. The 1st respondent-Bank would be entitled to Rs. 3,00,000/- and the 2nd respondent the auction purchaser would be entitled to Rs.5,00,000/-, and upon such payment to the respondents, auction sale shall stand set aside. **(M. Noohukan v. Bank of Tranvancore, 2008 (104) RD 552)**

◆ O. 21, R. 16, S. 146 – Whether application for execution of decree filed by assignee being member of joint family property would be maintainable – Held, "Yes".

The explanation inserted by CPC Amendment Act of 1976 clearly provides that by virtue of Section 146, CPC a transferee of rights in the property, which is the subject-matter of the suit may apply for execution of decree without a separate assignment of the decree. Assignment of decree is slightly different from assignment of property. In case of assignment of property, the position is actually governed by Section 146, C.P.C.

Property being joint family property and Jagdish Saran having share in the property being member of the joint family could file execution application even without partition. It was, therefore perfectly maintainable. **(Bal Krishna Verma v. VIth ADJ, Jhansi, 2008 (2) ALJ 580)**

◆ **O. 21, Rr. 54(1A) and 66 (2) - Execution of decree – Auction sale in execution of decree without notice to judgment debtor and valuation of property by court would be illegal and void.**

The records do not reveal that the appellant-judgment-debtor was served with a notice as required under Order XXI, Rule 54 (1) (A) of the Code in the Appendix-B. Forms 23. 24 and I29, It is to be noted that the records, reveal that the address of the appellant as contained in the sale deed was different from the address at which the process server purportedly affixed the notice on the door and in the open court and at the chorah only. It has also to be noted that under Order XXI, Rule 66 (2) the service of the notice has to be personally effected on the judgment debtor. That also does not appear to have been done. Interestingly, the valuation of the, property as required to be done under the proviso to sub-rule (2) of Rule 66 of Order XXI of the Code has not been done. The same appears to have been valued on the spot at Rs. 9,00,000.

Hence, auction sale in execution of decree without notice to judgment-debtor and valuation of property by court illegal and void. (Mahakal Automobiles v. Kishan Swroop Sharma, 2008 (2) AWC 1859).

◆ **O. 21, R. 58 – The agreement for sale creates an obligation attached to the ownership of property**

Whenever a claim is preferred under O. 21, R. 58, CPC against attachment of immovable properties, the fact that the properties are sold or the sale confirmed will not deprive the court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by trial court or the appellate court (under the amended Code) and in the event of the claim being allowed, the sale and the confirmation of sale shall to that extent be treated as a nullity and of no effect, as the judgment-debtor had no title which could pay to the court auction-purchaser.

An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment and on principles, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. If a person, having a contract of sale in his favour, has such pre-existing right the attachment could not be binding upon him. If the promise get a conveyance, after the attachment, in pursuance of his contract, he takes a good tile inspite of the attachment. **(Kancherla Lakshminarayana v. Mattaparthi Syamala and ors., 2008 Supreme 655)**

◆ **O. 21, R. 102 – A transferee from judgment-debtor is presumed to be aware of the proceedings before court of law - A purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by competent court.**

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 S. 52 of the Transfer of property Act, 1882. Rule 102 of O. 21 of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendentelite, 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. **(Usha Singh v. Dina Ram, 2008 (2) Supreme 710)**

◆ **O. 21 read with Sec. 34 – Grant of interest by executing Court – Sustainability of**

Hence, executing court cannot step out and grant interest which was not part of decree pre-execution.

It is well settled legal position that an executing court cannot travel beyond the order or decree under execution. It gets jurisdiction only to execute the order in accordance with the procedure laid down under Order XXI, CPC.

In State of Punjab v. Radha Ram and anothers, 1990 (2) SLR 588, Single Judge of the Punjab and Haryana High Court has taken the view that even if the decree is silent upon interest the executing court grant it in case of money claims and observed that executing court, while calculating the relief of past emoluments would have the powers under section 34 of the Code of Civil Procedure, 1908 and would be in a position to grant interest. **(Punjab State v. Harvinder Singh v. 2008 (104) RD 556).**

◆ **O. 39 – Permanent prohibitory injunction in respect of agricultural land cannot be granted by civil court merely on the basis of revenue entry.**

Civil court is not competent court to grant the relief for permanent prohibitory injunction merely on the basis of revenue entry in his favour specially in the circumstances when the proceeding under Section 41 of the Land Revenue Act for demarcation of land for plot No. 6522/2 was dismissed. After dismissal of the proceedings under Section 41 of the Land Revenue Act the proper course and remedy available to the plaintiff-respondent was to approach the revenue Court and not to seek the relief for injunction from the civil court. **(Narendra Singh v. Sardar Swarn Singh, 2008 (2) AWC 1525)**

◆ **O. 39, R.1 – Ad interim injunction - Grounds for granting it.**

Power to grant ad interim injunction is discretionary and depends upon the establishment of prima facie case, balance of, convenience and irreparable loss and in cases where public interest is pitched against private interest, the Court should be extremely slow in passing orders of ad interim injunction against public interest and should explore other means of redressing the wrong, one of which can be awarding compensation to the plaintiff. Apart from considering

three cardinal principles of prima facie case, balance of convenience and irreparable loss the Courts while making an order of temporary injunction have also to take into account the parties relevant prospects of success on merits and effect on the public interest, if any, involved. **(Nizam Uddin v. Nagar Nigam, Allahabad, 2008 (2) AWC 1496)**

◆ **O. 39, R.1 – Power to Grant ad interim injunction should be extremely slow in cases which against public interest.**

The legal position as culls out from the various other pronouncements of various Courts is that power to grant ad interim injunction is discretionary and depends upon the establishment of prima facie case, balance of convenience and irreparable loss and in cases where public interest is pitched against private interest the court should be extremely slow in passing orders of ad interim injunction against public interest and should explore other means of redressing the wrong, one of which can be awarding compensation to the plaintiff. **(Nizamuddin v. Nagar Nigam, Allahabad, 2008 (104) RD 579)**

◆ **S. 21 – Objection as to place of suing regarding territorial jurisdiction.**

Plea regarding territorial jurisdiction should be taken at first opportunity and it cannot be raised for first time in appeal. **(Sabir Ahmad v. District Judge, Baghpat, 2008 (2) ALJ (NOC) 452 (All)**

◆ **S. 24 – When an application for transfer is made by a party, the court is required to issue notice to the other side and hear the party before directing transfer.**

The purpose of Section 24 CPC is merely to confer on the Court a discretionary power. A court acting under section 24 CPC may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may be ordered suo motu and it may be done for administrative reasons. But when an application for transfer is made by a party, the court is required to issue notice to the other side and hear the party before directing transfer. To put it differently, the

Court must act judicially in ordering a transfer on the application of a party. In the instant case the reason which has weighed with the High Court for directing transfer does not really make out a case for transfer. **(Jitendra Singh v. Bhanu Kumari, 2008 (2) Supreme 833)**

Constitution of India

◆ **The concept equality as enshrined in Art. 14 embraces the entire realm, of State action.**

The court has reiterated the settled position of law for the benefit of the administrative authorities that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair minded authority could ever have made it. The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well as State, not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equal is to be treated equally even in the matter of executive or administrative action. As a matter of fact, the doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action. The administrative action is to be just on the test of 'fair play' and reasonableness. The courts have, therefore, examined the case of the appellant in the light of the established doctrine of equality and fair play. The principle is the same, namely, that there should be no discrimination between the appellant and HC Vijay Pal as regards the criteria of punishment of similar nature in departmental proceedings. The appellant and HC Vijay Pal were both similarly situated, in fact, HC Vijay Pal was the real culprit who, besides departmental proceedings, was an accused in the excise case filed against him by the Excise Staff of Andhra Pradesh for violating the Excise Prohibition Orders operating in the State. The appellate authority exonerated HC Vijay Pal mainly on the ground of his acquittal by the criminal court in the Excise case and after exoneration, he has been promoted to the higher post, whereas the appeal and the revision filed

by the appellant against the order of punishment have been rejected on technical ground that he has not exercised proper and effective control over HC Vijay Pal at the time of commission of the Excise offence by him in the State of Andhra Pradesh. The order of the disciplinary authority would reveal that for the last about three decades the appellant has served the Police Department of Haryana in different capacity with unblemished record of service. **(Man Singh v. State of Haryana, 2008 (3) Supreme 308)**

◈ **Art. 15(3) – Cr.P.C., S. 125(1)(c) – Denying of maintenance to unmarried daughter who had attained majority and who is unable to maintain herself – Is contrary to spirit of Art. 15(3) and 39(e) and (f) of above**

The provision of S. 125(1)(c) of the Code as It is presently worded, are acceptable, so far as the obligation of a father to maintain an able bodied son, who has crossed 18 years of age is concerned where a rider could possibly be imposed that the said son may not be held entitled for maintenance unless he is able to show that his inability to maintain himself is due to some mental or physical abnormality or injury. But to expect that an unmarried daughter, who is still going to college or staying at home awaiting her marriage, and has no source of independent income to maintain herself can be denied maintenance from her father, who possesses sufficient means only because her inability to maintain herself is not due to any physical or mental abnormality as required in S. 125(1)(c) would be extremely harsh and oppressive and in all likelihood violative of Articles 14 and 21 of the Constitution. This provision appears particularly anomalous and discriminatory because in the other clauses of Section 125(1), i.e. in clauses (a), (b) and (d), a person with sufficient means is required to maintain his wife, his legitimate or illegitimate minor child whether married or not or his father or mother who are unable to maintain themselves and there is no additional requirement for these categories of persons to demonstrate that their inability to maintain themselves is due to physical or mental abnormality or injury for claiming the benefit of this salutary social legislation. The provision as it stands also seems contrary to the spirit

of Articles 15(3) and 39 (e) and (f) of the Constitution which veritably enjoin the State to design laws for welfare of women and children and for ensuring that children and youth are protected from moral and material abandonment. Under Muslim Personal Law also provisions for maintenance has been made for unmarried daughters and even for divorced daughters who are unable to maintain themselves. Therefore, S. 125(1)(c) needs to be amended by the Legislature and the right of to be maintained by a parent having sufficient means should be provided to all unmarried daughters, even after they have attained majority who are unable to maintain themselves. **(Smt. Raj Kumari Awasthi v. State of U.P., 2008 (3) ALJ 100)**

◆ **Art. 21- Right to privacy – Asking lady to appear in witness box to allow opposition to prove allegations against her mental health would violates her right to privacy.**

A witness may be recalled under Section 138 of the Evidence Act to be cross-examined. The trial Court may permit a witness to be examined by a party again and again, if it is necessary to ascertain the truth. Such discretion however will not be exercised after the party has finished with his evidence and may have dismissed some of his witnesses, and the fact in such case may have been contradicted by the witnesses which have been dismissed. The Court would not suffer him to avail of such disingenuous conduct, and certainly not in appeal when such opportunity could be availed in the trial Court.

Further, asking a lady to appear in the witness box to allow the opposition to prove their allegation against her mental health is a direct affront to her right of privacy. She has a right not to appear for such cross-examination. The Court would not insist a lady to cross-examined in such a case. **(Doongar Mal Singodia v. Anoop Kumar Agarwal, 2008 (2) ALJ 680)**

◆ **Art. 141- Precedent- Judgment per incurium does not lay down binding precedent.**

It has been held that a judgment per incuriam does not lay down a binding precedent. **(M/s Maa Vind Vasini Industries v. Purvanchal Vidyut Vitran Nigam Ltd., 2008 (2) ALJ 456 (DB))**

◈ **Art. 226 - Writ petition cannot be thrown out only on the ground of availability of alternate remedy – Grounds for entertainment discuss.**

It is true that normally this Court declines to entertain the writ petition where the aggrieved person has efficacious alternative statutory remedy. The doctrine of exhaustion of other remedy is a self-imposed restriction by the Court so that a person, who has, statutory remedy for redressal of his grievance before another forum, may not be allowed to bye-pass such remedy, However, the existence of statutory remedy is not an absolute bar in entertaining the petition under Article 226 of the Constitution where there is apparent and gross violation of mandatory statutory provision of an Act or the Constitution. The Hon'ble Apex Court in the case of Whirlpool Corporation v. Registrar of trade Marks, Mumbai and others, AIR 1999 SC 22 : 1999 (2) A WC 2.54 (SC) (NOC), held that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus. mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for "any other purpose". However, their Lordships have carved out three contingencies, where alternative remedy will not stand in the way In entertaining the writ petition under Article 226 of the Constitution of India, viz. (I) where the writ petition has been filed for the enforcement of any of the fundamental rights; (2) where there has been a violation of the principle of natural justice; and (3) where the order or proceedings are wholly without jurisdiction or where the vires of an Act is challenged.

Since, in the case in hand, admittedly, the order has been passed without following the mandatory provision of the Act and also in

violation of principles of natural justice thus, the writ petition cannot be thrown only on the ground of availability of alternative remedy when there Is blatant error in the order. **(Pushpendra Singh (C.P. 2187) v. State of U.P., 2008 (2) AWC 1572)**

Consumer Protection Act

- **S. 2(1)(d) (as amended in 1993) – Consumer – Definition of**

The definition after the amendment of 1993 would clearly envisage if any one buys goods for consideration or for any commercial purpose, he would not fall within the definition of consumer. The explanation after the amendment in 1993 clarified that goods bought and used by a consumer exclusively for the purpose of earning his livelihood by means of self-employment would oust the commercial purpose. In the instant case the Complainant had decided to plant popular trees in 9 acres of irrigated land. Taking up growing up of trees in 9 acres of irrigated land would not amount to indulging in self-employment.

Thus, where the appellant who was a leading manufacturer of matchstick items, under a scheme floated jointly with NABARD, entered into an agreement with Complainant through which 1800 ETPs (Entire Transplants of Poplars) were to be given to the Complainant in large scale for commercial profit and it were not purchased were not for self-consumption, but ultimately were for resale, and primarily it was for commercial purpose, with a view to make profit, therefore complainant cannot be termed as consumer and complaint under Act against appellant would not be maintainable. **(M/s Wimco Ltd. v. Ashok Sekhon, 2008 (3) ALJ 171)**

- **S. 14(1)(d) – In absence of any allegation of having suffered any loss or any prayer for compensation and without any material on record to show negligence, it was not open to the Commission to grant compensation.**

It is to be noted that there was no prayer for any compensation. There was no allegation that the complainant had suffered any loss. Compensation can be granted only in terms of Section 14(10(d) of the Act. Clause (d) contemplates award of compensation to the consumer for any loss or injury suffered due to negligence of the opposite party. In the present case there was no allegation or material placed on record to show negligence. (Godfrey Philips India ltd. v. Ajay Kumar, 2008 (2) Supreme 851)

◆ **S. 21- Medical Negligence - Consent to undergo treatment given by patient's relative is not valid and real consent when patient is a competent adult.**

The appellant was neither a minor, nor mentally challenged, nor incapacitated. When a patient is a competent adult, there is no question of someone else giving consent on her behalf. There was no medical emergency during surgery. The appellant was only temporarily unconscious, undergoing only a diagnostic procedure by way of laproscopy. The respondent ought to have waited till the appellant regained consciousness, discussed the result of the laproscopic examination and then taken her consent for the removal of her uterus and ovaries. In the absence of an emergency and as the matter was still at the stage of diagnosis, the question of taking her mother's consent for radical surgery did not arise. Therefore, such consent by mother cannot treated as valid or real consent. (Samira Kohli v. Prabha Manchanda, 2008 (2) ALJ 711)

Contract Act

◆ S.10 – Respondent not accepting the terms of the 1993 offer letter – Entire amount paid by him refunded which he accepted without any demur or protest – The said letter not culminating into an allotment – Cannot be termed as concluded contract.

