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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, 2009**

**Volume: XVI** **Issue No.: 2**

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## Adverse Possession

◆ **Principle of Adverse Possession – Pleading of adverse possession – Burden on person to establish it.**

Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party; (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. **(Hemaji Waghaji Jat v. Bhikhabhai Khengarbhi Harijan and Others; 2009(106) RD 784)**

◆ **Adverse Possession – Concept of**

The Court had an occasion to examine the concept of adverse possession in T. Anjanappa and Others v. Somalingappa and another; 2006(101) RD 705 (SC). The Court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The Court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possession actually informing the real owner of the former's hostile action. **(Hemaji Waghaji Jat v. Bhikhabhai Khengarbhi Harijan and Others; 2009(106) RD 784)**

◆ **Adverse Possession – Adverse possession would not benefit a person who took possession in contravention of law.**

Law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly

disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner. **(Hemaji Waghaji Jat v. Bhikhabhai Khengarbhi Harijan and Others; 2009(106) RD 784)**

## Arbitration and Conciliation Act

◆ **S. 3 – Receipt of written communication – when communication is deemed to have been received.**

Section 3 of the Act:

"S.3. Receipt of written communications.-(1) Unless otherwise agreed by the parties-

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communication in respect of proceedings of any judicial authority."

A bare perusal of the aforesaid provisions would reveal that if a written communication is delivered to the addressee personally at his

place of business, it shall be deemed to have been received by him on the day it was delivered. Admittedly, a copy of the award had been sent to Subhash Chander at the Alka Cinema which was, in fact, the property which was the subject-matter of the partnership business between the parties. In this view of the matter, the statement of the Postman Dharam Pal becomes extremely relevant wherein he deposed that on the 30th August, 1999, Subhash Chander had not been present in the cinema premises and that on the next day he had refused to receive the communication even when tendered to him which fact had been endorsed by him on the envelope which had then been returned to the sender. Thus, Court is of the opinion that by virtue of sub-clause (a) of Section 3(1) read with Section 3(3), a presumption that the document had indeed been delivered is writ large on the facts of the case. **(Kailash Rani Dang v. Rakesh Bala Aneja & Anr.; 2009(2) ALJ 543)**

## Arms Act

◆ **S. 14 – Arms licence – Refusal to grant – Validity of.**

Registration of a criminal case U/s. 304-B IPC could be a ground to reject an application for grant of a licence by the Licensing Authority in public interest, but registration of a case on a complaint of the wife of the petitioner is personal dispute inter se between the two parties, in which public interest is not involved. Consequently, the ground for rejection of petitioner's application for grant of an arm's licence on ground that it was not in public interest to grant such a licence, would be patently erroneous and cannot be sustained. **(Vineet Kumar v. Commissioner, Kanpur Region, Kanpur & Ors.; 2009(3) ALJ 284)**

◆ **S.17(3) – Suspension of arms licence of petitioner on the ground that petitioner appeared to be person of criminal nature since two criminal cases were pending – Reasons so recorded not proper, hence order of suspension liable to be quashed.**

Suspension of arms licence – Exercise of power – Validity – No finding recorded that possession of arms licence with petitioner would endanger public peace or public safety – Order of suspension

only stated that petitioner appeared to be a person of a criminal nature since two criminal cases were pending, and therefore, it would not be in public interest to allow petitioner to hold licence – Reasons so recorded by licencing authority not proper – Order of suspension liable to be quashed. **(Sohan Ram v. State of U.P. & Ors.; 2009 Cri.L.J. (NOC) 451 (All)**

## Civil Procedure Code

**S. 11 – Bar of res-judicata – When not applicable.**

In the case at hand the judgment in support of the decree passed in original suit No. 102 of 1984 ex facie does not in any manner decides any issue on merits. In the said suit the written statement on behalf of both the defendants i.e. Mahesh and Smt. Sugiya were filed separately disputing the claim of Smt. Ram Sakhi for the cancellation of the sale deed. However, the suit proceeded ex parte and was decreed by a totally non-speaking and unreasoned judgment.

A perusal of the aforesaid relevant portion of the judgment in unequivocal terms demonstrates that the same has been passed on account of the absence of the defendants which led the Court to record satisfaction with the plaint case. However, it does not even record the statements of the fact, the defence set-up in written statement, and the evidence adduced in support thereof as also the reasoning for arriving at the conclusion. Therefore, in nutshell the aforesaid judgment is not a decision within the meaning of Section 11, CPC and does not even conform to the definition of the judgment as contained under Section 2(9) read with Order XX, Rule 4(2) of the CPC. Accordingly, it cannot operate as a bar of res-judicata. **(Nitin Kumar & Ors. V. Rajendra Kumar; 2009 (3) ALJ 423)**

**S. 11 – Res-judicata – Applicability of.**

The application of the plaintiff rejecting the application for attachment of the property before the judgment, was an interlocutory order, which was passed during the pendency of the suit and would not operate as res-judicata in so far as the execution of the decree is concerned.

The principle of res-judicata is based on the need of giving finality to judicial decisions and the principle of res-judicata is that the same matter should not be judged again and again. It primarily applies to the past litigation and future litigation on the same issue. In the present case, an interlocutory application for attachment before the judgment is not a decision which brings finality between the parties, which would operate as res-judicata after the decree is passed by the trial court. **(Mewa Lal v. Kedar Nath & Ors.; 2009(2) ALJ 575)**

◆ **S. 47 – Objection under – Rejected being time barred in execution proceeding sustainability of – No limitation is prescribed for an objection under S. 47 CPC.**

Court in Nar Singh Das clearly held that no limitation in provided under section 47 of the Code of Civil Procedure for filing objections and the relevant portion of the judgment is quoted below:-

> "It was also urged on behalf of the decree holder that the objection was barred by limitation. Reliance in support was placed upon Gangadhar Martant v. Jagmohandas Varjivanda; AIR 1931 Bom 446, in which Article 181 of the Limitation Act was held applicable to an objection under section 47, CPC. With all respect it is difficult to hold that an objection under section 47, CPC can fall within the purview of the Article 181 of the Limitation Act. It was observed in AIR 1935 All 1016 that no limitation is prescribed for an objection under section 47, CPC. The objection was therefore not barred by limitation."

In view of the aforesaid decision, the Judge, Small Causes Courts was not justified in dismissing the objections filed by the petitioner under section 47 of the Code of Civil Procedure as being barred by limitation. **(Pradeep Kumar Awasthi v. Uma Kant Tripathi; 2009(106) RD 805)**

◆ **S. 100, 2(9) & O.XLI and XLII – Second Appeal – Maintainability of – Second appeal against order rejecting application U/s. 5 of Limitation Act for condonation of delay in filing first appeal maintainable.**

The Apex Court in the case of Shyam Sunder Sharma v. Pannalal Jaiswal and others; AIR 2005 SC 226: 2005 (1) AWC 410 (SC), wherein the Hon'ble Apex Court held as under:

"The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew; 1987(2) KLT 848. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI, introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect is confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed alongwith an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

In view of recent decision of the Apex Court in Shyam Sunder Sharma's case, now undisputedly, the rejection of an application for condoning the delay in fling the appeal is a decision in the appeal. In view of that, the objection raised by stamp reporter is overruled and the second appeal is held to be maintainable. **(Smt. Prem Wati and another v. Smt. Munni Devi alias Minakshi and another; 2009(2) AWC 1099)**

◈ **O. V, R. 2 – Envelope containing summons served on defendant was not accompanied by copy of plaint would not amount to service of summons U/O. V, R. 2.**

In Shafiqur Rahman Khan v. IInd Additional District Judge, Rampur and others; AIR 1983 Alld. 12, a Division Bench of the Hon'ble Court has examined the provisions of Order 5 Rule 2 of the CPC and held as under:-

"This provision makes it incumbent and mandatory for every summons to be accompanied by a copy of the plaint. Then a statute uses the word "shall" prima facie it is mandatory. The word "shall" raise a presumption that the particular provision is imperative. In ordinary parlance, the term "shall" is considered as a word of command and one which always or which must be given a compulsory meaning. It has a peremptory meaning and it is generally imperative or mandatory. It has the invariably significance of excluding the idea of discretion, and has the significance of operating to impose a duty which must be discharged. Applying the aforesaid rule of construction, interpreting O. V. R. 2 of the Civil P.C., it appears to us that the word "shall" has to be construed imperatively and failure to be accompanied by a copy of the plaint would not amount to service of summons as required by O.V, R. 2 CPC."

The Court held that the envelope which is not accompanied by a copy of the plaint would not amount to service of the summons as required under O. 5, R. 2 of the CPC. **(Chauthi Ram v. Balli & Ors.; 2009(3) ALJ 144)**

◈ **O.6, R. 17 Proviso – Amendment of pleading – Bar after trial has commences.**

It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint. **(Vidyabai & Ors. v. Padmalatha & Anr.; AIR 2009 SC 1433)**

◈ **O. VI, R. 17 – Amendment of written statement – Power to allow amendment to be liberally exercised.**

It is useful to refer to the relevant provisions of CPC. Order VI, Rule 17 reads thus:

> "**Amendment of Pleadings.-** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

This rule was omitted by the Code of Civil Procedure (Amendment) Act, 1999. However, before the enforcement of the Code of Civil Procedure (Amendment) Act, 1999, the original rule was substituted and restored with an additional proviso. The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the Court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy loading to protest all over the country. Thereafter, the rule was restored in its original form by Amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of

amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in Courts to deal with the unforeseen situations whenever they arise. **(Chander Kanta Bansal v. Rajinder Singh Anand; 2009(106) RD 763)**

◈ **O. VI, Rule 17, Proviso – Reasons for adding proviso – To curtail delay and expedite hearing of cases.**

The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case. It also helps in checking the delays in filing the applications. Once the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea; it is for the Court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases. **(Chander Kanta Bansal v. Rajinder Singh Anand; 2009(106) RD 763)**

◈ **O. VIII, R.1 – Provision in O. VIII, R.1 is directory even after 2002 amendment – Time for filing WS can be extended on sufficient cause shown.**

The Supreme Court in a large number of decisions in Salem Advocate Bar Association, Tamilnadu v. Union of India; AIR 2005 SC 3353: 2005 (3) AWC 2996 (SC): Kailash v. Nanhku and others; (2005) 4 SCC 480: 2005(2) AWC 1490 (SC): Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and others; (2005) 6 SCC 705: 2005 (4) AWC 3861G and Shaikh Salim Haji Abdul Khayum Sab v. Kumar and

others; AIR 2006 SC 396: 2006(1) AWC 529 (SC), has held that even after the amendment of the provisions of O. VIII, R.1, pursuant to the Amendment Act of 2002, the provision of the Order VIII, R.1 is still directory in nature and is not mandatory and that time could be extended on sufficient cause being shown. **(Somaroo v. Smt. Prakriti Acharya and others; 2009(2) AWC 1098)**

◈ **O. IX, R. 9 – Restoration Of petition dismissed for default – "Sufficient" – Petitioner had engaged two counsels, one could not appear due to illness and other was elevated to Bench – Cause shown for non-appearance is sufficient – Refusal of restoration of petition was improper.**

The appellant had engaged the services of two learned counsels. Unfortunately for him, one was elevated to the bench and other was suffering with physical ailment. All this information was forthcoming in the application filed for restoration. The High Court has not appreciated these facts. In the opinion of the Court whether the applicant has made out sufficient cause or not, in the application filed, the court is required to look at all the facts pleaded in the application. No doubt, the consideration of the existence of sufficient cause is the discretionary power with the court, but such discretion has to be exercised on sound principles and not on mere technicalities. The approach of the court in such matters should be to advance the cause of justice and not the cause of technicalities. A case as far as possible should be decided on merits and the party should not be deprived to get the case examined on the merits. **(Raj Kishore Pandey v. State of U.P. & Ors.; 2009(2) ALJ 541)**

◈ **O. IX, R. 13 – Exparte decree – Not challenged before superior court – Restoration application filed after a lapse of 3 years without filing any delay condonation application – Effect of.**

In the present case, judgment and decree dated 10.9.1996 has not been challenged by the petitioner on merits before the Superior Court, but only preferred restoration application under Order IX, Rule 13 of CPC, that too after a lapse of 3 years without filing any condonation application. The Court cannot look into the merits of

judgment and decree dated 10.9.1996 passed against the petitioner in a proceedings arising out of the rejection of restoration application filed under O. IX, Rule 13 of CPC. The scope of the writ petition is only to see whether the petitioner was prevented by sufficient cause form appearing when the suit was called for hearing. Over and above, in the present case neither the petitioner has filed condonation application under section 5 of the Limitation Act, nor assigned sufficient cause for not appearing when the suit was called for hearing. The petitioner, but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiffs claim. **(Noor Mohammad and Others v. 1st Addl. District Judge, Rae Bareli and Others; 2009(106) RD 816)**

◆ **O. XIII, R. 3 – Documentary evidence – Admissibility when not in dispute and if same is marked as exhibit, prompt objection must be taken and judicially determined.**

The objection relating to proof of document should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection

raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. **(Hemendra Rasiklal Ghia v. Subodh Mody.; 2009(3) ALJ 69)**

## Constitution of India

◆ **Article 14 – Licence of fair price shop – Cancellation of – Licence for fair price shop cannot be cancelled on absolutely vague charges and without reply of licensee.**

In the present case, the charges against the petitioner were absolutely vague. The reply submitted by the petitioner was not considered while passing the orders, either by the Sub-Divisional Officer or by the appellate authority and merely saying that there were irregularities, without specifying any kind of irregularity and without there being any evidence having been called for from the petitioner, would not be a ground for cancelling the licence of the petitioner. As such, the orders dated 11.9.2006 and 30.4.2008, passed by the Sub-Divisional Magistrate and the Commissioner respectively deserve to be set aside. **(Siyaram v. State of U.P and Others; 2009(2) AWC 1200 (All HC)**

◆ **Article 14 – Principle of Natural Justice – Cancellation of bail on ground that complainant was not heard and thus principles of natural justice were violated – Not proper.**

It is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going undergrounds or becoming unavailable to the investigating agency,

(7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the Court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the Court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a Court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

Having regard to the facts of the case the Court is of the firm opinion that the bail granted to the appellant for alleged commission of bailable offence could not have been cancelled by the High Court on the ground that the complainant was not heard and, thus, principles of natural justice were violated. A principle of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it, will lead to an empty formality. **(Rasiklal v. Kishore Khanchand Wadhwani; 2009 Cri.L.J. 1887)**

◈ **Article 20(2) – Double Jeopardy – Determinations.**

In the instant case, the offence for which the appellant, accused was tried earlier in the foreign country, USA was in respect of a charge of conspiracy. He was in respect of a charge of conspiracy to possess a controlled substance with the intention of distributing the same, whereas the appellant now is being tried in India for offences relating to the importation of the contraband article from foreign country, Nepal into India and exporting the same for sale in the USA. While the first part of the charges would attract the provisions of Section 846 read with Section 841 of Title 21 of United States Code (USC) controlled Substances Act, the latter part, being offences under the NDPS Act, 1985, would be triable and punishable in India, having particular regard to the provisions of Sections 3 and 4 of the Penal

Code read with S. 3(38) of the General Clauses Act, which has been made applicable in similar cases by virtue of Article 367 of the Constitution. Therefore, the offences for which the appellant was tried and convicted in the USA and for which he is now being tried in India, are distinct and separate and do not, therefore, attract either the provisions of S. 300(1) of Cr.P.C. or Art. 20(2) of Constitution.

The plea that apart from the offence for which the appellant had been tried and convicted in the USA, he could also have been tried in the USA for commission of offences which were also triable under the NDPS Act, 1985, as the contents thereof are different from the provisions of Title 21 USG Controlled Substances Act which deal with possession and distribution of controlled substances within the USA, would not be tenable. The provisions of Ss. 3 and 4 of the Penal Code would be apt in a situation such as the present one. In view of those provisions a person liable by any Indian law to be tried for any offence committed beyond India is to be dealt with under the provisions of the Code, would also apply to any offence committed by any citizen of India in any place within and beyond India. **(Jitendra Panchal v. Intelligence Officer, NCB (From: Bom); 2009 AIR SCW 1559)**

◈ **Article 20(3) – Testimonial compulsion – Narco Analysis and Brain Mapping test does not violate principle of testimonial compulsion embodied under Article 20(3).**

Since Article 20(3) specifically deals with the question of testimonial compulsion, there was no occasion to bring the matter within the purview of Article 21 of the Constitution of India, because when there is a specific clause about a particular matter, another omnibus provision which may encompass the issue need not be considered.

It is now settled law that, hair and nails of the accused can be taken for utilization during investigation even if the accused does not agree to the same. If that invasion of the person of the accused is permissible, the, principle should be applicable to Narco Analysis and Brain Mapping test also.

The discovery of the truth is the desideratum of investigation, and, all efforts have to be made to find out the real culprit, because, one guilty person, who escapes, is the hope of one million. Courts have, therefore, to adopt a helpful attitude in all efforts, made by the prosecution for discovery of the truth. If the Narco Analysis and Brain Mapping test can be helpful in finding out the facts relating to the offence, it should be used and utilized and the courts should not obstruct the conduct of the exercise. **(Abhay Singh v. State of U.P.; 2009(3) ALJ 387)**

◆ **Article 21 – Petition for compensation for custodial death – Grounds for non allowing petition.**

In cases of police torture or custodial death, there is any direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues – and the present case is an apt illustration as to how one after the other police witnesses feigned ignorance about the whole matter.

The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times by the Courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crimes in a civilised society, governed by

the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under-trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops the foundations of the criminal justice delivery system would be shaken and the civilisation itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The Courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve; otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which, if it happens, will be a sad day, for any one to reckon with.

In view of the fact that sanction for prosecution has been granted, charge-sheet had been filed and cognizance had been taken, the court feels that no further direction at present is necessary. It is needless to say that if at any point of time, evidence surfaces before the concerned Court to show that some other offences appear to have been committed, necessary orders can be passed. The Court is not for the present accepting the prayer for compensation because that would depend upon the issue as to whether there are custodial death. The writ petition is accordingly disposed of. The Court makes it clear that the Court have not expressed any opinion on the truth or otherwise of the allegations made and which will be considered by the concerned Court. **(Dalbir Singh v. State of U.P. & Ors.; 2009 Cri.L.J. 1543)**

◆ **Article 21 – Right to speedy trial – Violation of – Constitutional guarantee and cannot be violated.**

Where the Court comes to the conclusion that the right to speedy trial of an accused under Art. 21 of Constitution has been infringed, the charges or the conviction, as the case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings

may not be in the interest of justice. In such a situation, it is open to the Court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial.