We are also of the view that the question of acceptance of the proposal of allotment did not arise because the entire money which was deposited with the Noida authorities in the year 1993 was admittedly, as noted herein earlier, refunded by them and the same was also encashed by the respondent without raising any objection. Secondly, the allotment that was made in the year 1996 was @ Rs. 3600/- per sq. mtr. Which was accepted by the respondent on deposit of the money. In our view, since the contract was concluded by execution of the lease deed from which it appears that the rate was to be given as per the market value of the plot on the date of allotment, it was not open to the respondent to approach the MRTP Commission and say that the allotment

must be made at the old rate, i.e. @ Rs. 2750/- per sq. mtr. and not @ Rs. 3600/- per sq. mtr. We are, therefore, unable to accept the impugned order of the MRTP Commission on this count. (New Okhla Industrial Development Authority v. Arvind Sonekar, 2008 920 Supreme 836)

Criminal Trial

◆ Oral evidence has to get primacy and medical evidence is basically opinionative

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

Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eye witnesses only if it is so conclusive as to rule out even the possibility of the eyewitnesses version to be true.

To discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice. (Ram Swaroop v. State of Rajasthan, 2008 (2))

◆ Fair trial – Denial of fair trial is injustice to accused as is to the victim and the society

The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

"Witnesses" as Benthem said : are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences face by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of

being haunted by those against whom he has deposed. (Himanshu Singh Sabharwal v. State of M.P. & ors., 2008 (2) Supreme 718)

◆ Evidence of two witnesses in relation to identification of accused – When not reliable

In the instant case the accused persons were not known to prosecution witness No. 6. He has disclosed the names for the first time in the sessions Court. No test identification parade was conducted. It is well settled that in cases where accused is not known to the witnesses, ordinarily the identification of an accused for the first time in court should be corroborated by previous identification in the test identification parade. The court did not find any extra ordinary reason for accepting the evidence of witness on question of identification of accused person for the first time in court. This being the position, it is not possible to place reliance on the evidence of PW 6. (Anil Kumar @ Pintu v. State of Bihar (Now State of Jharkhand), 2008 (2) Supreme 738)

◆ Testimony of an eye-witness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses.

As regards non-examination of the independent witnesses who probably witnessed the occurrence on the road side, suffice it to say that testimony of the PW-Sanjay, an eye-witness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned Trial Judge for discarding and dis- believing the testimony of PWs-4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the Police about the incident on the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well-settled that in such cases many a times, independent

witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons some times are not inclined to become witnesses in the case for variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny. (Mahesh S/o Janardhan Gonnade v. State of Maharashtra, 2008 (2) Supreme 898)

◈ Merely because prosecution has failed to explain injuries on the accused, the same cannot be a solitary ground for doubting the prosecution case, if otherwise, evidence relied upon is found to be credible.

This court in Krishan & ors v. State of Haryana, (2006) 12 SCC 459 held that merely because prosecution has failed to explain injuries on the accused, the same cannot be a solitary ground for doubting the prosecution case, if otherwise, evidence relied upon is found to be credible. In the case on hand, as we are of the view that no ground is made out to disbelieve and discard the evidence of PWs-4, 8 and 16, who are injured and non-injured eye-witnesses and whose evidence is corroborated by other oral and documentary evidence including the medical evidence, therefore non-explanation of simple injury on little finger of the right hand of the appellant by the prosecution is insignificant in the teeth of the overwhelming, cogent, consistent and trustworthy evidence appearing on record against the appellant for holding him guilty of the commission of the offence. (Mahesh S/o Janardhan Gonnade v. State of Maharashtra, 2008 (2) Supreme 898)

◈ Interested witness – Well-settled that mere relationship of the witnesses cannot be the sole basis to discard or disbelieve their evidence if it is otherwise found to be believable and trustworthy.

It is by now well-settled that mere relationship of the witnesses cannot be the sole basis to discard or disbelieve their evidence if it is otherwise found to be believable and trustworthy. However, when the Court has to appreciate the evidence of any interested witness it has to be very careful in weighing their evidence. In other words, the evidence of an interested witness requires greater care and caution while scrutinizing his evidence. The Court has to address to itself whether there are any infirmities in the evidence of such a witness; whether the evidence is reliable and trustworthy and whether the genesis of the crime unfolded by such an incident is probable or not. If the evidence of any interested witness or a relative on a careful scrutiny is found to be consistent and trustworthy, free from infirmities or any embellishment there is no reason not to place reliance on the same (see Arjun Marik & ors. v. State of Bihar, (1994) Supp.(2) SCC 372). (Bathula Nagammalleswara Rao v. State Rep. By Public Prosecutor, 2008 (3) Supreme 129)

◆ Settled that even if a major portion of the evidence is found to be deficient, in case the residue is sufficient to prove guilt of an accused, conviction can be maintained – The maxim *"falsus in uno falsus in omnibus"* has no application in India and the witnesses cannot be branded as liars.

It is settled that even if a major portion of the evidence is found to be deficient, in case the residue is sufficient to prove guilt of an accused, conviction can be maintained. It is the 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 fact that evidence of some of the witnesses has been found to be deficient. Falsity of a particular material witness or material particular would not ruin it from the beginning *"falsus in uno falsus in ominibus"* has no application in India and the witnesses cannot be branded as liars [See Sudershan Reddy and ors v. State of A.P. (2006) 10 SCC 163] (Bathula Nagammalleswara Rao v. State Rep. By Public Prosecutor, 2008 (3) Supreme 129)

Criminal Procedure Code

◆ **S.125 – Sec. 125 is applicable to all persons belonging to all religions and had no relationship to the personal law of the parties**

Under Section 125 of the Code of Criminal Procedure an obligation is cast upon the appellant to maintain his wife and children till the marriage between them was declared null and void by competent court. Under the Hanafi Law, an irregular marriage continues to subsist till terminated in accordance with law. Therefore, the wife and children of such marriage would be entitled to maintenance under the provisions of Section 125. **(Chand Patel v. Bismillah Begum, 2008 (2) Supreme 614)**

◆ **S. 125(1)(b) – Maintenance to child - Duties lies on person having sufficient means to maintain his legitimate or illegitimate minor child whether married or not.**

Under Section 125(1)(b) of the code of Criminal procedure, the duty on a person having sufficient means to maintain his legitimate or illegitimate minor child, whether married or not, unable to maintain itself. **(Alok Banerjee v. Smt. Atoshi Banerjee, 2008 (2)ALJ 560)**

◆ **The delay in sending FIR to the Magistrate having been satisfactorily explained, was not fatal.**

It is not doubt true that FIR (Ex. P5) came to be recorded at 11.00 a.m. On 18.07.1996 in the Police Station by Head Constable P. Mallikajunarao (PW-8), who was posted at the relevant time at Police Station, Thulluru. The incident of murder of deceased No. 1 and deceased No. 2 took place at 7.30 p.m. On 18.07.1996 as per Complaint (Ex.P1) made by PW-1 to Sub-Inspector Maqbool Khan (PW-11), which was sent to Police Station, Thulluru, though PC No. 2896 for registration of the FIR. It has come in the cross-examination of PW-8 that the distance between Police Station, Thulluru, and Mangalagiri where the Magistrate holds court is about 20 kms. PW-8 categorically stated that FIR (Ex.P5) was registered by him at 11.00 p.m. on 18.07.1996 and even if the copy of the FIR was to be sent to the Magistrate during the mid-night, it was not possible for the Police

Constable to take the FIR and deliver the same b to the Magistrate at Mangalagiri on the intervening night of 18/19.07.1996 as there was no bus service available during the night time between the two places. The trial court in its judgment observed that the FIR was received by the Magistrate at 4.00 p.m. On 19.07.1996. The trial court has noticed but not accepted the contention of the learned counsel for the accused persons that in these circumstances the statement of PW-1 (Ex. P1) might have been recorded at 3.00 p.m. On 19.07.1996 at village Uddandayunipalem and from the village itself the statement might have been set to Mangalagiri in a police vehicle and therefore, the same was received by the Magistrate at 4.00 p.m. On 19.07.1996. The court has independently scrutinized the evidence of PW-1 and PW-11, the Investigating Officer. It is their clear and consistent testimony that statement (Ex.P1) was recorded at 9.00 p.m. It is undisputed fact that one Rama Mohana Rao, son of A-6, was murdered on the same evening at about 6.00 or 6.30 p.m. At the outskirts of village Uddandayunipalem. It is the evidence of PW-11, Sub-Inspector of Police, that about 7.10 p.m. M. Venkatarao informed him that his rival group of men armed with deadly weapons was moving towards their village and on receiving the information he along with other police personnel had immediately proceeded to village Uddandayunipalem in a private jeep for maintaining law and order. PW, Head Constable, in cross-examination, corroborated the version of PW, Sub-Inspector of Police, that on 18.07.1996 around 7.15 p.m. On receipt of the information in regard to some incident of violence in the village, PW 11 along with five staff members left the Police Station for maintaining law and order in the village. PW-8 sent FIR (Ex.P5) to the Magistrate through PC No. 2896 who brought statement of PW-1(Ex.P1) at 11.00 p.m. To the Police Station. PW-13, Circle Inspector of Police, stated that on the mid-night of 18/19.07.1996 at about 00.15 hours he received a copy of express FIR through PC No. 2896 disclosing the incidents of murder of three person in village Uddandayunipalem. The endorsement made on FIR (Ex.P5) by the Magistrate on its bare perusal would reveal that he received a copy of the FIR through PC No. 1293 and not through PC No. 2896 as

deposed by PW.8. It appears from the record that PC No. 2896 handed over a copy of express FIR to PW-13, Circular Inspector of Police, at village Uddanadayunipalem at 00.15 hours on the intervening night of 18/19.07.1996 and then constable PC No. 1293 might have been deputed to deliver the FIR (Ex. P5) to the Magistrate at Mangalagiri. The trial court in its judgment observed that keeping in view the serious and tense situation in the village because of the murder of three persons on the same evening, the entire staff of Police Station was deputed to maintain law and order problem there. Out of the victims, one was the son of A-6, ex-Sarpanch of the village, whereas deceased No. 1 was the sitting Sarpanch of the same. Village. Lodging the FIR with the police and delay in sending a copy of the Fir to the Magistrate was a result of shortage of police personnel who could not be deputed to deliver the same to the Magistrate during the night of 18.07.1996 or in the early hours of 19.07.1996. The High Court has re-examined the evidence on record and held that the delay in sending FIR to the Magistrate was not deliberate or intentional, but because of some technical errors committed by the Investigating Officer during the course of investigation of the case which could not be found fatal to the case of the prosecution Officer was not cross-examined on this point. **(Bathula Nagamalleswara Rao v. State Rep. By Public Prosecutor, 2008 (3) Supreme 129)**

◈ **S. 156 – Order for registration of FIR cannot he challenged by filing petition u/s 482 – Remedy is to file writ petition u/Art. 226 of Constitution**

The legal position is that after registration of FIR the same can be challenged only by way of filing a writ petition under Art. 226 of the Constitution of India and the present application under section 482 Cr.P.C. Is not maintainable. **(Harpal Singh v. State of U.P., 2008 (3) ALR 17)**

◈ **S. 156(3) – Order for registration of FIR and investigation of case is an administrative order prospective accused has no right of hearing at that stage.**

A prospective accused has got no right to challenge order of registration and investigation as he has got no right to be heard at that stage.

The order passed under section 156(3), Cr.P.C. is the judicial order but it is administrative in nature. In such circumstances, the impugned orders passed under Section 156(3), Cr.P.C. cannot be interfered with in a petition filed under Section 482, Cr.P.C. on behalf of the prospective accused. **(Siya Ram Agrahari v. State of U.P. & Anr., 2008 (2) ALJ 613)**

◆ **S. 167 – Power of Magistrate for remand to judicial custody – Magistrate is empowered to add or delete offence. Hence remand of accused by addition of offence u/s 326 of IPC was not without jurisdiction.**

Order for judicial remand of accused has to be passed on subjective satisfaction of Magistrate on basis of relevant police papers, the perusal of relevant police papers is essentially required for application of the judicial mind of Magistrate concerned, in such process the learned Magistrate concerned is not under obligation to accept the report of the I.O. without applying the judicial mind for passing the judicial remand, it may be accepted or it may be rejected or it may be altered by adding some more offence or deleting some offence. Where the Magistrate concerned perused relevant police papers and came to conclusion that offence under S. 326, I.P.C. was also made out and passed the judicial remand under section 326 I.P.C. also whereas the I.O. had sought the remand only under Ss. 325, 323, 506, 452 I.P.C. it cannot be said Magistrate had exceeded its jurisdiction. The Magistrate concerned is always empowered to refuse the remand sought by 1.0 or to add some more offence or delete some offence in the remand order. **(Sanaul Haque v. State of U.P., 2008 (2) ALJ 778)**

◆ **S. 197 – Before S. 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by the while acting or purporting to act in the discharge of his official duties**

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

complained of and the official duty of the public servant. This aspect makes it clear that the concept of S. 197 does not get immediately attracted on institution of the complaint case. **(Anjani Kumar v. State of Bihar, 2008 (3) Supreme 153)**

◆ **S.190 – Cognizance – Complaint accompanied by false affidavit would become irrelevant when cognizance has taken on police report.**

The only question that falls for consideration is whether the order was passed by learned Magistrate on protest petition or on the police report.

It is now only necessary to refer to section 190, occurring in Chapter XIV, relating to jurisdiction of Criminal courts in inquiries and trials. That section is to be found under the heading "Conditions requisite for initiation of proceedings" and sub-section (1) is as follows:

(1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police-officer, or upon his knowledge or suspicion, that such offence has been committed.

(Har Prasad v. Ranveer Singh, 2008 (2)ALJ 792)

◆ **S.190 – Cognizance of offence on protest petition – Validity of – Magistrate is fully empowered to take cognizance on protest petition, mere fact that Magistrate had earlier accepted final report of no consequence.**

Magistrate is fully empowered to take cognizance on Protest petition filed by the complainant against the final report submitted by the Police after investigation and one of the options open to the Magistrate while considering said final report is that he may treat the Protest petition as a complaint. The power of the Magistrate to take cognizance on such a complaint is not lost merely because the Magistrate has earlier accepted the final report submitted by the police investigating the incident in question on the basis of first information report.