Where investigations were conducted by an officer, who had no jurisdiction to do so and the appellant could not be accused of delaying the trial merely because he successfully exercised his right to challenge an illegal investigation and even the direction issued by the High Court had no effect on the prosecution and they slept over the matter for almost seventeen years, for which there was no explanation whatsoever, it was held that, the stated delay clearly violated the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution and that under these circumstances, further continuance of criminal proceedings, pending against the appellant in the Court of Special Judge was unwarranted and despite the fact that allegations against him were quite serious, they deserve to be quashed. **(Vakil Prasad Singh v. State of Bihar; 2009 Cri.L.J. 1731)**

◈ **Article 31 and 300A – Right of Property – Not only a Constitution or statutory right but also a Human Right.**

According to Revamma's case, the right of property is now considered to be not only a constitutional or statutory right but also a human right. In the said case, the Court observed that "Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment, etc. but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the judgments of Beaulane Properties Ltd. V. Palmer; 2005(3) WLR 554, and Japye (Oxford) Ltd. V. United Kingdom; 2005(49) ERG 90. The Court herein tried to read the human rights position in the context of adverse possession. But what is commendable is that the dimensions of human rights have widened so much that now property dispute issues are also being raised within

the contours of human rights. **(Hemaji Waghaji Jat v. Bhikhabhai Khengarbhi; 2009(106) RD 784)**

◈ **Art. 134 – Appeal against acquittal – Power of Supreme Court to interfere – Grounds for.**

If the view taken by the High Court is plausible or possible, then it would not be proper for Supreme Court to interfere with an order of acquittal and Supreme Court would be justified in interfering with the judgment of acquittal of the High Court only when there are very substantial and compelling reasons to discard the High Court decision. Supreme Court stated some of the circumstances in which perhaps Supreme Court would be justified in interfering with the judgment of the High Court, but these are illustrative not exhaustive. (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position; (ii) The High Court's conclusions are contrary to evidence and documents on record, (iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice; (iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; (iv) Supreme Court must always give proper weight and consideration to the findings of the High Court; (vi) Supreme Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal. Held, on facts of case, that no interference was warranted in judgment of acquittal by High Court. **(State of U.P. v. Banne; 2009 AIR SCW 1989 All)**

◈ **Article 141 – Binding effect of precedent – Depends on how factual situation fits in with the fact situation of decision relied.**

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret

words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. **(State of A.P. v. M. Radha Krishna Murthy; 2009 Cri.L.J. 1896)**

◆ **Articles 226 – Powers under Article 226 are discretionary in nature.**

It cannot be doubted that the powers of the Court under Article 226 of the Constitution are discretionary in nature but in the present case, the petitioner had filed objections under section 47 of the Code of Civil Procedure, which have been rejected as being barred by limitation. The court had earlier given liberty to the tenant to raise all possible objection in the Execution Case No. 70 of 1981 initiated by the landlord and, therefore, the learned Counsel for the respondent is not justified in contending that the Court should restrain from exercising its discretionary jurisdiction even though these objections have been rejected on a ground which is not sustainable in law. **(Pradeep Kumar Awasthi v. Uma Kant Tripathi; 2009(106) RD 805)**

◆ **Article 226 – Dismissal of writ petition without giving time/opportunity to file rejoinder affidavit would not be justified.**

The writ petitioners have a right to file rejoinder-affidavit and they were entitled for some reasonable time to file rejoinder-affidavit. The purpose of granting time to file rejoinder-affidavit is to meet the allegations made in the counter-affidavit. Accordingly in dismissing the writ petition only on the basis of the counter-affidavit the learned single Judge committed an error as it is ex facie against the principles of fair play. It may have been different where repeatedly time was being granted to file rejoinder-affidavit and the petitioner was not

filing rejoinder-affidavit. In that case the learned single Judge would have been justified in deciding the writ petition but where no time was ever granted for filing rejoinder-affidavit, the learned single Judge was not justified in deciding the writ petition without giving an opportunity for filing rejoinder-affidavit. Therefore, the judgment and order dated 1.8.2008; passed by learned single Judge is not sustainable. **(Subhash and Others v. State of U.P. and Others; 2009(2) AWC 1307)**

◆ **Article 226 – Res-judicata – Earlier writ petition was pending – No final finding recorded on any issue involved therein – Plea of res-judicata, not tenable.**

Though agreement between petitioner and corporation regarding retail outlet did not contain any such provision of stoppage of supply and agreement permits only termination of agreement on violation of any of its condition, and adulteration was one of grounds on which agreement can be terminated and since there was no challenge by petitioners to 'Marketing Discipline Guidelines' and on contrary petitioners themselves relied upon these very guidelines. 'Marker check' having indicated possible adulteration. Corporation would be within its right to stop sales and supplies of petroleum products to petitioner's retail outlet. Even otherwise, considering from public interest point of view, it would be unreasonable to adopt an interpretation that despite prima facie confirmation of adulteration in petroleum products at retail outlet by scientific 'Marker check' the retail outlet would still be allowed to continue with mischief by sale of adulterated stock. **(M/s. Vindhya Service Station & Anr. V. Union of India & ors.; 2009(2) (NOC) 313 (All)**

◆ **Article 226 – Writ of mandamus – In absence of any rule meant for regularisation, no mandamus can be issued directing authorities to regularise services of daily wager.**

In the case of Mahendra I, Jain and others v. Indore Development Authority and others reported in (2005) 1 Supreme Court Cases 639: (AIR 2005 SC 1252) the Apex Court has observed:-

"The question, therefore, which arises for consideration is as to whether they could lay a void claim for regularisationof their services. The answer thereof must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation."

There is nothing on the record to indicate that the petitioner is eligible for consideration for the purposes of regularisation, therefore, in view of the above decisions of the Apex Court order for regularisation of the petitioner's services cannot be passed by the Court in absence of any statutory provisions. **(Sarvan Kumar v. State of U.P. & Ors.; 2009(2) ALJ 552)**

## Consumer Protection Act, 1986

◆ **S. 2(e) – Consumer Dispute – What constitutes.**

Where there is a public auction without assuring any specific or particular amenities, and the prospective purchaser/lessee participates in the auction after having an opportunity of examining the site, the bid in the auction is made keeping in view the existing situation, position and condition of the site. If all amenities are available, he would offer a higher amount. If there are no amenities, or if the site suffers from any dis-advantages, he would offer a lesser amount, or may not participate in the auction. Once with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are

not provided. With reference to a public auction of existing sites (as contrasted from sites to be 'formed'), the purchaser/lessee is not a consumer, the owner is not a 'trader' or 'service provider' and the grievance does not relate to any matter in regard to which a complaint can be filed. Therefore, any grievance by the purchaser/lessee will not give rise to a complaint or consumer dispute and the fora under the Act will not have jurisdiction to entertain or decide any complaint by the auction purchaser/lessee against the owner holding the auction of sites. **(U.T. Chandigarh Administration & Anr. V. Amarjeet Singh & Ors.; AIR 2009 SC 1607)**

◈ **S. 2(1)(g) – If supply of electricity to consumer not provided in time as agreed upon – There is deficiency in service U/s. 2(1)(g) of Consumer Protection Act.**

'Deficiency' under S. 2(1)(g) means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. As indicated in the definition of 'service', the provision of facilities in connection with supply of electrical energy is a service. Supply of electricity by the Board or for that matter KPTC to a consumer would be covered under section 2(1)(o) being 'service' and if the supply of electrical energy to a consumer is not provided in time as is agreed upon, then under section (2)(1)(g), there may be a case for deficiency in service. **(Karnataka Power Transmission Corp. Ltd. And another v. Ashok Iron Works Pvt. Ltd.; 2009(2) AWC 1154 (SC)**

◈ **S. 2(1)(g) – Medical Negligence – Proof of – Choice of one reasonable course of treatment to other – Not negligence.**

◈ **S. 2(1)(g) – Medical Negligence – Doctor prescribing new course of treatment as no known method was available – Doctor cannot be hold negligent.**

There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has

never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be held liable? In the opinion of the Court he should not. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian twin sisters who were joined at the head since birth or the first heart transplant by Dr. Barnard in South Africa. However, in such cases it is advisable for the doctor to explain the situation to the patient and take his written consent. **(Martin F.D'Souza v. Mohd. Ishfaq; 2009(3) ALJ 165)**

◆ **S. 2(1)(g), 13, 18 and 22, Cr.P.C. – Ss. 204 & 151 – Complaint of Medical Negligence – Procedure for Trial.**

Whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District. State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. The Courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists. The police officials should not arrest or harass doctors unless the facts clearly come within the parameters laid down in 2005 AIR SCW 3685, otherwise the policemen will themselves have to face legal action. **(Martin F.D.'Souza v. Mohd. Ishfaq; 2009 AIR SCW 1807 (E))**

◆ **S. 2(1)(g), 2(1)(r), 23 – Deficiency in education service – Admitting students for BDS Course by giving misleading advertisement amounts to deficiency in service.**

Deficiency in service-Educational services-Non-affiliated and unrecognised Dental College-Admitting students for BDS Course by

giving misleading advertisement-Amounts to deficiency in service and also unfair trade practice-College liable to refund admission expenses and pay compensation to students as directed by Commission-Considering fact that College had played with and virtually ruined career of students-Supreme Court directed payment of Rs. 1 Lakh to each student as additional compensation. **(Budhist Mission Dental College & Hospital v. Bhupesh Khurana; 2009 AIR SCW 2139)**

◆ **Ss. 2(1)(g), 21 and 23 – Deficiency in service – Medical Negligence – Doctor cannot be hell guilty of medical negligence, if patient continues taking medicine prescribed even after being stopped.**

A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide Achutrao Haribhau Khodwa and others v. State of Maharashtra and others; AIR 1996 SC 2377, or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade. **(Martin F.D'Souza v. Mohd. Ishfaq; 2009(2) AWC 1220 (SC))**

◆ **S. 2(1) (m) – Person – Includes company – Definition is inclusive not exhaustive.**

Section 2(1)(m) which enumerates four categories namely, (i) a firm whether registered or not; (ii) a Hindu undivided family; (iii) a co-operative society; and (iv) every other association of persons whether registered under the Societies Registration Act, (1860) or not, while defining 'person' cannot be held to be restrictive and confined to these four categories as it is not said in terms that 'person' shall mean one or other of the things which are enumerated, but that it shall 'include' them. S. 2(1)(m), is an interpretation clause, and must have

been intended by the Legislature to be taken into account in construing the expression 'person' as it occurs in S. 2(1)(d) While defining 'person' in S. 2(1)(m), the Legislature never intended to exclude a juristic person like company. **(Karnataka Power Transmission Corpn. Ltd. V. Ashok Iron Works Pvt. Ltd. (From Karnataka); 2009 AIR SCW 1502 (A)**

## Contempt of Court Act

◆ **Criminal Contempt – Libellous imputation against Judge – When amount to contempt.**

Though certain imputations against the Judge may be only libellous against that particular individual, it may at times amount to contempt also depending upon the gravity of the allegations. In Brahma Prakash Sharma case; AIR 1971 SC 221, the Court held that defamatory attack on a Judge may be a libel so far as the Judge is concerned and it would be open to him to proceed against the libeller in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt.

The same view has been taken in Perspective Publications (P) ltd. V. State of Maharashtra; AIR 1971 SC 221 and C.K. Daphtary v. O.P. Gupta; AIR 1971 SC 1132. Therefore, apart from the fact that a particular statement is libellous, it can constitute criminal contempt if the imputation is such that the same is capable of lowering the authority of the Court. The gravity of the aforesaid statement is that the same would scandalise the court. **(Haridas Das v. Usha Rani Banik (Smt.) and Others Apu Banik; (2009) 1 SCC (Cri) 750)**

◆ **S. 15 – Action for contempt – Leave of Advocate General – High Court cannot compel Advocate General in writ jurisdiction to grant such leave.**

From the plain reading of Section 15 of the Act it appears that in the case of criminal contempt the Supreme Court or the High Court may take action on its own motion or on a motion made by the

Advocate General or any other person, with the consent in writing of the Advocate General, amongst other conditions prevailing therein. There is no scope for the Advocate General to decide the application, as prayed for. He is only empowered to give consent in writing for making a criminal contempt which is in the nature of leave. The court could not compel the Advocate General in the writ jurisdiction to grant such leave, which is his independent view. Even thereafter the Court can take cognizance suo motu if no leave is there, provided such case is cognizable in nature. **(Abdul Mahmood v. Advocate General, Uttar Pradesh, Allahabad & Ors.; 2009(2) ALJ 600)**

## Contract Act

◈ **S. 10 – Specific Relief Act – Ss. 20, 15 – Validity of agreement.**

All agreements of sale are bilateral contracts as promises are made by both – the vendor agreeing to sell and the purchaser agreeing to purchase. It cannot be said that unless agreement is signed both by the vendor and purchaser, it is not a valid contract. Even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. Moreover, in India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale. **(Aloka Bose v. Parmatma Devi (From Patna); 2009 AIR SCW 1030 (B)**

## Criminal Procedure Code

◈ **S. 125 – Procedure for grant of maintenance to aggrieved person in case of domestic violence – Court is competent to award maintenance in accordance with provision of S. 20 of Protection of Women from Domestic Violence Act.**

The golden rule of interpretation of statutes is that the words of a statute must prima facie be given their ordinary meaning. The words of provisions under S. 20 of Protection of Women from Domestic

Voilence Act are clear, plain and unambiguous. The provisions are independent and are in addition to any other remedy available to the aggrieved under any legal proceeding before the civil court, criminal court or family court. The provisions are not dependent upon S. 125 of Criminal P.C. or any other provisions of the Family Courts Act, 1984 or any other Act relating to award of maintenance. In case of award of maintenance to the aggrieved person under the provisions of the Act, the Court is competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of S. 20 of Protection of Women from Domestic Violence Act. Aggrieved person is not required to establish his case in terms of S. 125 of Cr. P.C.

Relief of maintenance to wife and children is available under their entitlement and liability of the person against whom relief is claimed under S. 125 of Criminal P.C., when such person is unable to maintain herself and the person against whom relief is claimed is under obligation to maintain and having sufficient means to maintain, but fails to maintain the applicants. But in case of domestic violence, the court is empowered to grant such relief if the person is aggrieved as a result of the domestic violence and may grant monetary relief in terms of maintenance which would be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved party is accustomed and also empowered to grant lump sum or monthly maintenance or to direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries. However, the Magistrate is not empowered to grant relief in such form in accordance with S. 125 of Criminal P.C. At the time of interpretation of statutes, the Court is required to see whether the provisions of the statute are plain, unambiguous and capable of giving their ordinary meaning. **(Rajesh Kurre v. Safurabai & Ors.; 2009 Cri.L.J. (NOC) (Chhatisgarh)**

◈ **S. 125(3) – Failure to comply with order of maintenance – Magistrate is empowered to sentence defaulting person for term upto one month for each month of default.**

Sub-section (3) of S. 125 provides for summary procedure for recovery of maintenance allowance fixed by Magistrate, if any person fails without sufficient cause to comply with the order. It is provided that in such a case, for every breach of order. Magistrate may issue warrant for levying amount due in manner provided for levying fines and may sentence such person for whole or any part of each month's allowance for maintenance including interim maintenance remaining unpaid to imprisonment for a term which may extend to one month or until payment if sooner made. Sub-section (3) of S. 125 thus empowers the Magistrate to award sentence upto one month for whole or part of each month's allowance remaining unpaid. Limitation on power of Magistrate to impose imprisonment for a term not exceeding one month, therefore, has to be viewed in the background of purpose for which such imprisonment is provided. S. 125 (1) refers to monthly allowance to be fixed by the Magistrate for maintenance of wife, child, father or mother on such monthly rate as the Magistrate thinks fit. Upon failure of a person to comply with such an order, it is open for Magistrate for every breach of the order to issue warrant for levying the amount due and further to sentence such a person for whole or any part of each month's allowance remaining unpaid to imprisonment for a term which may extend to one month. The legislature never intended that regardless of extent of default on part of husband, the Magistrate can impose sentence only upto one month. True interpretation of S. 125(3) would be that for each month of default in payment of maintenance, it is open for the Magistrate to sentence the defaulting person to imprisonment for a period of one month or until payment if sooner made.

If for each month of default of payment of maintenance, the wife were to file separate application before the Magistrate, surely, it would be open for the Magistrate to pass separate orders of sentences each not exceeding one month. Thus it would be open for the wife to file one consolidated application for every month of arrears and in such a situation. It would be open for the Magistrate to pass one consolidated order of sentence upto a maximum one month for each month of default in payment of maintenance.

Thus, the Magistrate in exercise of powers U/s. 125 is empowered to sentence a defaulting person for a term upto one month (or until payment if sooner made) for each month of default subject of course to the limitation provided in proviso to sub-section (3) of S. 125. In other words, it is open for Magistrate to award sentence upto a maximum of one month for each month of default committed by the person ordered to pay maintenance and maximum limit of sentence of one month referred to in sub section (3) of S. 125 will be applicable for each month of default. **(Suo Motu v. State of Gujarat; 2009 Cri.L.J. 920)**

◆ **S. – 154 – FIR – Delay in lodging FIR, if explained, may be condoned and is not relevant.**

In the present appeals the informant and the State of Punjab had questioned the acquittal directed by the High Court. The High Court primarily directed acquittal on the ground that there was delay in lodging the FIR and there is doubt about the weapon used. It was also observed that there was delay in delivery of the special report of illaqa Magistrate. The direction of injuries was referred to by the High Court. In that view the prosecution version was held to be not acceptable.

The appellant submitted that the High Court has come to contradictory conclusions. It has even overlooked the concession made by learned counsel appearing before the High Court that either there was delay in lodging the FIR or in sending the special report to the Illaqa Magistrate. The High Court also completely ignored the evidence of Dr. B.R. Sharma. The High Court acquitted the respondents on "the possibility therefore that the defence story may just be correct cannot be ignored.

The first aspect which has been highlighted by the High Court was purported delay in lodging the FIR. The trial Court noted that there was in fact no delay and even if there was some delay the same was satisfactorily explained. The occurrence took place at 6.30 p.m. on 11.2.1993. FIR was lodged at about 12.00 mid-night. The dead body was dispatched to the mortuary and reached there at 1.40 p.m.