In the present case the Magistrate has treated the Protest petition filed by the complainant against the final report (submitted by the Police under section 173 Cr.P.C.) as a complaint and after following the procedure prescribed under Chapter-XV took cognizance and summoned the revisionists/accused for the offences under sections 457 and 380 IPC has thus committed no illegality. **(Paras Tiwari v. State of U.P., 2008 (2) ALJ 667)**

◆ **S. 378 – If two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted**

In State of Rajasthan v. Raja Ram, (2003) 8 SCC 180, this Court held that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice, which may arise from acquittal of the guilty, is no less than the conviction of an innocent, Further, it is held that in a case where admissible evidence is ignored, a duty is cast upon the Appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by the Appellate Court considering the appeal

against the judgment of acquittal is to interfere only where there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were again highlighted by this court in Shivaji Sahabrao Bobade v. State of Maharashtra, ((1973)2 SCC 793; Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 and Jaswant Singh v. State of Haryana, (2000) 4 SCC 484 and same parameters were reiterated in the latest judgment of this Court in State of Goa v. Sanjay Thakran & anr., (2007) 3 SCC 755. **(Mahesh s/o Janardhan Gonnade v. State of Maharashtra, 2008 (2) Supreme 898)**

◆ **S. 378 – General Principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal, as emerging from decisions of the Supreme Court, stated.**

In Chandrappa v. State of Karnataka, (2007) 4 SCC 415, on consideration of a catena of earlier decisions of this Court and Privy Council, the following general principles regarding-powers of the Appellate Court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to

interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

Again in a recent, decision in Girja *Prasad (Dead)* by *LRs. v. State of* M.P., [(2007) 7 *SCC* 625], this Court held that in an appeal against acquittal, it is for the Appellate Court to keep in view the relevant principles of law, to re-appreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence. In the teeth of the well-established principles discussed in the above-stated decisions, the question whether the High Court in exercise of its appellate jurisdiction has exceeded its limitations in an appeal against acquittal of the appellant by the Trial Judge, shall be dealt with in the later part of the judgment after recording all the submissions urged on behalf of the appellant before us. **(Mahesh s/o Janardhan Gonnade v. State of Maharashtra, 2008 (2) Supreme 898)**

◈ **S.407- Transfer of case – Permissibility of.**

There is no allegation in the transfer application against the transferee court and the trial is at the stage of defence evidence. In such circumstances, there is no chance to pressurize the petitioner or the prosecution witnesses by opposite party No.2 or by any person on his behalf. Although, the opposite party No.2, is the sitting M.L.A. of Congress Party, within the same area, it does not mean that he had

over powered all the judicial officers of the rank of Sessions Judge as well as Additional Sessions Judge

As the present case is at the stage of defence evidence and the evidence of all the prosecution witness have already been recorded, the trial of this case cannot be transferred to any Sessions Division at this stage. **(Anurag Kumar Pandey v. State of U.P., 2008 (2) ALJ 615)**

◆ **S. 451 - Jurisdiction of Criminal –Criminal Court for Disposal of seized property – Criminal court would have jurisdiction to pass appropriate order for disposal of property to avoid its decay.**

The Criminal Courts have jurisdiction under Section 451 of the Code of Criminal Procedure to pass appropriate orders with regard to the custody and disposal of the property pending trial. The vehicle loaded with solvent is standing in the open place at the police station premises for the last about six years. The vehicle will become junked with passage of time.

In view of these facts and circumstances, allowing the revision the impugned order dated 19-6-2001 is set aside. The seized Tanker and goods loaded in it shall be released by the Magistrate concern in favour of the revisionist on his furnishing appropriate bonds with sureties and guarantee for the production of the vehicle if required by the Court at any point of time. **(Virendra Pal Singh v. State of U.P., 2008 (2) ALJ 670)**

◆ **In disputes where the question involved is of purely personal nature – The Court should ordinarily accept the terms of compromise even in criminal proceedings**

An application for quashing of FIR registered u/Sec. 379, 406, 409, 418, 506/34 IPC on account of compromise entered into between the complainant and the accused has been declined by the trial court on the ground that Sec. 406 was not compoundable. High Court has also dismissed the application for quashing the proceeding on the basis of compromise.

This court noticed from the reading of FIR and another documents that the dispute was purely personal one between two

contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against the accused. The court therefore, is of opinions that no useful purpose would be served in continuing with the proceedings in the light of the fact that the complainant had passed away and possibility of conviction being recorded has thus to be ruled out. It is to be emphasized that it is perhaps advisable that in disputes where the question involved is purely personal nature, the court should ordinarily accept the terms of compromise even in criminal proceedings as keeping the matter alive with no possibility of result in favour of prosecution is luxury which the courts, grossly over burdened as they are, cannot afford and that the time so saved can be utilized in deciding more effective and meaningful litigation. **(Madan Mohan Abbot v. State of Punjab, 2008 (2) Supreme 750)**

Education Act

◆ **U.P. Basic Education Act – S.19(i) – Grant in aid – Cannot be claimed by institution as a matter of right.**

The grant in aid cannot be claimed by the educational institution as a matter of right. The petitioner institution can claim grant in aid only under some Government Order as a result of policy decision. The petitioners were not able, to show any Government Order under which they can claim grant in aid as a matter of right. While granting the recognition under the provisions of Basic School (Appointment of Teachers and Service Condition and Other Conditions) Rules, 1975 it was made clear that the Government would not be responsible for financial resources and financial recourses have to be arranged by the private institutions. If the Government, as a matter of policy, bas taken a decision to provide free education to the students below the age of 14 years towards their constitutional obligation by opening the schools under the scheme Sarva Shiksha Abhiyan and the responsibility to provide grant in aid was given to the local body and Zila Panchayat for imparting education, the petitioners cannot claim grant in aid as a matter of right. **(Committee of**

Management, Prathamik Anusuchit Prathmik Paqthshala Darauli v. Chief Secretary, Govt. of U.P., Lucknow, 2008 (2) ALJ 473)

Election Law

◆ **Constitution of India , Art. 226 – Election dispute – Right of person to contest election or to challenge same is not fundamental right, Hence writ petition would not be maintainable.**

The right of a person to contest an election or too challenge it is not a fundamental right nor even a common law right but originates from the statute or from the rules and bye laws of an association. A breach of such a statutory right or right under the rules or bye laws can be redressed by availing the remedy which the statute or the bye laws or rules provide or by a civil court except where in the case of a civil suit unless the remedy of a suit is barred. **(Satya Narain Tripathi v. State of U.P., 2008 (3) ALJ 11)**

Essential Commodities Act

◆ **S.6-A - Disposal of Load Tanker with solvent seized u/A – Jurisdiction of criminal courts is not completely ousted in this matter.**

The Criminal Courts have jurisdiction under Section 451 of the Code of Criminal Procedure to pass appropriate orders with regard to the custody and disposal of the property pending trial. The vehicle loaded with solvent is standing in the open place at the police station premises for the last about six years. The vehicle will become junked with passage of time. **(Virendra Pal Singh v. State of U.P., 2008 (2) ALJ 670)**

Evidence Act

◆ S. 69 – Provisions of S. 69 can be invoked only after all processes of the court to produce the attesting witness has been exhausted – This having not been done, the appellate court committed a serious error in law.

In a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69, i.e., by

examining witnesses who were able to prove the hand- writing of the testator or executants. The burden of proof then may be shifted to others. **(Babu Sing v. Ram Sahai @ Ram Singh, 2008 (3) Supreme 314)**

◆ S. 118 – Competent witness

Indian Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease – whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (Golla Yelugu Govindu v. State of Andhra Pradesh, 2008 (2) Supreme 592)

◆ Estoppel – Respondent accepting the rate of the land at Rs. 3600/- per sq. mtr. And executing the lease deed at the accepted rate and already paid in terms of the offer letter – It was not open to the respondent now to allege that in view of the earlier concluded contract, he was liable to pay @ Rs. 2750/- per sq. mtr. In respect of the plot in question.

In the year 1993, a letter was issued by the Noida authorities, offering a plot of land for starting a nursing home, to the respondent in respect of which the consideration money was fixed at Rs. 2750/- per sq. mtr. It is an admitted position that this offer of the Noida authorities was not accepted by the respondent as it was found from the record that the amount under the offer letter was not deposited by the respondent. On the other hand, the Noida authorities also could not allot the plot offered in the said

letter of 1993 and the amount of Rs. 1,00,000/-, which was deposited by the respondent with them was refunded by account payee cheque and the same was duly encashed by the respondent without raising any objection. Therefore, the respondent, having accepted the refunded money without raising any objection could not turn around and say that the offer letter of 1993 was an allotment letter and therefore, it was a concluded contract between the parties. Furthermore, a perusal of the said letter would not show that it was an allotment letter. In the view of the court, by this letter, a plot of land was only offered to the respondent and there is nothing on record to show that the said offer letter had culminated into an allotment letter. Therefore, in view of the discussions made herein above, it is difficult to conceive that the earlier offer letter @ 2750/- per sq. mtr. As that was the offer of the Noida authorities in the year 1993. The apart, after accepting the rate of the land at Rs. 3600/- per sq. mtr. And executing the lease deed at the accepted rate and after having already paid in terms of the offer letter it is not open to the respondent now to allege that in view of the earlier concluded contract, he was liable to pay @ Rs. 2750/- per sq. mtr. In respect of the plot in question and therefore, the Noida authorities were liable to refund the excess amount paid by him. It will not be out of place to mention here that in the scheme itself, one of the conditions was that the rate would be charged at the prevailing market price on the date of allotment of the plot in question which, in this case was done only in the month of April, 1996 and not in the month of December, 1993. In view of the foregoing reasons, it would be clear that the offer letter of 1993 for allotment of a plot made by the Noida authorities could not be treated as a concluded contract and therefore, it was not at all an allotment letter. (New Okhla Industrial Development Authority v. Arvind Sonekar, 2008 920 Supreme 836)

- Promissory estoppel – Doctrine discussed.

Estoppel is a rule of equity which has gained new dimensions in recent years. A new class of estoppel has come to be

recognized by the courts in this country as well as in England. The doctrine of 'promissory estoppel' has assumed importance in recent years though it was dimly noticed in some of the earlier cases. The leading case on the subject is Central London Property Trust Ltd. v. High Trees House Ltd., 1947 (1) KB 130. The rule laid down in High Trees case (supra), against came up for consideration before the King's Bench in Combe v. Bombe, (1951) 2 KB 215. There in the court ruled that the principle stated in High Tree's case (supra), is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word. But that principle does not create any cause of action, which did not exist before; so that, where a promise is made which is not supported by any consideration, the promise cannot bring an action on the basis of that promise. The principle enunciated in the High Trees case (supra), was also recognized by the House of Lords in Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. (1995) 2 All ER 657. That principles was adopted by this Court in Union of India v. Indo-Afghan Agencies Ltd., AIR 1968 SC 718 and Turner Morrison and Co. Ltd. v. Hungerford Investment Trust Ltd., 1972(1) SCC 857. Doctrine of "Promissory Estoppel" has been evolved by the courts, on the principles of equity to avoid injustice. "Promissory Estoppel" is defined in Black's Law Dictionary as "an estoppel which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee, and which does

induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise".

In the backdrop, let us travel a little distance into the past to understand the evolution of the doctrine of "promissory estoppel". Dixon, J. an Australian Jurist, in Grundt v. Greate Boulder Gold Mines Proprietary Ltd., (1939) 59 CLR 641 (Aust) laid down as under : "It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumptions were deserted that led to it". The principle, set out above, was reiterated by Lord Denning in High Trees's case (supra). This principle has been evolved by equity to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel. Its object is to interpose equity shorn of its form to mitigate the rigour of strict law, as noted in Anglo Afghan Agencies's case (supra) and Sharma Transport Represented by D.P. Sharma v. Government of A.P. And others, 2002 (2) SCC 188. (State of Arunachal Pradesh v. Nezone Law House, Assam, 2008 (2) Supreme 856)

◆ In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself.

In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bold expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be

sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must forever the present in the mind of the Court.

As the factual scenario goes to show the principles of promissory estoppel were clearly inapplicable to the facts of the case. (State of Arunachal Pradesh v. Nezone Law House, Assam, 2008 (2) Supreme 856)

Guardians and Wards Act

◆ **S. 9 – Territorial jurisdiction for application for custody of child – Is to be determined by residence of child fact not with regard to residence of mother or father.**

It is the actual residence of the child which determines the territorial jurisdiction of the Court and the residence of the mother alone, unsupported by the fact of the child residing with her, does not determine the territorial jurisdiction of the Court.

Section 6(a) of 1956 Act and Section 9 of 1890 Act operate in different fields. Both are independent of each other. Whereas Section 6 of 1956 Act deals with the issue of the natural guardianships of a Hindu minor, and Clauses (a), (b) and (c) define the natural guardians, S. 9 of 1890 Act lays down rule with respect to territorial jurisdiction of court where application for custody of a child has to be filed. This Section clearly relates to and refers the "ordinary residence" of the child and says that only such Court shall have the jurisdiction to entertain the petition where the child "ordinarily resides." The issue of natural guardianship of child being subject-matter of s. 6 of 1956 Act cannot be thrust upon, linked with or imported into Section 9 of 1890 Act. If the Legislature intended that residence of mother or father of child should determine ordinary residence of the child himself, it should have used the expression to that effect in S. 9 of 1890 Act. It did not do so. It used and specified the expression "ordinary residence" of the child himself. The expression is unambiguous and

totally certain as well as clear. Clause (a), S. 6 of 1956 Act merely stipulates and provides that custody of a minor who has not completed age of five years shall ordinarily be with the mother. The use of word "ordinarily" in clause (a) clearly indicates legislative intent that even though in normal course and normal circumstances the custody of a child below the age of five years should normally be with the mother, it cannot be mandatory so in every fact situation, irrespective of various reasons, grounds and circumstances. **(Himanshu Mahajan v. Rashu Mahajan, 2008 (2) ALJ (NOC) 503 (HP)**

General Clauses Act

◆ **S. 6-A – Custody of minor – Custody of minor who is below 5 yrs. Should ordinarily with mother but not necessarily.**

From a bare reading of the provisions of Section 6-A of the Act it is clear that the custody of the minor who is below 5 years should ordinarily be with the mother. The word 'ordinarily' does not mean "necessarily". Once the matter is before the court under Section 6 of the Act, the court would consider all aspects of the matter including the provisions relating to the welfare of the minor. The court can also consider the provisions of Section 19 of the guardians the Wards Act. This court is of the opinion that the detention of the child by the father of the opposite party was neither illegal nor could it be said to be without any authority of law. **(Amit v. Nirmal Sahu, 2008 (3) ALJ 204)**

Hindu Law

◆ **S.12-Annulment of marriage cannot be sought on ground that wife had HIV infection or any other disease at time of marriage.**

There is nothing in section 5 to annul the marriage on the ground of HIV infection or any other disease. Admittedly, the parties were major at the time of marriage, therefore, there was no need for consent of guardians.

On the ground of any disease except mental disease, no marriage can be declared null and void as provided under Sections 5

and 12 of the Act. **(Smt. Triveni Singh v. State of U.P., 2008 (2) ALJ 674)**

◆ **S.13(1)(6b) –Amendment of divorce petition on ground of cruelty- Period of two years since alleged desertion by wife expired during pendency – Hence amendment could be sought in divorce petition.**

If the divorce petition had been filed only on the ground of desertion then it would not have been maintainable, as two years had not expired at the time of filing of divorce petition. Even expiry of two years since the date of desertion during pendency of divorce petition would not have cured the defect. However, divorce petition had been filed on the ground of cruelty hence it was maintainable. In such situation if the period of two years since the alleged desertion expired during the pendency of divorce petition then amendment could be sought in the divorce petition for adding the ground of desertion also as one of the ground for divorce. **(Sanjeev Kumar Sinha v. State of U.P. and anr., 2008(2) ALJ 687)**

◆ **Ss.18 and 19 - Maintenance of daughter-in-law – Property in name of mother-in-law can neither be subject matter of attachment nor during lifetime of husband, his personal liability to maintain his wife – Can be directed to be enforced against such property.**

Maintenance of a married wife, during -subsistence of marriage, is a personal obligation on the husband. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject-matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property. **(Vimlaben Ajitbhai Patel v. Vatslabeen Ashokhbai Patel, 2008 (2) AWC 1636 (SC)**

Indian Easement Act

◆ **S.4 – Easement defined – For beneficial enjoyment of Land on Easementary right can be claimed.**

For beneficial enjoyment of Land on Easementary rights can be claimed. Expression 'land' explained in explanation to S. 4 will include a house. Word 'building' used in S/1`5 has a broader spectrum**. (Ramcharan v. Ram Asrey; 2008 (2)ALJ 512)**

Hindu Marriage Act

◆ **S.13(1)(iii) –Dissolution of marriage on the ground of disease. (i.e. Schizophrenia) - Validity of.**

The court below has recorded finding that the lady since the first day of marriage did not respond to normal situations in a normal way. From the evidence on record, it was fully proved that schizophrenia suffered by the lady was of such magnitude which warranted divorce as held by the Supreme Court in Ram Narain Gupta v. Rameshwari Gupta, AIR 1988 SC 2260 : 1988 (2) AWC 1231 (SC) referred in Vineet Saxena v. Pankaj Pandey; AIR 2006 SC 1662 (Para 12).

Accordingly, the Court has got absolutely no option but to accept the findings of fact recorded by the court below. **(Hirdaya Narain Rai v. Ratanjay Pradhan, 2008 (2)AWC 1576)**

Indian Succession Act

◆ S. 68 r/w S.3 T.P. Act, 1882 – Not only the execution of Will must be proved but actually execution must be attested by at least two witnesses in conformity with the provisions of section 3,T.P.Act-'Attestation' and 'execution' connote two different meanings

Indisputably a Will is to be attested by two witnesses in terms of Section 68 of the Indian Evidence Act (Act). Indisputably the requirement of Section 63(1)(c) of the Indian Succession Act is

required for to be complied with for proving a writ. Section 68 of the Act mandates proof by attesting witnesses of not merely of execution by also attestation by two witnesses. That is to say, not only the execution of Will must be proved but also actually execution must be attested by atleast two witnesses. Attestation must of execution of Will be in conformity with the provisions of Section 3 of the Transfer of Property Act.

'Attestation' and 'execution' connote two different meanings. Some documents do not require attestation. Some documents are required by law to be attested. **(Babu Sing v. Ram Sahai @ Ram Singh, 2008 (3) Supreme 314)**

- When genuineness of a Will is in question, in addition to proving the execution of the Will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any.

In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a Will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation as the words 'at least' have been used therein. When genuineness of a Will is in question, apart from execution and attestation of Will, it is also the duty of a person seeking declaration about the validity of the Will to dispel the surrounding suspicious circumstances existing if any. Thus, in addition to proving the execution of the Will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the Will would, inter alia, depend thereupon. **(Babu Sing v. Ram Sahai @ Ram Singh, 2008 (3) Supreme 314)**

◆ Background facts may assume importance –Where a plea of undue influence was taken, the onus therefore would be on the objector and not on the propounder.

The Court, while granting probate of the will, must take into consideration all relevant factors. It must be found that the will was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however, a plea of undue influence was taken, the onus wherefor would be on the objector and not on the offender. (See Savithri & Ors. v. Karthyayani Amma & Ors,JT (2007) 12 SC 248) **(Babu Singh v. Ram Sahai @ Ram Singh, 2008 (3) Supreme 314)**

Indian Penal Code

◆ **S. 34 – Common intention – Section 34 if attracted only when act is done in furtherance of common intention of all accused but not on the ground of his mere presence on spot.**

Section 34 is only attracted where the act was done in furtherance of common intention of all the accused. That is the question of fact depending upon the facts and circumstances of each case. There is no clear and unimpeachable evidence that the common intention developed during the course of fight. There is no direct evidence available to infer even by the circumstantial evidence that there was a plan or meeting of mind of all the assailants and appellant to commit the offence. The essence of liability is to be found in the existence of the common intention emanating from the accused's meeting to the doing of a criminal act in furtherance of such intention. It appears that simply because of the presence it cannot conclusively be said that appellant shared the common intention to commit the murder. There is no overt act. Thus, the participation of the appellant has become doubtful in the commission of the offence, more so the evidence adduced before the trial court does not lead to an inference that he had definite common intention to kill the victim. **(Girind Singh Yadav v. State of U.P., 2008 (2) ALJ 627)**

◆ **S. 113-B – Presumption u/s 113-B arises when a woman committed suicide within a period of seven years from the date of marriage – Ss. 304B and 498A cannot be held to be mutually inclusive**

Section 498-A of IPC and S. 113-B of the Evidence Act include in their amplitude past events of cruelty. Period of operation of Section 113-B of the Evidence Act is seven years, presumption arises when a woman committed suicide within a period of seven years from the date of marriage.

Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman is required to be established in order to bring home the application of
Section 498A IPC. Cruelty has been defined in the Explanation for the purpose of Section 498A. Substantive Section 498A IPC and presumptive Section 113A of the Evidence Act have been inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. It is to be noted that Sections 304B and 498A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. The Explanation to Section 498A gives the meaning of 'cruelty'.

There is no evidence to show that appellant was either present when the demand was made or she herself made any demand.

Above being the position, the prosecution has failed to establish to accusations against the appellant. **(Noorjahan v. State Rep. By D.S.P., 2008 (3) Supreme 161)**

◆ **S. 300, Exp . 4 - For invoking the provision it has to be established that the act was committed in a heat of passion without pre-meditation**

For bringing in its operation it has to be established that the Act was committed without pre-meditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender

having taken undue advantage and not having acted in cruel or unusual manner. This Exception deals with the case of prosecution not covered by first Exception. The exception is founded upon the same principle, for in both there is absence of pre-meditation. But while in the case of Exception 1 there is total deprivation of self control, in case of Exception 4 there is only that heat of passion which clouds mens sober reason and urges them to deeds which they would not otherwise do. In fact Exception 4 deals with the cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties put them in respect of guilt upon equal footing. A sudden fight implies mutual provocation and blows on his side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without pre-meditation, (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the fight occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. It is not possible to enunciate any general rule as to

what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case; For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no pre-meditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression undue advantage as used in the provision means unfair advantage. (Golla Yelugu Govindu v. State of Andhra Pradesh, 2008 (2) Supreme 592)

◆ **304-B – Dowry death, harassment and cruelty on account of dowry period which can within expression "soon before" - Determination of**

In the present case it has been proved that there was an attempt to end her life by setting her on fire about a year before this incident but fortunately the lady survived after getting proper and prompt treatment with the help of her brothers. Thereafter for some days the relations looked ostensibly normal. But soon thereafter the consistent harassment and cruelty was resumed and this time the attempt proved to be more foolproof resulting in her instant death. The gap in between the two burning incidents was not long. In the peculiar facts and circumstances of this case where two consecutive attempts were made to end her life by setting her on fire even a period of approximately one year does not make it stale since there was a continuous process of harassment and after the first incident of burning there was only an ostensible normalcy between husband and wife. There fore it has to be construed to be "soon before" the unnatural death and there was existence of proximate and live link between the demand of dowry, consequential harassment and the unnatural death. (Suresh Kumar Singh v. State of U.P., 2008 (3) ALJ 194)

◆ **S. 300 – Exception 1 & 4 – Applicability**

The Fourth Exception of Sec. 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been

more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in exception 4 as in 1; but they injury done is not the direct consequence of that provocation.

Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. **(Suresh Kumar v. The State of H.P., 2008 (2) Supreme 746)**

Interpretation of Statutes

- **Principles of interpretation**

It is now a Trite law that wherever a term has been defined under a statute, the same should ordinarily be given effect to. There cannot however, be any doubt what so ever that the interpretation clause being prefaced by the words "unless there is anything repugnant in the subject and context" may in given situations mean that the legislature intended a different meaning – While determining such a question, the court ordinarily must preserve the statutory right of a party to prefer an appeal. (Bharat Coking Coal Ltd. v. M/s Annapurna Construction, 2008 (2) Supreme 576)

- **Interpreting different entire – We settled that when two views are possible, one which favours the assessee should be adopted – Case at hand is not one where application of a commercial meaning or trade nomenclature runs contrary to the context in which the word was used**

It is now a well settled principle of law that in interpreting different entries, attempts shall be made to find out as to whether the same answers the description of the contents of the basic entry and

only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort. **(M/s Mauri Yeast India Pvt. Ltd. v. State of U.P., 2009 (3) 9)**

Juvenile Justice (Care & Protection of Children) Act

◆ **S. 2 r/w S. 32 – S. 2 of the Act 2000 is beneficial legislation – Whether the offender was a juvenile on the date of commission of an offence is question of fact**

Principles of beneficial legislation, however, are to be applied only for the purpose of interpretation of the statute and not for arriving at a conclusion as to whether a person is juvenile or not. Whether an offender was a juvenile on the date of commission of the offence or not is essentially a question of fact which is required to be determined on the basis of the materials brought on records by the parties.

A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature. After certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests.

The genuineness of the school certificate and the horoscope of accused had been questioned. The school certificate produced by the appellant was found to be forged and fabricated and as a matter of fact a criminal case was directed to be instituted against the Head of the Institution.

The court, therefore, had no other option but to determine the age on the basis of the Medical Reports. (Jyoti Prakash Rai @ Jyoti Prakash v. State of Bihar, 2008 (2) Supreme 583)

◆ **S. 7 – Power of Juvenile Justice Board – Regarding determination of juvenility of accused as per S.7-A – Not tenable.**

Newly added S. 7-A makes it unambiguously clear that the said section has been enacted to expedite the determination of juvenility of an offender. Now under the added section once it is brought to the notice of any court that an accused brought before it, is or seems to be

juvenile it has been conferred with the right to determine is age and juvenility. The claim of juvenility may be raised before any court an it shall be recognized at any stage even after final disposal of the case. Ss. 7 and 7-A of the Act are complementary and they do not overlap or interdict each other. The right of the board is kept in tact by amending act No. 33 of 2006. S. 7-A does not eclipse S. 7 of the Act but enlarges its scope and makes it more meaningful and practical. Further, S.7-A of the Act has to be read in conjunction with sec. 49 of the Act. From a joint reading of both the statutory sections it is more clear that any competent authority can determine the age of an accused and its juvenility. Principle of harmonious constructions permits such an exercise. **(Om Prakash v. State of U.P., 2008 (2) ALJ 379)**

◆ **S. 21 – Determination of juvenileship – Procedure laid down u/s 21 to be followed by court.**

Accused filed school leaving certificate. It is not admissible without formal poof. But accused must be given opportunity to lead evidence and other party must also be given opportunity to rebut allegation. Even if documents were not found reliable sessions Judge should have got accused medically examined. (Subhash Yadhav v. State of U.P., 2008 (2)ALJ (NOC) 546 (All)

Limitation Act

◆ **S. 48 – Power of Dy. Director Consolidation – Order pass by it merely on basis of spot inspection without memo and without notice to parties would be illegal.**

In case no inspection was done then the Deputy Director Consolidation cannot revert the findings of fact stating that he has visited the spot and after going through the factual position of the spot, he has decided the controversy. It shall always be appropriate that while making spot inspection, the Deputy Director Consolidation must prepare a memo in the presence of parties and such memo should be kept in the record of the proceedings. In the present case,

admittedly, no such memo exists on the paper book lying in the office of the Deputy Director Consolidation.

Order passed by DDC merely on basis of spot inspection without memo and without notice to parties, Illegal. (Lallo Ram v. Deputy Director consolidation, 2008 (2) ALJ 605)

Minimum Wages Act

◆ **S. 6H – Minimum Wages Act, S. 26(2)- Whether Industrial Laws applicable to employees whose service conditions governed by statutory rules – Held, "No"**.

Industrial laws do not apply to the employees whose service conditions are governed by statutory rules. So, U.P. Act does not apply to employees of the cooperative society. The notification dated 306.1988 issued under sub-section (2) of Section 26 of Minimum Wages Act, 1948 (in short 'the Wages Act') makes the position clear that provisions of the aforesaid Act are not applicable to the service of workman employed under the societies which are registered with the Registrar of Cooperative Societies. It was indicated that the salaries and conveyance etc. paid by the registrar of the cooperative societies are also reviewed from time to time. **(Prabhu Dayal v. Sadhan Sahkari Samiti Mujuri Vikas Khand Paniyara, 2008 (2)AWC 1602)**

Motor Vehicles Act & Motor Accidents

◆ S. 2(30) – Financer of a vehicle in a hire purchase agreement – Whether could be construed as an owner of a motor vehicle within meaning of Section 2(30) of Act, 1988 – Person who was in possession of vehicle, and not the financer being the owner would be liable to pay damages for motor accident.

Appellant admittedly was the financer. As the vehicle was the subject matter of Hire Purchase Agreement, the appellant's name was mentioned in the Registration Book.

Section 2 of the Act provides for interpretation of various terms enumerated therein.

It starts with the phrase "Unless the context otherwise requires". The definition of "owner" is a comprehensive one. The interpretation clause itself states that the vehicle which is the subject matter of a Hire Purchase Agreement, the person in possession of vehicle under that agreement shall be the owner. Thus, the name of financer in the Registration Certificate would not be decisive for determination as to who was the owner of the vehicle. Court is not unmindful of the fact that ordinarily the person in whose name the registration Certificate stands should be presumed to be the owner but such a presumption can be drawn only in the absence of any other material brought on record or unless the context otherwise requires.

In case of a motor vehicle which is subjected to a hire purchase agreement, the financer cannot ordinarily, be treated to be the owner. The person who is in possession of the vehicle, and not the financer being the owner would be liable to pay damages for the motor accident. (M/s Godavari Finance co. v. Degala Satyanarayamma, 2008 (2) Supreme 841)

◆ S. 149 – Liability of Insurance Company – Liability could not be saddled on insurance Co. if driver of offending vehicle has no valid licence and there was no cross examination of witness who produced record which show that no driving licence was issued to driver.