Police papers reached there at 4.40 p.m. and the special report was received at 6.11 p.m. on 12.2.1993. The explanation given to explain the so called delay was that two sons of Mal Singh were seriously injured and the first reaction was to provide the medical facilities to them and accordingly he took them to Amritsar, got them admitted to the hospital and immediately thereafter the FIR was registered. Therefore, there is absolutely no delay in lodging the FIR. **(State of Punjab v. Atma Singh and Ors.; 2009(4) Supreme 298)**

◆ **S. 154 – FIR – Evidentiary value of – It is a vital and valuable piece of evidence.**

There is no doubt that FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led by the prosecution at the trial. FIR is the earliest information regarding the circumstances under which the crime was committed, including the names of the actual culprits and the part played by them, the weapons, if any, used as also the names of the eyewitnesses, if any. Delay in lodging FIR may result in embellishment, which is a creature of an afterthought. **(Mahmood and another v. State of U.P.; (2009) 1 SCC (Cri) 763)**

◆ **S. 154 – Initial information of crime – Nature of**

Telegraphic information flashed by SPO who reached at scene of occurrence immediately after occurrence and received by Investigating Officer, stating only that a dead body is lying at Railway Station – It cannot be said that absence of material information in any manner destroy case of prosecution as it was telegraphic information – More so, as no telephone was installed at concerned railway station and telephone installed at Control Room was out of order and he had to go to police post to send telegraphic message, which explained delay in sending information and absence of detailed information. **(Mukhtiar Singh v. State of Punjab (From P & H); 2009 AIR SCW 1475)**

◆ **S. 154 – Contents of FIR – Non-reproduction the indecent, ugly or unpleasant words spoken by the accused – Effect of**

The Courts are known for its discipline, decorum and decency. The reproduction or the repeated reproduction of such abuses in Court is neither proper nor justified especially when the same meaning may be conveyed by using the word "abuse".

Hence the complainant has simply observed the rule of decency by not reproducing the indecent, ugly or unpleasant words spoken by the accused, which have insulted him. He has rightly used the word "abuse" to convey the meaning of those words which were uttered by the petitioner against the complainant.

The court of the view that the reproduction of the indecent and unpleasant words constituting the abuse was not necessary in the FIR. **(Vijay Bajpai v. State of U.P. & Anr.; 2009 Cri.L.J. 1689)**

◆ **S. 156(3) – Scope – Magistrate is fully empowered under S. 156(3) to pass order for further investigation on final report.**

Scope – Magistrate is fully empowered under section 156(3) to pass order for further investigation on final report – View that order for further investigation can be made only if charge sheet has been submitted by police held erroneous. **(Gopi Singh v. State of U.P. & Anr.; 2009 Cri.L.J. (NOC) 476 (All)**

◆ **S. 156(3) – Order directing investigation of case after registration of FIR – Cannot be challenged by perspective accused by filing criminal revision or in proceedings U/s. 482.**

At the stage of S. 156(3), Cr.P.C. any order made by Magistrate does not adversely affect right of any person, since he has got ample remedy to seek relief at appropriate stage by raising his objections. It is incomprehensible that accused cannot challenge the registration of FIR by police directly, but can challenge the order made by Magistrate for registration of same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and that he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a

right to install the investigation, but for the limited ground available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of FIR.

Thus, prospective accused has no right to stop the registration of the FIR and its investigation by the police either by filing revision or moving application under section 482, Cr.P.C. Although after registration of case in pursuance of the order passed under S. 156(3), Cr.P.C., the accused can move High Court in its writ jurisdiction under Article 226 of Constitution for quashing of the FIR, but prior to registration of FIR, the prospective accused has no right to challenge that order. **(Abdul Aziz & Ors. V. State of U.P. & Ors.; 2009(2) ALJ 512)**

◆ **S. 161 – Statement recorded U/s. 161 – Non-supply of – Non-supply of such statements recorded U/s. 161 and denial of opportunity for cross-examination would result infraction of fair trial.**

Court in Nandikamma Lakshmamma after referring to the judgment of the Privy Council in Kotayya v. Emperor held that failure of prosecution to supply the statements recorded by PW 17 by the investigating officer under S. 161 Cr.P.C., as well as the accused is a serious lapse on the part of the prosecution, which had adversely affected the rights of the appellants under S. 162 Cr.P.C., and Section 145 of the Evidence Act, apart from infraction of Sec. 173 and 207 Cr.P.C.

Denial of an opportunity for cross-examination on the earliest statements would result a fatal flaw and also infraction of fair trial under Art. 21 of the Constitution. When a suggestion was made to PW 14 that he admitted that he verified the statements of the witnesses recorded by Inspector of Police which were not filed along with the charge-sheet, he has not claimed any privilege in respect of statements recorded under S. 161 Cr.P.C., by PW 13 by giving reasons why such statements were not made available to the accused. Therefore, Court has no hesitation in coming to the conclusion that the prosecution wantonly suppressed the earliest statements recorded, which if

produced will not substantiate the accusation made against the accused. **(Gangula Venkateswara Reddy & ors. v. the State of Andhra Pradesh; 2009 Cri.L.J. 1958)**

**S. 177 – Territorial jurisdiction – Determination of**

The territorial jurisdiction of a Court with regard to criminal offence would be decided on the basis of place of occurrence of the incident and not on the basis of where the complaint was filed and the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another Court. The venue of enquiry or trial is primarily to be determined by the averments contained in the complaint or charge sheet. S. 177 of Cr.P.C. provides that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. **(Rajendra Ramchandra Kavalekar v. State of Maharashtra (From Bombay); 2009 AIR SCW 1379 (A)**

**S. 197 – Sanction to prosecute – Act done in discharge of official duty does not include cases of abuse of power.**

All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. The underlying object of 197 is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of S. 197 and have to be considered dehors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

Where the Deputy Superintendent of Police was alleged to have committed acts of extortion and criminal intimidation while conducting investigation of case the acts cannot be said to be part of the duties of the investigating officer while investigating an offence entitling him to get protection of S. 197. **(Choudhury Parveen Sultana v. State of West Bengal & Anr.; 2009 Cri.L.J. 1318)**

◈ **S. 228 – Framing of charge – At the stage of framing of charge, no meticulous scrutiny is required, strong suspicion of commission of offence alone is sufficient.**

At the stage of framing of charge no meticulous scrutiny is required, only a strong suspicion of the commission of offence is sufficient for framing of charge. In the case of Onkar; 2008 Cri.L.J. 1391, it has been held by the Apex Court in para 11 thus:

"It is true that at the stage of framing of charge the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the Court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence. **(Haresh & Ors. V. State of Chhattisgarh; 2009 Cri.L.J. 1383)**

◈ **S. 240 – Framing of charge – Recording of reason – Necessity of.**

When the Magistrate, on the basis of the materials available on the Case Diary, decides to frame charge/s against the accused, he is not required to record the reason. But in reverse case i.e., when he opts to discharge the accused, he has to accord his reasons. **(Ganga Ram v. State of U.P. & Ors.; 2009 Cri.L.J. 1362)**

**◈ S. 313 – Personal examination of accused under – Object and necessity of – What would be – Effect of failure to examine the accused.**

The section itself declares the object in explicit language that it is 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence again him'. In Jai Dev v. State of Punjab; AIR 1963 SC 612, Gajendragadkar, J (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

> "…….The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'

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

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

him. **(Inspector of Customs, Akhnoor, Jammu & Kashmir v. Yashpal and Another; (2009) 4 SCC 769)**

◆ **S. 319 – Summoning of additional accused – Court can exercise jurisdiction under S. 319 Cr.P.C. before witness is allowed to be cross-examined.**

Once the deposition is recorded, no doubt there being no cross examination, it would be a prima facie material which would enable the Sessions Court to decide whether the powers under section 319 Cr.P.C. should be exercised or not. In view of this, the court can exercise jurisdiction under Section 319 Cr.P.C. before the witness is allowed to be cross-examined. **(Smt. Radha Devi v. State of U.P. & Anr.; 2009 Cri.L.J. (NOC) 430 (All)**

◆ **S. 319 – Order for summoning of additional accused – When not liable to be interfered.**

The ingredients of Section 319 are unambiguous and indicate that where in the course of inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence, for which such person could be tried together with the accused, the Court may proceed against such person for the offence he has committed.

All that is required by the Court for invoking its powers under Section 319 Cr.P.C. is to be satisfied that from the evidence adduced before it, a person against whom no charge had been framed, but whose complicity appears to be clear, should be tried together with the accused. It is also clear that the discretion is left to the Court to take a decision on the matter.

Considered the submissions made on behalf of the respective parties and the provisions of Section 319 Cr.P.C. and have arrived at the conclusion that no interference is called for with the order passed by the High Court. **(Ram Pal Singh & Ors. V. State of U.P. & Anr.; 200(3) ALJ 154)**

◆ **S. 321 – Nature and Scope of**

While Section 321 Cr.P.C. itself does not apply to POTA, the principle of judicial review embodied therein does. In other words, Section 321 Cr.P.C. is a codified version of judicial review. At the trial court level, Section 321 Cr.P.C. ensures that the judiciary makes the final decision by approving the Public Prosecutor's decision to withdraw a case. Even if Section 321 Cr.P.C. is made inapplicable by a special law like POTA (Repeal), 2004 or POTA, 2002, judicial review still applies. Section 321 Cr.P.C. is a general provision that can be subjected to special laws. **(Mahmadhusen Abdulrahim Kalota Shaikh (2) v. Union of India and Others; (2009) 1 SCC (Cri) 620)**

◆ **S. 321 – Withdrawal from prosecution – Validity – Rejection of permission.**

A Constitutional Bench in Sheonandan Paswan v. State of Bihar and Others, (1987) 1 SCC 288: (1987 Cri.L.J. 793), has laid down the parameters within which the powers under Section 321 can be invoked. The constitutional Bench decision of the Court in Sheonandan Paswan v. State of Bihar (1987) 1 SCC 288: (AIR 1987 SC 877: 1987 Cri.L.J. 793). It is held therein that when an application under Section 321 is made, it is not necessary for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. What the Court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The Court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the public prosecutor makes an application for withdrawal after taking into consideration all the material before him, the Court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher Court is satisfied that such consent was given on an over all consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the Court in a

supervisory and not an adjudicatory manner. What the Court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable under Section 321 is fettered only by consent from the Court on a consideration of the material before it. What is necessary to satisfy the Section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

The judgments clearly impose a statutory and solemn duty both on the Public Prosecutor and the court to follow the mandatory requirements as laid down. **(Balak Ram and Etc. v. State of H.P.; 2009 Cri.L.J. 2011)**

◈ **S. 354 – Penology – Punishment to be awarded for crime must not be irrelevant and it should "respond to society's cry for justice against criminal".**

The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". **(State of M.P. v. Kashiram & Ors.; 2009 Cri.L.J. 1530)**

◈ **S. 374 – Whether major discrepancy in evidence of witnesses, can become ground of conviction – Held, "No".**

In the present case, three persons lost their lives. The occurrence took place on 22.3.1979. The deceased and PW 1 were traveling in a bullock cart while PW 3 was following them. The accused persons were holding several weapons and fired gunshots at the deceased persons as a result of which they lost their lives.

The trial court found the accused persons guilty and convicted them.

In appeal, the High Court by the impugned Judgment has set aside the conviction. The reasoning indicated by the High Court for directing acquittal is that the evidence of PW 1 and PW3 do not inspire confidence. On a reading of their evidence it is clear that they could not have witnessed the occurrence as claimed and they also changed the place of occurrence and the manner in which the alleged occurrence took place. It was noticed that the witnesses were shifting their version almost at every stage. **(State of U.P. v. Mangal Singh & Ors.; 2009(4) Supreme 348)**

◆ **S. 378 – Appeal against acquittal – Grounds – Prevention of miscarriage of justice should be paramount consideration.**

There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. 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 from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P.; 2003 (3) SCC 21). The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are substantial reasons for doing so. If the impugned judgment is clearly unreasonable and irrelevant and convincing materials have been unjustifiably eliminated in the process, it is a

substantial reason for interference. **(M/s. Siyaram & ors. v. State of M.P.; 2009 Cri.L.J. 2071)**

◆ **S. 389 – Suspension of sentence pending appeal – Ground – Mere fact of grant of bail during trial and absence of its misuse would not be sufficient to suspend sentence and grant bail.**

The Appellate Court is duty bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail.

The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really is necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. **(Anil Ari v. State of West Bengal; 2009 Cri.L.J. 1328)**

◆ **S. 389 – Suspension of sentence pending appeal – Murder case – Benefit of suspension to be granted only in exceptional cases.**

In Vijay Kumar v. Narendra and others; 2002 (9) SCC 364 and Ramji Prasad v. Rattan Kumar Jaiswal and another; 2002 (9) SCC 366, it was held by the Court that in cases involving conviction under Session 302, IPC it is only in exceptional cases that the benefit of suspension of sentence can be granted. In Vijay Kumar's case it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder. **(Anil Ari v. State of West Bengal; 2009 Cri.L.J. 1328)**

◆ **S. 397(3), 482 – Revision – Powers of High Court U/s. 397(3) – Does not debar High Court from entertaining application U/s. 482.**

The object of the introduction of sub-section (3) in S. 397 was to prevent a second revision so as to avoid frivolous litigation, but, at the same time, the door to the High Court to a litigant who had lost before the Sessions Judge was not completely closed and in special cases the bar under S. 397(3) could be lifted. In other words, the power of the High Court to entertain a petition under S. 482, was not subject to the prohibition under Sub-sec. (3) of S. 397 and was capable of being invoked in appropriate cases. Thus, there is no complete bar under S. 397(3) debarring the High Court from entertaining an application under S. 482. **(Shakuntala Devi v. Chamru Mahto; 2009 AIR SCW 1896 (A))**

◆ **S. 436 – Bail – In bailable offence, there is no question of discretion for granting bail.**

Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. For the purposes of bail, offences are classified into two categories, that is, (i) bailable, (ii) non-bailable. Section 436 provides for granting bail in bailable cases and Section 437 in non bailable cases. A person accused of a bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting bail. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. Persons contemplated by this Section cannot be taken in custody unless they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties. **(Vaman Narain Ghiya v. State of Rajasthan; 2009 Cri.L.J. 1311)**

◆ **S. 437 – Application for bail – For granting bail existence of prima facie case is only to be considered – Detailed discussion of evidence and elaborate documentation of merits is to be avoided.**

While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been prejudged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required. **(Vaman Narain Ghiya v. State of Rajasthan; 2009 Cri.L.J. 1311)**

◆ **S. 437 – Grant of bail – Complainant can challenge the order on merits also – Ground of misuse is not the only way out to challenge same.**

It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also. In the opinion of the Court, therefore, the complainant could question the merits of the order granting bail. However, the court finds from the order that no reasons were given by the learned Judge while granting the bail and it seems to have been granted almost mechanically without considering the pros and cons of the matter. **(Brij Nandan Jaiswal v. Munna @ Munna Jaiswal & Anr.; 2009 Cri.L.J. 833)**

◆ **S. 437 – Grant of Bail – While granting bail, particularly in serious cases like murder, reasons must be given.**

While granting bail, particularly in serious cases like murder some reasons justifying the grant are necessary.

Therefore, without expressing anything on the merits of the bail application, the court would choose to set aside the order granting bail and direct the High Court to decide the application again. **(Brij Nandan Jaiswal v. Munna @ Munna Jaiswal & Anr.; 2009 Cri.L.J. 833)**

**S. 437 – Grant of Bail – Consideration of**

It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are, (a) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (b) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant; (c) Prima facie satisfaction of the Court in support of the charge.

Bail granted to accused charged inter alia under Unlawful Activities (Prevention) Act without keeping in view the relevant parameters. Order liable to be set aside. **(State of Maharashtra v. Dhanendra Shriram Bhurle (From: Bombay); 2009 AIR SCW 1245)**

**Ss. 437 and 439 – Bail – Jurisprudence of**

"Bail" remains an undefined term in Cr.P.C. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:

> "……When a man is taken or arrested for felony, suspicion of felony, indicated of felony, or any such case, so that he is restrained of his liberty, and, being by law bailable, offers surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justice of goal delivery at the next sessions, etc. Then upon the bonds of these

sureties, as is aforesaid, he is bailed-that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice. **(Vaman Narain Ghiya v. State of Rajasthan; (2009) 1 SCC (Cri) 745)**

◈ **S. 438 – Anticipatory bail – Expression "reason to believe" – Mere "fear" is not belief; grounds on which belief is based must be capable of being examined.**

The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. **(Vaman Narain Ghiya v. State of Rajasthan; 2009 Cri.L.J. 1311)**

◈ **S. 438 – Anticipatory bail – Direction that applicant shall be released on bail "whenever arrested for whichever offence whatsoever" – Such blanket order should not be passed.**

A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would

serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. **(Vaman Narain Ghiya v. State of Rajasthan; 2009 Cri.L.J. 1311)**

◆ **S. 438 – Anticipatory fail – Conditional grant – Validity of.**

Accused allegedly cheated, complainant by fraudulent transfer of property for sale consideration of Rs. 32.5 Lacs – Imposition of onerous condition of deposit of Rs. 32 Lacs for granting anticipatory bail is Improper – Matter remitted back for reconsideration. **(Ramathal v. Inspector of Police; 2009 AIR SCW 2218)**

◆ **S. 482 – Inherent powers for quashing proceedings – Power to be exercised only if complaint does not disclose any offence or is frivolous, vexatious or oppressive.**

In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complainant does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under S. 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. When information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance.

Distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations has to be kept in view.

Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it

would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short circuit a prosecution and bring about its sudden death. **(State of Punjab v. Inder Mohan Chopra (From P & H); 2009 AIR SCW 1521 (B)**

**S. 482 – Power of High Court – When can be exercised.**

Where the Court comes to the conclusion that the right to speedy trial of an accused under Art. 21 of Constitution has been infringed, the charges or the conviction, as the case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the Court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial.

Where investigations were conducted by an officer, who had no jurisdiction to do so and the appellant could not be accused of delaying the trial merely because he successfully exercised his right to challenge an illegal investigation and even the direction issued by the High Court had no effect on the prosecution and they slept over the matter for almost seventeen years, for which there was no explanation whatsoever, it was held that, the stated delay clearly violated the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution and that under these circumstances, further continuance of criminal proceedings, pending against the appellant in the Court of Special Judge was unwarranted and despite the fact that allegations against him were quite serious, they deserve to be quashed. **(Vakil Prasad Singh v. State of Bihar (From: Patna); 2009 AIR SCW 1418)**

**S. 482 – Inherent powers – Exercise of – When not permissible**

The inherent jurisdiction though wide has to be exercised sparingly, carefully and with caution. It should be exercised to do real and substantial justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent

abuse. When no offence is disclosed by the complaint, the Court may examine the question of fact. When complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant had alleged and whether any offence is made out even if the allegations are accepted in toto. When exercising jurisdiction under S. 482, the High Court could not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. To put it clear, it is the function of the trial Judge to do so. The Court must be careful to see that its decision in exercise of its power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. If the allegations set out in the complaint do not constitute offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under S. 482. However, it is not necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. **(U.P. Pollution Control Board v. Dr. Bhupendra Kumar Modi & Anr.; 2009 Cri.L.J. 1148)**

◆ **S. 482 – Inherent powers – Petitioner cannot under guise of exercise of jurisdiction U/s. 482 ask court to recall or reconsider its earlier order.**

**(Raja alias Dosewala alias Nagaraja v. the Jail Superintendent, Central Prison & Ors.; 2009(2) ALJ (NOC) 380 (Kar.)**

## Criminal Trial

◆ **It is well settled that once the genesis of the occurrence is proved, minor contradictions cannot dispel entire prosecution case.**

There is overwhelming evidence on record to show that the incident had taken place in the village.