The Insurance company is required to prove the breach of the condition of the contract of insurance by cogent evidence. In the event the Insurance Company fails to prove that there has been breach of conditions of the policy on the part of the insured, the Insurance company cannot be absolved of its liability. This Court did not lay down a degree of proof, but held that the parties alleging the breach must be held to have succeeded in establishing the breach of the condition of the contract of insurance on the part of the Insurance Company by discharging its burden of proof. The Tribunal, must arrive at a finding on the basis of the materials available on the record. (Oriental Insurance Co. Ltd. v. Prithvi Raj., 2008(2) ALJ 736)

◆ **S. 70 – All the authorities mentioned in Act are statutory authorities and must Act with the four corners of law.**

The Act is a self contained Code. All the authorities mentioned therein are statutory authorities. They are bound by the provisions of the Act. They must act within the four corners thereof. The State although, have a general control but such control must be exercised strictly in terms of Art. 162 of the Constitution of India. Having regard to the nature and the manner of the control specified therein, it may lay down a policy. Statutory authorities are bound to act in terms thereof, but per se the same does not authorize any Minister including the Chief Minister to Act in derogation of the statutory provisions. Constitution of India does not envisage functioning of the government through the Chief Minister alone. It speaks of Council of Ministers. The duties or functions of the Council of Ministers are ordinarily governed by the provisions contained in the Rules of Business framed under Art. 166 of the constitution of India. All governmental orders must comply with the requirements of a statute as also the constitutional provisions. Our Constitution envisages a rule of law and not rule of men. It recognizes that, how so ever high one may be, he is under law and the constitution. All the constitutional functionaries must, therefore, function within the constitutional limits.

In the matter of grant of permit to individual applicant, the State has no say. The Chief Minister or any authority, other than the statutory authority, therefore, could not entertain an application for grant of permit nor could issue any order thereupon. Even any authority under the Act, including the appellate authority cannot issue any direction, except when the matter comes up before it under the statute. (Pancham Chand v. State of H.P., 2008 (2) Supreme 688)

◆ **S. 173- Whether "awarded amount" includes interest? – Held" Yes".**

The words "awarded amount" evidently include the amount of interest awarded under the impugned award. **(Parmanand Singh v. Smt. Kaushilya Devi, 2008 (2) AWC 1650)**

National Security Act

◆ **S.3 – Delay in passing detention order - Order of detention passed after seven months from date of incident after grant of bail would become immanent and cannot be said to be delayed.**

Since in the present case also the petitioner had been lodged in jail immediately after the incident had taken place and was then no apprehension of his indulging in illegal activities, thus the impugned order having been passed on 4.5.2007 cannot be said to be delayed. **(Usman v. Union of India, 2008 (2) ALJ 677)**

Negotiable Instruments Act

◆ Ss. 118(a) and 139 – When a contention of misuse of cheque has been raised, the accused must be granted an opportunity for adducing evidence, notwithstanding presumptions under sections 118(a) or 139

When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused

for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it. An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-section (2) of Section 243 of the Cr.P.C., which reads as under :

"Section 243 – Evidence for defence.

(1) -

(2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination of cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examination or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(T. Nagappa v. Y.R. Muralidhar, 2008 (3) Supreme 196)

- S. 138, 142 – Complaint of dishonour of cheque when it should be lodge?

Complaint filed before expiry of 15 days would be premature and cognizance taken thereon would be illegal and liable to be quashed.

Complainant of dishonour of cheque is required to give notice to accused within 30 days after receiving the information from Bank regarding non payment of cheque and the accused has to be given 15 days time to make payment and if in case the payment is not made within 15 days of the receipt of the notice, the complainant can present the complaint within one month. It shows that cause of action to file complaint accrues to the complainant after expiry of 15 days of receipt of notice, and the accused has to be given 15 days period to make the payment. It is a statutory provision and this period cannot be curtailed. The legislature made a provision that on the complaint presented after 30 days cognizance could be taken if complainant satisfies the court for the delay, But in its wisdom the legislature did not make any provision to cover contingency where complaint is presented before expiry of 15 days of the notice under proviso (c) S.138 of the Act. It has purposely not been done as it would curtail the right of the accused to make the payment within 15 days, because if payment is made no offence remains under S.138 of the Act and therefore the cognizance taken before expiry of 15 days was not legal. Thus where accused had received the notice of dishonour on 6-9-2004 but the complaint was filed on 18-9-2004 i.e. before the expiry of period of 15 days the complaint was not competent under S.142 (b) of the Act as cause of action had not arisen to take cognizance and the complaint being premature would be liable to be quashed. **(Anil Kumar Shukla v. State of U.P., 2008 (2) ALJ 417)**

Prevention of Corruption Act

◈ **S. 4 (2) - Cr.P.C., S. 4 – Determination of Jurisdiction – Designated Court- Court of special Judge Appointed for area within which offence was committed, would have jurisdiction to try that offence.**

Section 4(2) of the P.C. Act, clearly provides that the court of Special Judge appointed for the area within which the offence was committed, will have jurisdiction. Braj Bhushan Prasad's case (supra)

further clarifies that the place of jurisdiction would be determinative by reference to the place where the main offence was committed. Prima facie the facts supplied to the Court clearly point out that the jurisdiction of the Lucknow court is not ousted in the matter. **(Central Bureau of Investigation, New Delhi v. Smt. Juhie Singh & anr. , 2008(2) ALJ 620)**

- S. 4(2) – Jurisdiction – Offence committed in Lucknow – Designated court at Lucknow would have jurisdiction to try offence.

Section 4(2) of the P.C. Act, clearly provides that the court of Special Judge appointed for the area within which the offence was committed, will have jurisdiction. Braj Bhushan Prasad's case (supra) further clarifies that the place of jurisdiction would be determinative by reference to the place where the main offence was committed. Prima facie the facts supplied to the court clearly point out the jurisdiction of the Lucknow court is not ousted in the matter. **(Central Bureau of Investigation, New Delhi v. Smt. Juhie Singh, 2008 (2) ALJ 620)**

Prevention of Food Adulteration Act

- S. 7 – Sale of adulterated – Food article consideration for quashing complaint

In the absence of full information of the alleged customer, it is not, prima-facie, liable to be accepted that the recovered stored Khowa belonged to one customer Vijai. It is worthwhile to mention here that 450 bags of Khowa weighing 200 quintal have been found in the Cold Storage. There is no evidence also on behalf of the petitioners to show that such customer Vijai had kept such Khowa in the Cold Storage of the petitioner. Therefore, prima-facie, it indicates that the same has been stored for the purposes of sale and not otherwise. The decision referred to above relied upon by the learned counsel for the petitioners is not applicable in the facts and circumstances of the present case. The sample was found adulterated as per public analyst report. In such circumstances, prima-facie, an offence under the Food Adulteration

Act has been made out against the petitioners. It is the matter of evidence as to who is alleged customer namely Vijai. If he comes forward in the Court and admits that he had kept the said Khowa in the Cold Storage of the petitioners, in such circumstances, these facts can be looked into by the trial court. In view of the above petition filed on behalf of both the petitioners is liable to be dismissed. **(Swaroop Cold Storage, Lucknow v. State of U.P. 2008 (2) ALJ 647)**

Registration Act

S.49 – Unregistered lease deed –Admissibility of

Invoking proviso to Section 49 of the Registration Act, as terms of lease are not a collateral purpose within its meaning. AIR 1991 SC 744 (Rai Chand Jain v. Miss Chandra Kanta Khosla) speaks that it is well settled that unregistered lease executed by both the parties can be looked into for collateral purposes. In AIR 2003 SC 1905 (Bondar Singh and others v. Nihal Singh and others) it was held that legal position is clear that a document like the sale-deed, even though not admissible in evidence, can be looked into for collateral purposes. The Court held that the collateral purpose is to be seen on the nature of the possession of the plaintiffs over the suit land. The sale-deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. **(M/s A.R.C. Overseas private Ltd. v. M/s Bougainvillea Multiples and Entertainment Centre Pvt. Ltd., 2008 (2) ALJ 663)**

Service Law

Constitution of India, Art. 16- Compassionate appoint –Cannot be claimed by son after attaining majority as vested Right.

If the family has sufficient means to survive for years together and can take care of the minors who have turned into major after undergoing educational qualification etc. that itself would be evident to show that now the family is not in financial crisis as it could have at the time of sudden demise of the deceased necessitating compassionate appointment at a late stage i.e. after several years compassionate appointment cannot be claimed as a 'vested right'. The vested right may arise from contract, statute or by operation of law. However; asking for compassionate appointment after attaining the

majority by no stretch of imagination can be said to be a vested right. Consequently issuance of direction to respondents to consider the petitioner for compassionate appointment after more than 1-1/2 decade would be contrary to the basic purpose and objective of the scheme of compassionate appointment. **(Mahendra Pratap Sharma v. State of U.P., 2008 (2) ALJ 450)**

◆ **Constitution of India, Art. 16 – Compulsory retirement – Object is to weed out dead wood in order to maintain high standard of efficacy.**

Compulsory retirement is a facet of "doctrine of pleasure" embodied in Article 310 of the Constitution. The rule holds balance between the rights of individual Government servant and the interest of the public. It is intended to enable the employer to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. The object is to weed out the dead wood in order to maintain high standard of efficiency and honesty. It does not cast any stigma and cannot be constituted to be a punishment of Government servant when exercised in public interest under F.R. 56. Lack of efficiency by itself does not amount to a misconduct and, therefore, such incumbent may not be delinquent needs to be punished but may prove to be a burden on the administration, if by insensitive, insouciant, unintelligent or dubious conduct impede the floor or promote stagnation. In a developing country where speed, i probity, sensitive, enthusiastic, creativity and non-brevity process are immediately required, callous and paper logged are the bees setting sin of the administration. Sometimes, reputation of otherwise the information available to the superior officers reflects on the integrity of the employee but there may not be sufficient evidence available to initiate punitive action, but simultaneously conduct and reputation of such person is menace for his continuance in public service is injurious to public interest. In all such cases order of compulsory retirement may be passed by the competent authority. **(Shiv Kant Tripathi v. State of U.P., 2008 (2) ALJ 535)**

◆ Art. 311- Misconduct –What constitutes – If Govt. servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct.

The conduct which is blameworthy for the Govt. servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his

duty in service, it is misconduct. A disregard of an essential condition of the contract of service may constitute misconduct. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences, the same may amount to misconduct. It is not that misbehaviour involving some ill motive or mens rea which alone is to be seen rather, the negligence or recklessness in discharge of duty and a lapse in performance of duty or error of judgment may also be looked into in context of consequences directly attributable to such negligence.

Where the petitioner Judicial Officer while deciding the Land Acquisition reference had made a re-assessment of value of land enhancing the value of acquired land area 3 Bighas 4 Biswansi by Rs.92/- per square yard without having jurisdiction to do so on supplementary award restricted to dwelling house and trees while entertaining the application of the claimant without there being any provision so to do in his anxiety to unduly favour the claimant illegally without any reference under S. 18 of the Land Acquisition Act being made against the award given by Additional Collector thereby unduly given the claimant an additional amount of Rs.24,49,493/- compensation against all judicial norms and propriety for extraneous considerations, it was held that Judicial Officer had committed misconduct within the meaning of R. 3 of 1956 Rules. **(Jai Vir Singh v. State of U.P., 2008 (2) ALJ 79)**

◈ **Art. 311 – U.P. Govt. Servant (Disciplinary and Appeal) Rules, passed without mentioning as to whether incumbent was placed under suspension in contemplation of disciplinary proceeding would be illegal.**

A perusal of Rule 4 (1) shows that a government servant can be placed under suspension against whose conduct an inquiry is contemplated or is proceeding. A perusal of the entire order of suspension impugned in this writ petition nowhere shows that an inquiry was in contemplation or pending warranting suspension of the petitioner in the present case. Suspension order has been passed

without mentioning as to whether the incumbent is being placed under suspension in contemplation of disciplinary proceedings or pendency thereof.

The order of suspension impugned in this writ petition also suffers from the same illegality and, therefore, in our view it cannot be sustained in view of the law laid down in the case of Meera Tiwari (supra). **(Radhey Shaym Srivastava v. State of U.P.; 2008 (2) ALJ 649)**

◆ **Appointment secured on reserved post on basis of false caste certificate is liable to be terminated.**

When a person secures appointment on the basis of a false caste certificate he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. **(Union of India v. Dattatray S/o Namdeo Mendhekar, 2008 (2) AWC 1600)**

◆ **Order of dismissal passed without mandatory provision of law would be set aside.**

When appellants have been dismissed from service without holding any enquiry. They have not been informed of the charges against them nor been afforded opportunity of being heard in respect of charges before inflicting punishment of dismissal from service. Thus, in the absence of reasons for dispensing with the regular enquiry the impugned order of dismissal is patently illegal and it is difficult to uphold the same. **(Pushpendra Singh (C.P. 2187) v. State of U.P., 2008 (2) AWC 1572)**

◆ **U.P. Recruitment of Dependants of Govt. Servants (dying in Harness) Rules – rules 5 and 6 – Appointment on compassionate ground is permanent and services of appointed cannot be terminated treating him as temporary.**

Father of the petitioner, late Sri Dhiraj was working as Class IV employee in Rajkiya Vastukala Mahavidyalaya, Lucknow, who expired while he was in service. The petitioner thereafter moved an, application for appointment on compassionate ground under the

provisions of the U. P. Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974. It is admitted case of the parties that the petitioner was appointed by the order dated 19.3.1983 on a Class IV post. It is settled law that the appointments made under the provisions of the U. P. Recruitment of Dependants of Government Servants (Dying-in- Harness) Rules, 1974 are of permanent nature. Since appointment of the petitioner was of permanent nature, the provisions of U.P. Temporary Government Servants (Termination of Service) Rules, 1975 were not applicable. **(Ram Chandra v. State of U.P., 2008 (2) AWC 1611 (LB)**

◆ **Employment – Punishment –When employee found guilty of breach of Trust – No lenient view required to be taken.**

It is well-settled law that where an employee is given job of trust, as in the present case the Conductor is given on behalf of the corporation, and there are financial irregularities found, no lenient view is required to be taken against such employee who is found guilty of having breached such trust. The petitioner having been found guilty of such charges of carrying passengers without ticket not on one occasion but at least two occasions (even if the, third occasion is taken as doubtful) the punishment of treating the petitioner as a fresh entrant in service and not granting him the benefit of continuing of service is fully justified. (Sachida Nand Pathak v. Regional Manager, U.P. State Road Transport Corporation, Azamgarh,2008 (2)AWC 1792)

◆ Departmental proceedings – Appellant not given opportunity to adequately defend himself

The respondent, who was working as a Packer with the appellant company was put under suspension on charges of misbehaviour with his superiors. He was also served a second charge-sheet for another misconduct of misbehaving with one Mrs. Sasireka and using filthy language against her. A domestic enquiry was thereafter held against the respondent which indicted him on both charges. The management accepted the findings of the enquiry officer and finally he was dismissed from service on account of the gravity of misconduct and for having used abusive language. The respondent thereafter raised an industrial dispute. The Government declined to refer the dispute for further adjudication. Ultimately the matter was referred to the Labour Court. The Labour Court rendered its award holding that the disciplinary action initiated against the respondent was not an act of victimization, that the charges raised against the respondent stood proved and that the finding of the enquiry officer was justified.

Writ petition against the order was filed in the High Court which held that the punishment was disproportionate to guilt. Against the order of the High Court an appeal was filed by the appellant. The court held that the principles of Natural justice have to be complied within disciplinary proceeding. Punishment should not be disproportionate and shocking to the conscience . The court was of opinion that consequent appoint the

bitter relations between the parties and as even the High Court has found the charges proved though trivial and the fact that the respondent has not been on duty with the appellant management since the year 1981. It would be inappropriate to foist a cantankerous and abrasive workman on it. The appeal was dismissed accordingly but the court directed that instead of reinstatement the respondent would be entitled to the payment of Rs. 10,00,000/- as compensation as full and final settlement with respect to his entire claim. (Management of Aurofood Pvt. Ltd. v. S. Rajulu, 2008 (2) Supreme 784)

◆ Principle of apprehension of a Bias – The question of a bias is always the question of fact – The courts have to be vigilant while applying the Principles of bias as it primarily depends on the facts of each case – The court should only act on real bias and not merely on likelihood of bias.

The question of a bias is always the question of fact. The courts has to be vigilant while applying the Principles of bias as it primarily depends on the facts of each case. The court should only act on real bias not merely on likelihood of bias. In he present case, so far as the members of the committee who conducted a disciplinary inquiry was also the members of the Cantonment Board where the report was to be considered, decided and whether to accept it or not and finding the respondent (herein) guilty or not. The very fact that these three persons who conducted inquiry were also the members of the Board and that Board was to take a decision in the matter whether the report submitted by the Enquiry Committee should be accepted or not. Therefore, the participation of these three members in the committee

is given a real apprehension in the mind of the respondent that he will not get a fair justice in the matter because of the three members in the committee is given a real apprehension in the mind of the respondent that he will not get a fair justice in the matter because of the three members who submitted the report would be interest to see that their report should be accepted. This bias in this case cannot be said to be unreal it is very much real and substantial one hat the respondent is not likely to get a fair deal by such disciplinary committee. **(Cantonment Executive Officer v. Vijay D. Wani, 2008 (3) Supreme 1**)

- Appointment – Reservation – Three posts were advertised out of which two were reserved and one unreserved – The advertisement is stated 20% horizontal reservation for women – Her appointment cannot be faulted with.

The Court is required to consider the case and decide treating 'Combined Cadre' legal and valid. It is also clear that reservation policy of the State Government has been accepted by the University and has been enforced in making various appointment. This is also clear from the letter, dated February 26, 1999 by the Secretary, Government of U.P, to various authorities wherein it was expressly stated that a decision of 20% reservation for women in direct appointment had been taken by the government. Moreover, even the advertisement in question, dated August 10, 2000, pursuant to which applications were made by the writ-petitioner as also by respondent No. 4 refers to the advertisement and specifically states that the reservation policy of the Government will apply in filling up of posts. The High Court, in the circumstances, ought

to have considered and decided the question proceeding on the basis that there was reservation of 20% for women.

The court considered Indra Sawhney (I), applied it to the case on hand and held that the submission of the State was well founded and the contention of the petitioner that the reservation violated constitutional guarantee of 50% was not well-founded.

The Court stated;

The vertical reservation is now 50% for general category and 50% for SC, ST and Backward Classes. Reservation of 15% for various categories mentioned in the earlier circular which reduced the general category to 35% due to vertical reservation has now been made horizontal in the amended circular extending it to all seats. The reservation is no more in general category. The amended circular divides all the seats in CPMT into two categories one, general and other reserved. Both have been allocated 50%. Para 2 of the circular explains that candidates who are selected on merit and happen to be of the category mentioned in para 1 would be liable to be adjusted in general or reserved category depending on to which category they belong, such reservation is not contrary to what was said by this court in Indra Sawhney.

It is thus clear that the reservation for women candidates cannot be held invalid or in excess of permissible quota. In fact, reservation policy itself makes this position clear. A letter, dated February 26, 1999 referred to above and annexed as annexure P1 is explicitly clear. Para 2 reads thus;

Reservation will be Horizontal nature i.e. If any Woman candidate selected on the basis of reservation on any category then she will be fixed of the said category. **(Shiv Prasad v. Government of India, 2008 (30 Supreme 186)**

◆ Annual Remarks whether should be communicated even if they are not adverse-Held

Every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry. (Dev Dutt Vs. Union Of India & Ors. Civil Appeal No. 7631 of 2002 Decided on 12 -5 2008)

Societies Act

◆ **S. 3(2)(b) (U.P. Amendment) –Whether there is prohibition on use of certain names by societies – Held, "No".**

No restriction for use of word 'Brahman' . There would be no legal requirement to delete the word Brahman from name of society. **(Hindu Ucchatar Madhyamik Vidyalaya Society (Registered)**

Brahma Bhawan, Aligarh v. Commissioner, Agra Division, 2008 (2) (NOC) 419)

Specific Relief Act

S. 19 – Transfer of Property Act – S. 52 – Suit for specific performance on basis of an agreement for sale – On non payment of amount, owner again sold suit property and possession in question was handed over.

It will be relevant to mention here that the second purchase by the appellant was on 5.5.1975 i.e. Two days after the filing of the suit for specific performance on 3.5.1975. Though the applicability of Section 52 of the Transfer of Property Act, 1882 was not considered by the trial court, however, the first appellate court i.e. Learned Single Judge while granting the decree for specific performance found that the subsequent purchase made by the appellant-defendant was also bona fide for value and without notice of the agreement to sell but the said sale was subordinate to the decree that could be made in the suit for specific performance which was instituted prior to the sale in favour of the second purchaser. The main argument which was advanced before learned Single Judge was that Section 19 of the Specific Relief Act, 1963 provides that a decree for specific performance against the subsequent purchaser for bona fide who has paid the money in good faith without notice of the original contract can be enforced as the same is binding on the vendor as well as against the whole world. As against this, it was contended by the respondents that Section 52 of the TP Act which lays down the principle of lis pendens that when a suit is pending during the pendency of such suit if a sale is made in favour of other person, then the principle of lis pendens would be attracted. In support of this proposition a Full Bench decision of the Allahabad High Court in Smt. Ram Peary and others v. Gauri and other, (AIR 1978 All. 318) as well as a Division Bench judgment of the Madras High Court was pressed into service. Therefore, the question in this case is what is the effect of the lis pendens on the subsequent sale of the same property

by the owner to the second purchaser. Section 19 of the Specific Relief Act clearly says subsequent sale can be enforced for good and sufficient reason but in the present case, there is no difficulty because the suit was filed on 3.5.1975 for specific performance of the agreement and the second sale took place on 5.5.1975. Therefore, it is the admitted position that the second sale was definitely after the filing of the suit in question. Had that not been the position then we would have evaluated the effect of Section 52 of the Transfer of Property Act. But in the present case it is more than apparent that the suit was filed before the second sale of the property. Therefore, the principle of lis pendens will govern the present case and the second sale cannot have the overriding effect on the first sale. The principle of lis pendens is still settled principle of law. In this connection, the Full Bench of the Allahabad High Court in Smt. Ram Peary, (AIR 1978 All 318) has considered the scope of Section 52 of the Transfer of Property Act. The Full Bench has referred to a decision in Bellamy v. Sabine, [(1857) 44 ER 842 at p.843) wherein it was observed as under:

It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. **(Guruswamy Nadar v. P. Lakshmi Ammal (D) through LRs., 2008 (3) Supreme 284)**

Stamp Act

◆ **S. 47-A (U.P.) - Sale deed – Valuation of property – Valuation cannot be determined straightway on such an assumption that land is situated in close proximity of "abadi" area and on presumption that land is to be used for a purpose other than agriculture.**

In the present case, as observed by the Collector, admittedly, the land was an agricultural land and was being used for agriculture

purposes and, therefore, it cannot be treated to be a residential or commercial plot. The valuation cannot be determined straightway on such an assumption that the land is situated in close proximity of 'abadi' area and on the presumption that the land is to be used for a purpose other than the agriculture. **(Smt. Anusaya Singh v. Commissioner, Faizabad Division, Faizabad, 2008 (3) ALJ 215)**

Transfer of Property Act

◆ **S. 58(c) - Mortgage or mortgage by conditional sale – Determination of – Intention of parties is relevant consideration, if condition of re-conveyance is enumerated in document itself then it is mortgage. (State of U.P. v. Indian Christian Trustees, Calcutta, 2008 ALJ (NOC) 492)**

◆ **S. 58(c) - Mortgage or Mortgage by conditional sale – Determination of**

It is well settled that if the condition of re-conveyance is enumerated in document itself, then it has to be regarded as mortgage as provided under Section 58(c) of the transfer of Property Act, 1882.The question is always of intention of the parties. The extraneous evidence can be considered only when the terms of the documents are vague. However, if the terms of the document are clear enough then it is not necessary to consider the other evidence. **(Vasantrao, S/o Manoharrao Neb (since deceased by LRs.) v. Kishanrao, S/o Shanarrao Neb, 2008 (2) ALJ (NOC) 492 (Bom)**

◆ **S. 58(c) – Distinction between mortgage and sale**

There is a distinction between a mortgage by way of conditional sale and sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor. In case of latter the transaction does not evidence an arrangement of lending and borrowing, and thus, right to redeem is not reserved thereby.

If mortgage amount is returned within period of give years, then mortgage will be redeemed and if it is not so done, then document

itself would be treated as sale. **(Vishwanath Dadoba Karale v. Prisa Shantappa Upadhye (D) The LRs., 2008(2) Supreme 566)**

◆ **S. 106 – Notice for terminating tenancy.**

Notice for terminating tenancy is not required to be served on sub-tenants. Sub-tenants are at best, proper parties to eviction proceeding. **(S. Rajdev Singh v. M/s Punchip Associates Pvt. Ltd., 2008 (2) ALJ (NOC) 500)**

U.P. Consolidation of Holdings Act

◆ **Ss. 21(1), 20 and 11A – No question u/s 11-A can be raised or heard at subsequent stage of the consolidation proceeding if it not raised u/s 9 of Act.**

Section 11A of U. P. Consolidation of Holdings Act. 1953 thus, contains a principle akin to principle of res judicata. Thus, the objection which has been raised under Section 9 or which might or ought to have been raised under Section 9 cannot be allowed to be raised in subsequent proceedings of the consolidation. From the materials brought on the record it is clear that no objection regarding valuation of plot No.267, which was original holding of petitioners and the respondents, was raised under Section 9. Section 11A thus, creates a bar of raising an objection with regard to valuation of the land by original tenure holders of the plot.

Section 11A creates a bar on objection in respect of claim to land, partition of joint holding and valuation of plots etc. relating to the consolidation area, which has been raised under Section 9 or which might or ought to have been raised under that section, but has not been so raised. Thus, no question under Section 11A can be raised or heard at any subsequent stage of the consolidation proceedings. The Settlement Officer of Consolidation committed error in changing the valuation of plot No.267 from

80 paisa to 60 paisa, which has effect of reduction of valuation of the petitioners. Although the Settlement Officer of Consolidation has noted in the order that valuation of 80 paisa to 60 paisa be fixed with regard to which there is oral consent of the parties but in the order of Settlement Officer of Consolidation it has not been stated that the present petitioners, who were respondents in appeal, have agreed for reduction of the valuation, which had effect of taking out area from their I plots. In any view of the matter when there is a bar under Section 11A with regard to valuation, the same cannot be done even by any kind of consent by the parties. (Smt. Kiran Devi v. Dy. Director of Consolidation, Ghaziabad, 2008 (2) AWC 1492)

◈ **S. 48 – Power of Dy. Director Consolidation – Order passed by it merely on basis of spot inspection without memo and without notice to parties would be illegal.**

In case no inspection was done then the Deputy Director Consolidation cannot revert the findings of fact stating that he has visited the spot and after going through the factual position of the spot, he has decided the controversy. It shall always be appropriate that while making spot inspection, the Deputy Director Consolidation must prepare a memo in the presence of parties and such memo should be kept in the record of the proceedings. In the present case, admittedly, no such memo exists on the paper book lying in the office of the Deputy Director Consolidation.

Order passed by DDC merely on basis of spot inspection without memo and without notice to parties, Illegal. **(Lallo Ram v. Deputy director consolidation, 2008 (2) ALJ 605)**

U.P. Imposition of Ceiling on Land Holdings Act

S. 10 – Declaration of surplus land – Validity of

In the present case the basic question for deciding the matter in issue is, firstly, who is the tenure holder proceeded against and secondly, the date on which the ceiling i.e. Surplus land is to be calculated. While dealing with the first question the court is of the view that it is Sri Brij Narain against whom the proceedings were started vide notice dated 19.8.1974 under section 10(2) of the Act, and he is the only tenure holder proceeded against but in the statement of his holdings his ancestral sir and khudkasht land in which his five sons having equal share with him by birth under law were included. In case the proceedings are drawn under section 10 of the Act then the date of the application of the Act would be 8.6.1973 since as per the memorandum of family settlement prepared on 13.1968 the names of the sons had already been mutated in revenue record in 1380 Fasli. Section 29 of the act comes into play when certain land comes to the tenure holder by transfer, succession or otherwise then the date of application of Ceiling act is the date on which such transfer took place. If the proceedings are initiated under s. 29 of the act then the date 8.6.1973 will not be the relevant date . Once the matter has been finally settled by the law Courts till the stage of High Court where it has been held that apart from the family settlement allegedly held in 1963 all the sons of Brij Narain had equal $1/6^{th}$ separate and distinct share in the ancestral property being sir and khudkasht land, the Prescribed Authority could not club the same treating it as undivided land between the co-partners and accordingly declared surplus land under the Ceiling Act. More so, the notices issued to Brij Narain under Section 10(20 of the Act were only for determining the excess ceiling land with Brij Narain and cannot be taken into account as notices issued to the other co-partners sons of Brij Narain were under the proviso of Rule 8 of the rules Even on the fresh notice dated 25.6.1987 issued to sons of Brij Narain can be taken into account in respect with each distinct person independently but cannot be relegated back to 1974. The calculation cannot be made by clubbing all the separate holdings of the sons of Brij Narain after the date of

mutation of their names in revenue record. **(Govind Narain Verma v. State of U.P., 2008 (3) ALJ 80)**

U.P. Industrial Disputes Act

◆ **S. 2(s) - Whether definition of retrenchment given in Sec. 2(s) of above said Act is same as Central Act – Held, "Yes".**

The definition of retrenchment under Section 2 (s) of the U.P. Act is the same as the un-amended definition of retrenchment in the Central Act, there being no provision like clause (bb) under the U .P. Industrial Disputes Act. The result therefore is that the termination of services of a daily wager would also be included in the definition of retrenchment under the U.P. Industrial Disputes Act. The controversy which existed for some time as to whether the definition under the U.P. Act would prevail or that under the Central Act has now been settled by the Apex Court in U.P. State Sugar Corporation v. Om Prakash Upadhya, 2003 SCC (L & S) 77 and it has been held that the U.P. Act would prevail. The contention of the petitioner that Section 2(oo) (bb) would be applicable in this case has therefore no merit. **(Secretary, Krishi Utpadan Mandi Samity, Khair v. Presiding Officer Labour Court U.P. Agra, 2008 (2) ALJ 429)**

U.P. Municipality Act

◆ **S. 48(2) – Order ceasing financial power of President would be valid u/s 48(2) of above said Act**

The aforesaid Scheme clearly demonstrates that powers under the proviso is only an interim arrangement pending finalization of the proceedings. It is not disputed that by the impugned order proceedings have been initiated against the petitioner as contemplated under section 48(20 of 'Act of 1916'. The further reading of proviso clearly demonstrates that once the proceedings have been initiated under sub-section (2) of Section 48, the consequences are namely, seizure of financial and administrative power.