Once the genesis of the occurrence is proved, it is now well-settled, contradictions which are minor in nature would not be sufficient to dispel the entire prosecution case. It is true that all the

three prosecution witnesses who have been relied upon by the courts below are interested witnesses. It must, however, be borne in mind that despite existence of their animosity, keeping in view the relationship between the parties, it is unlikely that they would be falsely implicated. **(Gurunath Donkappa Keri and Others v. State of Karnataka; 2009(4) Supreme 302)**

◆ **Merely because other witnesses turned hostile, evidence of the remaining witness cannot be doubted.**

Having regard to the evidences brought on record by the prosecution, the courts are of the opinion that only because other witnesses have turned hostile, the same should not by itself be a ground for coming to a conclusion that the incident had not taken place near the shop of PW-9 **(Gurunath Donkappa Keri and Others v. State of Karnataka; 2009(4) Supreme 302)**

## Electricity (Supply) Act

◆ **S. 49 – Supply of electricity – Not sale.**

Section 49 speaks of supply of electricity to any person not being a licensee upon said terms and conditions as a Board thinks fit and for the purpose of such supply free uniform tariffs. The Court has already held in case of Southern Petrochemical Industries (2007 AIR SCW 3752) that supply does not mean sale. **(Karnataka Power Transmission Corporation Ltd. V. Ashok Iron Works Pvt. Ltd.; 2009(3) ALJ 242)**

## Essential Commodities Act

◆ **S. 3 – Fair price shop licence – Whether it can be cancelled on the ground that wife of licencee was elected as Pradhan of concerned village – Held, "No".**

Fair price shop licence – Can collation on ground that wife of licencee was elected as Pradhan of concerned village – Order passed prior to divorce between licensee and his wife – Not illegal – Subsequent divorce decree would not affect order passed earlier – Questions of fact whether there were any differences between

husband and wife on issue of contesting election of Pradhan, cannot be considered by High Court. **(Rohtas Bhagwan Das v. State of U.P. & Ors.; AIR 2009 (NOC) 1561 All)**

◆ **S. 7 – Probation of Offenders Act, S. 3 – Benefit of probation – Accused convicted for manufacturing of lubricating oil and greases without licence and which were found adulterated – Benefit of probation cannot be extended to accused.**

At the time of inspection, large quantity of stocks and/or products was stored. Though the allegations inter-alia were that no licence was obtained, proper books of accounts were not maintained and adulterated lubricating oil was stored.

Although the accused persons took the plea that there was no sale, but interestingly there was display board showing stocks and prices of the articles. This itself was indicative of the fact that sale transactions were being carried on. The trial Court and the High Court had rightly decided that there has been contravention of Clause 3 of the Control Order. In that view of the matter the conclusions cannot be faulted. Coming to the question whether the Probation Act can be applied, the Court had an occasion to deal with the same.

The rehabilatory purpose of the Probation Act is pervasive enough technically to take within its wings an offence even under the Act. The decision in Ishar Das v. State of Punjab; 1973 (2) SCC 65, is authority for this position. Certainly, "its beneficial provisions should receive wide interpretation and should not be read in a restricted sense". But in the very same decision the Court indicated one serious limitation.

The kind application of the probation principles is negatived by the imperatives of social defence and the improbabilities of moral proselyte-sation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-

making from numbers of consumers furnishes the incentive – not easily humanised by the therapeutic probationary measure. It is not without significance that the 47th report of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments. **(M/s. Precious Oil Corporation & Ors. V. State of Assam; 2009 Cri.L.J. 1330)**

## Evidence Act

◆ **S. 3 – Discrepancies in evidence – Not shaking basic version of prosecution – May be discarded.**

The discrepancies which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies which are due to normal errors of perception or observation should not be given importance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy. **(Babasaheb Apparao Patil v. State of Maharashtra; AIR 2009 SC 1461)**

◆ **S. 3 – Proof – Conduct of eye-witness – Simply because of eye-witnesses did not make any attempt to save deceased cannot be a ground to disbelieve and discard their testimony.**

On a careful and cautious scrutiny of the evidence of PW-1, PW-2 and PW-4, the court finds their evidence concise, precise and satisfactory on the point that they had seen the appellant.

The evidence of these three eyewitnesses is neither embellished nor embroidered.

Simply because the eyewitnesses did not make any attempt to save the life of the deceased from the clutches of the accused persons, their abnormal conduct by itself cannot be taken as a ground to disbelieve and discard their testimony in regard to the genesis of the occurrence and the part played by the appellant and the other convicted persons in the commission of the offence. **(Satvir v. State of Uttar Pradesh; 2009(2) ALJ 561)**

◆ **S. 3 – Related witness – Evidence of – Acceptance of**

It is well settled that if the witness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would inter alia be interested in ensuring that real culprits are punished. **(Rajender Singh v. State of Haryana; 2009 Cri.L.J. 1561)**

◆ **S. 3 – Circumstantial evidence – When it becomes sole ground for conviction.**

There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by the Court as far back as in 1952. **(Baldev Singh v. State of Haryana; 2009 Cri.L.J. 948)**

◆ **S. 3 – Merely because the eye-witnesses are family members their evidence cannot per se be discarded.**

Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. The court shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. **(State of U.P. v. Atul Singh etc. etc.; 2009(4) Supreme 332)**

◆ **S. 8 – Test Identification parade – When it is not necessary.**

In the instant case, all the witnesses have stated that they had otherwise known the accused persons and they were not strangers to them. In the moonlight and lantern light they clearly identified them. Therefore, the test identification parade was really not necessary in

this case. Whether test identification parade is necessary or not would depend on the facts and circumstances of each case. The Court in a series of cases has taken the view that the test identification parade under Section 9 of the Evidence Act is to test the veracity of the witness and his capacity to identify the unknown persons whom the witness must have seen only once but in the instance case the witnesses were otherwise known to accused persons, therefore, the test identification parade has no great relevance in the facts and circumstances of this case. **(State of U.P. v. Sukhpal Singh & Ors.; 2009 Cri.L.J. 1556)**

◈ **S. 9 – Lack of moon-light or artificial light does not per se preclude identification of the assailants, if they are known from before.**

The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872 (in short the 'Evidence Act'). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of the Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. **(Hem Singh @ Hemu v. State of Haryana; 2009(4) Supreme 338)**

◈ **S. 32 – Dying declaration – If it is found to be true and voluntary – Conviction can be based on it without further corroboration – Principles governing dying declaration stated.**

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Paniben v. State of Gujarat; AIR 1992 SC 1817

(i) there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja & Anr. V. the State of Madhya Pradesh; (1976) 2 SCR 764)].

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of Uttar Pradesh v. Ram Sagar Yadav and Ors.; AIR 1985 SC 416) and Ramavati Devi v. State of Bihar; AIR 1983 SC 164)].

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy and Anr. V. the Public Prosecutor; AIR 1976 SC 1994).

(iv) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of Madhya Pradesh; (1974) (4) SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (See Kaka Singh v. State of M.P.; AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath and Ors. v. State of U.P.; (1981) (2) SCC 654)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurthi Laxmipati Naidu; AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Oza and Ors. v. State of Bihar; AIR 1979 SC 1505)

(ix) Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanahau Ram and Anr. V. State of Madhya Pradesh; AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan and Ors.; AIR 1989 SC 1519).

(xi) Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra; AIR 1982 SC 839) and Mohan Lal and Ors. v. State of Haryana; 2007 (9) SCC 151). **(Varikuppal Srinivas v. State of A.P.; AIR 2009 SC 1487)**

◆ **S. 32 – Magistrate need not to make an independent enquiry about the fitness of injured, if doctor certified it.**

The conclusions of the High Court that PW 11 should not have gone by what the doctor i.e. Kanchana said and should have made independent enquiries is to say the least an absurd conclusion.

It is not understood as to what the High Court meant by observing that PW 11 should have found out from the deceased as to whether she was conscious and was in a fit condition to give the statement. The doctor who was attending to the deceased has clearly certified that she was in a fit condition to make the statement.

The High Court was of the view that the evidence of PW 11 shows that her satisfaction was a subjective satisfaction solely on the basis of the opinion of the Doctor. There is nothing wrong in such a satisfaction being arrived at because the doctor is an appropriate person to certify on that aspect. **(State of Tamil Nadu v. Karuppasamy; 2009 Cri.L.J. 940)**

◆ **S. 113-B – Presumption as to dowry death – Available only if trial is for offence of dowry death.**

The presumption as to dowry death can be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the

presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(4) Such cruelty or harassment was soon before her death. **(Tarsem Singh v. State of Punjab; AIR 2009 SC 1454)**

◈ **S. 115 – Implementation of tariff – Representation made to consumer of electrical energy in furtherance where of he had altered his position – Doctrine of promissory estoppel shall apply.**

The matter as regards fulfilment of the conditions of licence granted by the Commission in favour of the licensee is a matter between the parties thereto. If the Corporation fails to comply with any of the conditions laid down in the licence or violates the tariff, the licence of the licensee may be revoked. A penal action may also be taken. But the same would not mean that the licensee can be permitted to take advantage of his own wrong. It can approbate and reprobate, particularly when it is the beneficiary thereof.