Since the enquiry has been initiated under sub-section (2) of Section 48 of 'Act of 1916', the consequences are namely, seizure of

financial and administrative power. **(Rekha (Kinner) v. State of U.P., 2008 (3) ALJ 268)**

U.P. Panchayat Raj Act

◆ **S.5-A – Disqualification in Panchayat election – Mere pendency of appeal against conviction has no effect of deferring disqualification.**

Section 5-A disqualifies a person for being chosen for being Pradhan or member of Gram Panchayat if he suffers any of the disqualifications provided under clauses (a) to (n) thereof. The language of Section 5-A makes it clear that a person would be ineligible to contest an election or to stand for election if he suffers any of the disqualifications under clauses (a) to (n) of Section 50-A. Some of the disqualifications are permanent and some are temporary for a limited period. For such disqualifications which are for limited period, the period is also provided by three provisos appended at the end of Section 5-A. The period of disqualification under clauses (d), (f), (g), (h), (k), (l) or (m) is five years while for disqualification under clause (e) it is the period up to which the incumbent continues to be a defaulter or has not delivered record or property of the concerned local body. The computation of period of five years is to be made in accordance with Rule 3 of 1994 Rules. Therefore, the court is of the opinion that the petitioner suffered disqualification under Section 5-A(k) of 1947 Act. **(Amrendra Singh v. State of U.P., 2008(2) ALJ 260 (DB)**

U.P. Urban Building (Regulation & Letting) Act

◆ **S. 20(2) – Suit for Eviction – Service of notice of for termination of tenancy is not an absolute, but must for filing suit for eviction.**

Tenant was in arrears of rent for more than four months, excluding unpaid rent regarding which decree had already been passed. Notice was also refused by tenant. Tenant would be liable to be evicted. Arrears of rent

against which decree had already been passed would not remain arrears of rent but would assumed character of consolidated funds.

Service of notice for termination of tenancy is not an absolute must for filing suit for eviction. (Wali Mohammad v. IIIrd Additional District Judge, Agra, 2008 (2) (NOC) 264 (All.)

◆ S. 21(1)(a) - Release of premises - Tenant has alternate accommodation available with him cannot oppose release of premises in favour of landlord.

Tenant has alternate accommodation available with him. His family was in financially sound condition. Tenant himself was in business and had admittedly built two houses in which he was running his business. He can easily construct kitchen, latrine and bathroom over constructed room or on the land in his share. Tenant cannot oppose release in favour of landlord. **(Praveen Kumar v. Brij Bhushan Sharma, 2008 (2) (NOC) 280 (All)**

U.P. Zamindari Abolition and Land Reforms Act

◆ Bhumidhari rights in U.P. cannot be transferred through agreement and possession under UPZA and LR Act.

Title does not pass to a person if he is in possession on the basis of agreement. Bhumidhar land in Uttar Pradesh cannot be transferred through agreement and possession under UPZA & LR Act can be transferred only through registered sale deed/gift deed. Reading the whole plaint, it becomes quite clear that Viswanath Tiwari was a superfluous part. By maximum, he may be described as 'proper but not necessary part'. Even in his absence, the suit would have been perfectly maintainable.
(Chandra Bhan Singh v. Vijai Shanker, 2008 (104) RD 602)

◆ S.21 and 14 –Whether tenant of mortgagee of Zamindar conferred with any right? – Held, "No".

Just as under Section 21 of the Act, there is no right conferred upon the tenant of mortgagee, similarly under Section 14 also no right is conferred upon the tenant of mortgagee. Accordingly, the view taken by the Supreme Court in the aforesaid authority of Chandrika Prasad will equally apply to tenants of mortgagees of 'sir' as under Section 14 of the Act, they have not been conferred any right. **(Shiva Prasad v. D.D.C., Gorakhpur, 2008 (2)AWC 1663)**

◆ **Ss. 164, 155 and 166 – Sale/Mortgage –Whether Transfer of land by bhumidhar with delivery of possession would be deemed sale under U.P.Z and L.R. Act- Held, "Yes".**

A bare perusal of Section 155 would reveal that it would apply to a mortgage where the possession of land has been transferred or is agreed to be transferred in the future as security for the money advanced or to be advanced and it is such a transaction which is held to be void under Section 166. Section 164 however talks about transfer of a holding or part thereof made by a bhumidhar by which possession has been transferred for the purpose of securing any payment of money etc. and it says that notwithstanding anything contained in the document of transfer or any law for the time being in force, such a transaction would be deemed to be a sale to the transferee and to every such sale the provisions of Section 155 and Section 166 would not apply. **(Smt. Rama Devi v. Dilip Singh, 2008 (2)AWC 1813)**

Words and Phrases

◆ **"Mistake"** – Connotation is Tax Law – A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. Mistake to be rectified must be one apparent from the record. **(M/s. Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, U.P., 2008 ALJ 157)**

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Guidelines issued by Hon'ble High Court

- **Guidelines issued by Hon'ble High Court in case no. Criminal Misc. W.P. No. 15630 of 2006 (`Vishnu Dayal Sharma v. State of U.P.`)**

Certain guidelines have been issued by the Hon'ble High Court to different authorities for compliance in the case. The guidelines are of utmost importance and it is necessary that it should be in the knowledge of every judicial officer therefore the directions reproduced are as under: -

We think that it is only in that sensitised missionary spirit and co-operation by all the concerned parties and persons that this heart rending issue of missing children, and all the wider ramifications that we have been touching in this writ by means of continuous mandamuses may be addressed, so that we may be able to safeguard the present and future of the most precious resource of our nation – our children.

Summary of directions:

It is directed that the police and other authorities continue their efforts with utmost sincerity to recover the remaining 1694 still missing children and other missing children about whom there may be subsequent reports and continue to submit the updated position of missing children and the number of children rescued on the next and subsequent dates of listing of this petition. Special attention should be paid to recovering the missing girl child of very young age.

We urge the police and other authorities and civil society groups not to indulge in mutual recriminations and to engage in a sincere, and co-operative endeavour, with transparent sharing of information for rescuing the missing child as missing children can not be found by police actions alone, but require the co-operation of the entire civil society and other concerned persons and groups. The learned AGA is directed to furnish copies of counter affidavits and other documents with the State in case it is sought by the intervening NGOs so that they may verify the correctness of the information furnished and give other fruitful suggestions to the Court as to how the process of recovering missing children and other related matters can be carried out further.

We direct that wider publicity is given in the press and other media of the G.O. dated 13.5.08 issued in pursuance of earlier orders in this writ petition for taking action against errant Headmasters, Teachers, Village Pradhans and Village Panchayat Adhikaris, if any child of the ages 6 to 14 years is found not attending school to enforce the fundamental right to free and compulsory education guaranteed under Article 21-A of the Constitution and also the G.O. dated 11.10.07 wherein D.M.s, ADMs and SDMs and other concerned officials are directed to make random inspections in at least 50 schools every week and to take stringent action against absentee teachers. The Court would also like to have a progress report on the extent to which the direction to conduct random inspections of 50 schools per week have actually been achieved by the D.M.s, ADMs and SDMs concerned.

We also direct the Chief Secretary/ Principal Secretary (Primary Education) to provide a role to parents, concerned NGO's and Civil Society groups, local bodies and individuals for enforcing the said G.O's and for monitoring and evaluating the quality of teaching and other activities in the schools including the provision of mid day meals and to take action against the defaulters also when complaints are received from these parties and to submit a compliance report on the steps taken for enhancing the involvement of these groups and individuals on the next date. The Court would also appreciate if such civil society groups come forward for conducting social audits and for monitoring whether the State's promised provisions and claims are being implemented in reality and provide feed back to the Court in these matters.

On the next date the Principal Secretary (Primary Education), U.P. may indicate as to what concrete steps have been taken for improving teachers training and for improving the quality of teaching in the schools, and whether apart from carrying out a certain number of training programmes, there has been any effort to evaluate the outcomes of such training programmes.

We would like the response from the Principal Secretary (Primary Education), U.P. and the Chief Secretary as to the feasibility of the suggestion of the Court to set up a computerized data bank of all school going children of the age group of 6-14 years (and if possible to even put

up the data on the internet), which could inter alia include a) the digitalized photographs of the child (for which purpose a budget of 12.7 crores has been earmarked in the years 2007-2008 vide G.O. dated 19.3.08 and a budget for Rs. 5 crores is earmarked for 2008-2009), b) the class in which the child is studying, c) the name of his school d) and place of schooling. This information could further be upgraded every year to indicate e) whether the child was promoted at the end of the year, f) whether he/she has dropped out from the school and in the event of change of school or location, g) what is his new school and location. The Principals or other authorities can be imposed the duty of ensuring that the data with respect to each child is loaded on the computer. This data, if on the internet, could be made openly accessible, so that the claims of the child actually attending a particular school could be readily verified by concerned civil society groups, individuals and government functionaries, who may also suggest measures for improving the functioning of the school, in case large number of drop outs or failures in a particular classes are reported.

It is also suggested that the government or other concerned parties strive to enlist the support of some public spirited organizations such as the Infosys, or Wipro's Azim Bhai Premji, or the Bill Gates Foundations or even some search engines such as Yahoo or Google, who may perhaps be requested to help in developing soft ware for uploading this information on computers and also for providing net connectivity if the Court's suggestion in this regard is accepted by the State Government. These organizations could also be requested to share the burden for providing computers with web connectivity at all schools or at lead schools, as their contribution to a pious social cause. The State government is directed to contact these organizations and to submit their responses to the Court's suggestions on the next date.

As the existing police web site of missing children, is usually not accessible, as there is usually some problem with their server, the concerned department maintaining the web site is directed to improve the quality of the website and to ensure constant updating of their data base.

On the next date of listing we direct the Additional Solicitor General or Asst. Solicitor General to furnish information about the progress in setting up the nation level web site by the Ministry of Women and Child Development in collaboration with UNICEF and other parties which was slated to have become operational by June 2007 and the reasons for the delay.

We suggest that similar to the example of the intervenor "Don Bosco," the State Government should in addition to its existing web site on missing children, also consider setting up a web site containing a data bank for children unaccompanied by parents and guardians, by obtaining information of such children from children's shelter homes (public or private), information about street children or trafficked children form NGOs such as "Pratham", "Childline", or even from the Labour department in cases where they come across children engaged in occupations involving child labour whose parents are not traceable and who may or may not be studying in NCLP (National Child Labour Project) Schools, or from any other sources which may have information of such unaccompanied children, on which site searches can be made for the reported missing children.

The State government should also interconnect and hyper-link its existing web site on missing children with the Home link and other web sites set up (or to be set up) by the Central government with the aid of UNICEF, the NGO Don Bosco, and other web sites on this matter.

We also direct the DGP and the Principal Secretary (Home) U.P. to consider the feasibility of creating a little open source soft ware by permitting some responsible NGOs or principals or other authorities who could also be given a code number for loading information about missing children that they receive information about on to the Police web site on missing children, for whose accuracy they could be made answerable, as relying exclusively on the present system of closed feeding of the web site by the police after verification of the correctness of the information may be unduly time consuming and limiting.

We also desire that the Principal Secretary (Labour), U.P. and the Chief Secretary issue suitable directions or Government Orders requiring convergence of efforts by district level authorities headed by the DMs,

when cases of impermissible child labour or bonded labour are brought to light by the labour department, co-ordination with the education department to see that the child released from child labour goes to a school where there is proper opportunity for learning, mid-day meals are provided in the schools and that some employment is provided for the parents under government or other schemes to reduce hunger in the family, because launching prosecutions to the exclusion of other measures may only prove counter-productive. Let a compliance report be submitted on this direction on the next date of listing.

On the next date of listing we direct the Chief Secretary, U.P. and the Principal Secretary (Women and Child Development) to furnish us with details about the time frame by which the institutions and homes which are required to be set up in all the districts under the Juvenile Justice Act (as Amended in 2006) such as juvenile justice boards, different classes of government children's homes for children in conflict with the law, and in need of care and protection, child welfare committees etc. will actually be set up, and the impediments in setting up the same

We would also like a response from the Chief Secretary/ Principal Secretary, (Women and Child Development), U.P. when the State Commission for Protection of Child Rights is likely to be set up.

The State Government is directed to submit on the next date of listing the progress report regarding setting up of public display systems showing missing children etc. in public places such as railways and bus stations etc. in each district, steps for setting up which were pointed out to us on the last date as noted in our order dated 28.3.08, and the State should could consider the feasibility of reducing costs as suggested by the intervenor Jagriti Singh, or alternatively for handing over the work to his organization, if cost factors are impeding the setting up of such public display systems.

We direct the District Magistrate, Allahabad to submit comments on the impleadment application and annexures dated 22.1.08 submitted by the intervenor Sanjeev Singh, Advocate and his organization on a sample survey regarding the functioning of the mid day meal scheme in three blocks/tahsils of Allahabad, viz., Soraon, Koraon, and Shankargarh and to take steps and submit progress report on remedying the defects if the

survey findings are found correct, as hunger is another cause for children dropping out of schools and their consequential disappearance from their homes in search of employment and the State government has now mandated provision of mid day meals to all children in the 6-14 year age bracket in government and aided primary and upper primary schools.

We direct the concerned District Judges to furnish data in the required tabular form regarding provision of legal aid to the district level cells constituted for missing children in the cases where the said data has not already been furnished, and further progress reports in other cases on the next and subsequent dates of listing. Relevant feed back from the monthly meetings of district monitoring committees consisting of the District Judges, District Magistrates and the S.S.P./ S.Ps. in various districts should also be sent.

We direct the registry to share the said data and tabulations with the Member Secretary, U.P. Legal Services Authority for apprising him with the problems indicated in the responses of the district judges and for ensuring that missing children's matters are given priority in the monthly meetings of the monitoring committees, and for appropriate intervention and support on receiving the relevant feed back.

We direct the concerned authorities to comply with the directions in the matters of missing children as are being issued by the Member Secretary, U.P. Legal Services Authority from time as we expect him to play a nodal role in the matter, and for ensuring compliance of the orders of this Court in letter and spirit.

Let copies of this order and relevant documents be sent/given by the Registry at the earliest to the Chief Secretary, U.P.; the Principal Secretaries, Govt. of U.P: Labour; Primary Education; Women and Child Development; Home; Member Secretary, State Legal Services Authority; concerned District Judges; Director General Police, U.P., Lucknow; District Magistrate, Allahabad; A.G.A. Sri A.K. Sand; Additional Solicitor General, Govt. of India, Sri Ashok Nigam; Assistant Solicitor General, Govt. of India, Sri K.C. Sinha; Secretary, Ministry of Women and Child Development, Govt. of India, New Delhi; Chief, Child Protection Section, UNICEF, 73 Lodi Estate, New Delhi; Child Protection Officer, UNICEF, ¼ Vipul Khand, Gomti Nagar, Lucknow;

the intervenor Don Bosco Ashayalam, Lucknow; the interveners Jagriti Singh and Sanjeev Singh Advocates.

List this case on 8.8.2008 for receiving compliance reports, appropriate responses and for further orders.

Dated: 22.05.2008

Ishrat

STATUTE SECTION

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

Statement of Objects and Reasons

Traditional norms and values of the Indian society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973, the procedure is both time-consuming as well as expensive. Hence, there is need to have simple, inexpensive and speedy provisions to claim maintenance for parents.

2. The Bill proposes to cast an obligation on the persons who inherit the property of their aged relatives to maintain such aged relatives and also proposes to make provisions for setting up old age homes for providing maintenance to the indigent older persons.

The Bill further proposes to provide better medical facilities to the senior citizens and provisions for protection of their life and property.

3. The Bill, therefore, proposes to provide for:-

(a) appropriate mechanism to be set up to provide need-based maintenance to the parents and senior citizens

(b) providing better medical facilities to senior citizens

(c) for institutionalization of a suitable mechanism for protection of life and property of older persons,

(d) setting up of old age homes in every district.

4. The Bill seeks to achieve the above objectives.

CHAPTER I
PRELIMINARY

1. S**hort title, extent, application and commencement**.- (1) This Act may be called the **Maintenance and Welfare of Parents and Senior Citizens Act, 2007**

(2) It extends to the whole of India except the State of Jammu and Kashmir and it applies also to citizens of India outside India

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

2. **Definitions**.- In this Act, unless the context otherwise requires,-

(a) **"children"** includes son, daughter, grandson and grand-daughter but does not include a minor;

(b) **"maintenance"** includes provision for food, clothing, residence and medical attendance and treatment;

(c) **"minor"** means a person who, under the provisions of the Indian Majority Act, 1875, is deemed not to have attained the age of majority;

(d) **"parent"** means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen;

(e) **"prescribed"** means prescribed by rules made by the State Government under this Act;

(f) **"property"** means property of any kind, whether movable or immovable, ancestral or self acquired, tangible or intangible and includes rights or interests in such property;

(g) **"relative"** means any legal heir of the childless senior citizen who is no minor and is in possession of or would inherit his property after his death;

(h) **"senior citizens"** means any person being a citizens of India, who has attained the age of sixty years or above includes parent whether or not a senior citizens;

(i) **"State Government",** in relation to a Union territory, means the Administrator thereof appointed under article 239 of the Constitution;

(j) **"Tribunal"** means the Maintenance Tribunal constituted under section 7.

(k) **"welfare"** means provision for food, health care, recreation centers and other amenities necessary for the senior citizens.

3. Act to have overriding effect.- **The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or in any instrument having effect by virtue of any enactment other than this Act.**

CHAPTER II
MAINTENANCE OF PARENTS AND SENIOR CITIZENS

4. **Maintenance of parents and senior citizens.-** (1) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, shall be entitled to make an application under section 5 in case of-

(i) parent or grand-parent, against one or more of his children not being a minor;

(ii) a childless senior citizen, against such of his relative referred to in clause (g) of section 2.

(2) The obligation of the children or relative as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

5. **Application for Maintenance.- (**1) An application for maintenance under section 4, may be made -

(a) by a senior citizen or a parent, as the case may be; or

(b) if he is incapable, by any other person or organization authorized by him; or

(c) the Tribunal may take cognizance suo motu.

Explanation – For the purposes of this section "organization" means any voluntary association registered under the Societies Registration Act, 1860, (21 of 1860)or any other law for the time being in force.

(2) The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct.

(3) On receipt of an application for maintenance under sub-section (1), after giving notice of the application to the children or relative and after giving the parities an opportunity of being heard, hold an inquiry for determining the amount of maintenance.

(4) An application filed under sub-section (2) for the monthly allowance, for the maintenance and expenses for proceeding

shall, as far as possible be disposed of within ninety days from the date of the service of notice of the application to such person.

(5) An application for maintenance under sub-section (1) may be filed against one or more persons:

Provided that such children or relative may implead the other person liable to maintain parent in the application for maintenance.

(6) Where a maintenance order was made against more than one person, the death of one of them does not affect the liability of others to continue paying maintenance.

(7) Any such allowance for the maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or expenses of proceeding, as the case may be.

(8) If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole or any part of each month's allowance for the maintenance and expenses of proceeding, as the case be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made whichever is earlier:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Tribunal to levy such amount within a period of three months from the date on which it became due.

6**.** **Jurisdiction and procedure**.- (1) The proceedings under section 5 may be taken against any children or relative in any District-

(a) where he resides or last resided; or

(b) where children or relative resides.

(2) On receipt of the application under section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed.

(3) For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973.

(4) All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner prescribed for summons cases:

Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case ex parte.

(5) Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may be notification, specify in this behalf.

(6) The Tribunal before hearing an application under section 5 may, refer the same to a Conciliation Officer and such Conciliation Officer shall submit his finding within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

Explanation.- For the purposes of this sub-section "Conciliation Officer" means any person or representative of an organization referred to in Explanation to sub-section (1) of section 5 or the Maintenance Officers designated by the State Government under sub-section (1) of section 18 or any other person nominated by the Tribunal for this purpose.

7. **Constitution of Maintenance Tribunal.-** (1) The State Government may, by notification in the Official Gazette, constitute for each Sub-division one or more Tribunals as may be specified in

the notification for the purpose of adjudicating and deciding upon the order for maintenance under section 5.

(2) The Tribunal shall be presided over by an officer not below the rank of Sub-Divisional Officer of a State.

(3) Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.

8. **Summary procedure in case of inquiry.-** (1) In holding any inquiry under section 5, the Tribunal may, subject to any rules that may be prescribed by the State Government in this behalf, follow such summary procedure as it deems fit.

(2) The Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1978.

(3) Subject to any rule that may be made in this behalf, the Tribunal may, for the purpose of adjudicating and deciding upon any claim for maintenance, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

9. **Order for maintenance.-** (1) If children or relatives, as the case may be, neglect or refuse to maintain a senior citizen being unable to maintain himself, the Tribunal may, on being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal may deem fit and to pay the same to such senior citizen as the Tribunal may, from time to time, direct.

(2) The maximum maintenance allowance which may be ordered by such Tribunal shall be such as may be prescribed by the

State Government which shall not exceed ten thousand rupees per month.

10. **Alteration in allowance.-** (1) On proof of misrepresentation or mistake of fact or a change in the circumstances of any person, receiving a monthly allowance under

section 5, for the maintenance or ordered under that section to pay a monthly allowance for the maintenance.

(2) Where it appears to the tribunal that, in consequence of any decision of a competent Civil Court, any order made under section 9 should be cancelled or varied, it shall cancel the order or, as the case may be, vary the same accordingly.

11. *Enforcement of order of maintenance****.- (1) A copy of the order of maintenance and including the order regarding expenses of proceedings, as the case may be, shall be given without payment of any fee to the senior citizen or to parent, as the case may be, in whose favour it is made and such order may be enforced by any Tribunal in any place where the person against whom it is made, such Tribunal on being satisfied as to the identity of the parties and the non-payment of the allowance, or as the case may be, expenses, due.***

(2) A maintenance order made under this Act shall have the same force and effect as an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be executed in the manner prescribed for the execution of such order by that Code.

12. **Option regarding maintenance in certain cases.-** Notwithstanding anything contained in Chapter IX of the Code of Criminal Procedure, 1973, where a senior citizen or a parent is entitled for maintenance under the said Chapter and also entitled for maintenance under this Act may, without prejudice to the provisions of Chapter IX of the said Code, claim such maintenance under either of those Acts but not under both.

13. **Deposit of maintenance amount.**-When an order is made under this Chapter, the children or relative who is required to pay any

amount in terms of such order shall, within thirty days of the date of announcing the order by the tribunal, deposit the entire amount ordered in such manner as the Tribunal may direct.

14. A**ward of interest where any claim is allowed**.- Where any Tribunal makes an order for maintenance made under this Act, such Tribunal may direct that in addition to the amount of maintenance, simple interest shall also be paid at such rate and from such date not earlier than the date of making the application as any be determined by the tribunal which shall not be less than five per cent and not more than eighteen per cent.:

Provided that where any application for maintenance under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) is pending before a Court at the commencement of this Act, then the Court shall allow the withdrawal of such application on the request of the parent and such parent be entitled to file an application for maintenance before the Tribunal.

15. **Constitution of Appellate Tribunal** .- (1) The State Government may, by notification in the Official Gazette, constitute one Appellate Tribunal for each district to hear the appeal against the order of the Tribunal.

(2) The Appellate Tribunal shall be presided over by an officer not below the rank of District Magistrate.

16. *Appeals.-* ***(1) Any senior citizen or a parent, as the case may be aggrieved by an order of a Tribunal may, within sixty days from the date of the order, prefer an appeal to the Appellate Tribunal:***

Provided that on appeal, the children or relative who is required to pay any amount in terms of such maintenance order shall continue to pay to such parent the amount so ordered, in the manner directed by the Appellate Tribunal:

Provided further that the Appellate Tribunal may, entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) On receipt of an appeal, the Appellate Tribunal shall, cause a notice to be served upon the respondent.

(3) The Appellate Tribunal may call for the record of proceedings from the Tribunal against whose order the appeal is preferred.

(4) The Appellate Tribunal may, after examining the appeal and the records called for either allow or reject the appeal.

(5) The Appellate Tribunal shall, adjudicate and decide upon the appeal filed against the order of the Tribunal and the order of the Appellate Tribunal shall be final:

Provided that no appeal shall be rejected unless an opportunity has been given to both the parties of being heard in person or through a duly authorized representative.

(6) The Appellate Tribunal shall make an endeavour to pronounce its order in writing within one month of the receipt of an appeal.

(7) A copy of every order made under sub-section (5) shall be sent to both the parties free of cost.

17. **Right to legal representation** .- Notwithstanding anything contained in any law, no party to a proceeding before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner.

18. **Maintenance Officer.**- (1) The State Government shall designate the District Social Welfare Officer or an officer not below the rank of a District Social Welfare Officer, by whatever name called as Maintenance Officer.

(2) The Maintenance Officer referred to in sub-section, (1), shall represent a parent if he so desires, during the proceedings of the Tribunal, or the Appellate Tribunal, as the case may be.

CHAPTER III
ESTABLISHMENT OF OLDAGE HOMES

19. **Establishment of oldage homes**- The State Government may establish and maintain such number of oldage homes at accessible places, as it may deem necessary, in a phased manner, beginning with at least one in each district to accommodate in such homes a minimum of one hundred fifty senior citizens who are indigent.

(2) The State Government may, prescribe a scheme for management of oldage homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes. Explanation – For the purposes of this section, "indigent" means by senior citizen who is not having sufficient means, as determined by the State Government, from time to time, to maintain himself.

CHAPTER IV
PROVISIONS FOR MEDICAL CARE OF SENIOR CITIZEN

20. **Medical support for senior citizen**-The State Government shall ensure that,-

(i) the Government hospitals or hospitals funded or partially by the Government shall provide beds for all senior citizens as faras possible;

(ii) separate queues be arranged for senior citizens;

(iii) facility for treatment of chronic, terminal and degenerative diseases is expanded for senior citizens;

(iv) research activities for chronic elderly diseases and ageing expanded;

(v) there are earmarked facilities for geriatric patients in every district hospital duly headed by a medical officer with experience in geriatric care.

CHAPTER V

PROTECTION OF LIFE AND PROPERTY OF SENIOR CITIZEN

21. **Measures for publicity, awareness, etc., for welfare of senior citizen.-**The State Government shall, take all measures to ensure that-

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

(ii) the Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

(iii) effective co-ordination between the service provided by the concerned Ministries or Departments dealing with law, home affairs,

health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

22. **Authorities who may be specified for implementing the provisions of this Act.-** (1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the district Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

23. **Transfer of property to be void in certain circumstances-** (1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal..

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

(3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2) action may be taken on his behalf by any of the organization referred to in Explanation to sub-section (1) of section 5.

CHAPTER VI
OFFENCES AND PROCEDURE FOR TRIAL

24. **Exposure and abandonment of senior citizen.-**Whoever, having the care or protection of senior citizen leaves, such senior citizen in any place with the intention of wholly abandoning such senior citizen, shall be punishable with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousands rupees or with both.

25. **Cognizance of offences. -** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) every offence under this Act shall be cognizable and bailable.

(2) An offence under this Act shall be tried summarily by a Magistrate.

CHAPTER VIII
MISCELLANEOUS

26. **Officers to be public servants. -** Every officer or staff appointed to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. 45 of 1860

27. **Jurisdiction of civil court barred.-** No Civil Court shall have jurisdiction in respect of any matter to which any provision of this Act applies and no injunction shall be granted by any Civil Court in respect of anything which is done or intended to be done by or under this Act.

28. **Protection of action taken in good faith.-** No suit, prosecution or other legal proceeding shall lie against the Central Government, the state Governments or the local authority or any officer of the Government in respect of anything which is good faith or intended to be done in pursuance of this Act and any rules or orders made thereunder.

29. **Power to remove difficulties. -** If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of the commencement of this Act.

30. **Power of Central Government to give directions.-** The Central Government may give directions to State Governments as to the carrying into execution of the provisions of this Act.

31. **Power of Central Government to review.-** The Central Government may make periodic review and monitor the progress of the implementation of the provisions of this Act by the State Governments.

32. **Power of State Government to make rules.-** (1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for-

(a) the manner of holding inquiry under section 5 subject such rules as may be prescribed under sub-section (1) of section 8;

(b) the power and procedure of the Tribunal for other purposes under sub-section (2) of section 8;

(c) the maximum maintenance allowance which may be ordered by the Tribunal under sub-section (2) of section 8;

(d) the scheme for management of oldage homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the

inhabitants of such homes under sub-section (2) of section 19;

(e) the powers and duties of the authorities for implementing the provisions of this Act, under sub-section (1) of section 22;

(f) a comprehensive action plan for providing protection of life and property of senior citizens under sub-section (2) of section 22;

(g) any other matter which is to be, or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of State Legislature, where it consists of two houses or where such legislature consists of one House before that House.

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