If it had made a representation pursuant, whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply. The doctrine of promissory estoppel, it is now well-settled, applies also in the realm of a statute. **(M/s. Badri Kedar Paper Pvt. Ltd. V. U.P. Electricity Regulatory Commn. & Ors.; 2009(2) ALJ 565)**

## Family Courts Act

◈ **S. 19 – Hindu Marriage Act – S. 28 – Appeal limitation of – What would be the limitation period to file an appeal – Whether it would 30 days as prescribed by above Act or 90 days as prescribed by Hindu Marriage Act – Held, "30 days".**

The limitation provided under the Family Courts Act would prevail over the one which has been provided under the Hindu

Marriage Act for the simple reason that the Family Courts Act is in the form of super legislation vis-à-vis the Hindu Marriage Act. Insofar as procedure for settling family/matrimonial disputes is concerned, S. 20 of Family Courts Act in this regard specifically provided that in the event of inconsistency between provisions of that Act or any other law for the time being in force, the provisions of Family Courts Act shall prevail.

Accordingly, where the family courts have been established and a judgment and order is passed by it, the appeal against such judgment and order would be one under S. 19 of Family Courts Act and the provisions of S. 28 of Hindu Marriage Act insofar as it provides for filing an appeal pales into insignificance and stand superseded by S. 19 of Family Courts Act.

Therefore, the plea that the limitation for filing the appeal should be treated at 90 days can not be accepted and period of limitation of 30 days so specifically provided under super speciality statute can not be extended by the court.

Consequently the limitation for preferring an appeal against the judgment and order of Family Court would be as prescribed under S. 19 of Act and not the one which has been prescribed under S. 28 of Hindu Marriage Act. **(Ashutosh Kumar v. Anjali Srivastava; 2009(3) ALJ 370)**

## Hindu Adoption and Maintenance Act

**S. 8 – Capacity of female Hindu to take in adoption – Female Hindu can adopt daughter, son after death of her husband.**

A conjoint reading of sections 6, 8, 9, 10 and 11 clearly indicate that all conditions of valid adoption including the capacity of taking in adoption by female or for capacity of a person who is to be adopted has been statutorily laid down hence, the entire law has to be governed on the above provisions and the prohibition in the Shastric Hindu Law as noticed above, is no more in application. It is useful to refer Mulla Principle of Hindu Law (19th Edition) by S.A. Desai on

section 10 of 1956 Act. Following view has been expressed by the Commentator:

"The section brings about some important changes in the law on this branch of the subject. Under the law as hitherto applied, the person to be adopted had to be a male since adoption of a daughter was not recognised. Now under the Act, adoption can be of both, of a son as well as of a daughter. Another condition, imposed in the matter of the person who could be taken in adoption by the law as was hitherto applied, was that the person to be adopted must not be a boy whose mother the adopting father could not have legally married; but this rule was not strictly followed and in course of time, was restricted only to the case of a daughter's son, sister's son and mother's sister's son. The restriction was not applied to sudras and even as to the three other castes; it was held that an adoption, though prohibited under the rule, could be valid if sanctioned by custom. The present section does not lay down any such limitation or restriction and any person may be validly adopted, provided the person is capable of being taken in adoption as laid down in the section and the other conditions relating to adoption are fulfilled." **(Abhishek Sharma v. State of U.P. & Anr.; 2009(2) ALJ 435)**

## Indian Penal Code

◆ **S. 21 – Public servant – Govt. Company is not "public servant" but every employee of such company is "public servant".**

The term 'public servant' is not defined in the Code. However, section 2(y) of the Code provides that words and expressions used but not defined in the Code will have the meaning assigned to them under the Indian Penal Code. Section 21, IPC, defines 'public servant', the relevant portion of which is extracted below:

> "21. 'Public servant',- the words 'public servant' denote a person falling under any of the descriptions hereinafter following; namely-
>
> Every person in the service or pay of a local authority, a corporation established by or under a Central, Provincial or

State Act or a Government Company as defined in section 617 of the Companies Act, 1956".

Having regard to the aforesaid definition, it is clear that the appellant which is a government company is not a 'public servant', but every employee of the appellant is a 'public servant'. **(National Small Industries Corporation Ltd. V. State (NCT of Delhi) & Ors.; 2009 Cri.L.J. 1299)**

◆ **S. 34 – Scope of – Section is based on principle of joint liability – Section applies even if no injury has been caused by particular accused himself.**

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.

The Section does not say 'the common intention of all', nor does it say 'and intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.

As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh; AIR 1993 SC 1899, Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. **(Daya Shankar v. State of M.P.; AIR 2009 SC 1426)**

**◆ S. 34 – Common Intention – Overt act – For applying S. 34 overt act on part of all accused persons is not essential.**

It is well settled principle of law by a catena of decisions that for applying section 34 IPC, overt act on the part of all the accused persons is not essential. **(Ram Adhar v. state of Uttar Pradesh; 2009(2) ALJ 485 (DB)**

**◆ S. 34 – Principle of section based on principle of joint liability – Common intention amongst participants is essential elements.**

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of section 34, be it prearranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. **(Munnilal S/o Gokul Teli v. State of M.P.; 2009 Cri.L.J. 1590)**

**◆ S. 120-A – Conspiracy and abetment – Distinction between S. 109 & S. 120-A**

The offence of conspiracy created under S. 120A is bare agreement to commit an offence. It has been made punishable under S. 120B. The offence of abetment created under the second clause of S. 107 requires that there must be something more than mere

conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by S. 107 (secondly), "engages in any conspiracy for the doing of that thing, if an act or omission took place in pursuance of that conspiracy." The punishment for these two categories of crimes is also quite different. Sec. 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in the IPC. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under S. 120B for which a charge under S. 109 is unnecessary and inappropriate. Intentional aiding and active complicity is the gist of offence of abetment. **(Arjun Singh v. State of H.P.; 2009 Cri.L.J. 1332)**

◆ **S. 300 - Exceptions 4 and Exception 1 – Murder – Sudden quarrel is pre-conditions for applicability of Exception 4 to S. 300 – Difference between Exception 4 & Exception 1 of S. 300 – Stated.**

The Fourth Exception of Section 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 reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with 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 puts them in respect of guilt upon equal footing. A sudden fight implies mutual provocation and blows on each 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.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acting 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. A fight is a combat between two and more persons whether with or without weapons. 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 premeditation. 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'. **(Ravindra Shalik Naik & Ors. V. State of Maharashtra; 2009 Cri.L.J. 1549)**

◈ **S. 300 – Murder – testimony of related witness cannot be discarded merely on ground that he is related to victim.**

The testimony of the witnesses Rameshwar and Viddya Prasad was assailed by the learned amicus curiae contending that being the near relatives of the deceased, their testimony could not be relied upon to convict the accused. It was also submitted in this regard that according to the FIR version, the witnesses Gajraj and Surajbhan also had reached the place of incident, but for the reasons best known to the prosecution, these witnesses have been withheld and hence adverse inference should be drawn against the prosecution. The court is not impressed with these contentions of the learned amicus curiae. It is true that the witness Rameshwar is the father of deceased, whereas the witness Viddya Prasad is his son, but the testimony of these witnesses cannot be brushed aside on this ground. The law is

well settled that if the testimony of any witness is found reliable and acceptable, then his testimony cannot be discarded merely on the ground that he is related to the deceased or victim. **(Ram Adhar v. State of Uttar Pradesh; 2009(2) ALJ 485 (DB)**

◆ **S. 300 – Murder – Identification of accused – Whether evidence of eye-witnesses can be accepted while eye-witness and accused were closely related – Held, "Yes".**

One of the prime reasons indicated by the High Court to discard the prosecution version is that in a dark night the possibility of identification was not there. The source of light for identification was not mentioned in the FIR. It is significant to note that there were four of the witnesses and some of them were injured in the incidence. PW 2 was an injured eye-witness. His evidence has been discarded on the ground that the injury sustained by him was a typical bruise. The following observations of the High Court show total non application of mind.

Merely because the colour of the injury was not noted and the doctor has written that the injury was fresh, that is no ground to discard his evidence. **(State of U.P. v. Sheo Lal & Ors.; 2009(3) ALJ 249)**

◆ **S. 302 – Death sentence – Propriety of – Imposition of – Factors to be considered.**

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State

of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P.; (1987) 3 SCR 80, the Court while refusing to reduce the death sentence observed thus:

> ".…….it will be a mockery of justice to permit these appellants (the accused) to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by the Court in Sevaka Perumal v. State of T.N.; (1991) 3 SCC 471.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised

societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle Mc Gautha v. State of California;28 L Ed 2d 711, that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

In Jashubha Bharatisinh Gohil v. State of Gujarat; (1994) 4 SCC 353, it has been held by the Court that in the matter of death sentence, the courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life

sentence, the logic applies to all cases where appropriate sentence is the issue.

Imposition of sentence without considering its effect on the social order in many cases may be reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

In Dhananjoy Chatterjee v. State of W.B.; (1994) 2 SCC 220, the Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

These aspects have been elaborated in State of M.P. v. Munna Choubey; (2005) 2 SCC 710:

In Bachan Singh v. State of Punjab; (1980) 2 SCC 684, a Constitution Bench of the Court at para 132 summed up the position as follows:

> "To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to

death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware – as the court shall presently show they were of the existence of death penalty as punishment for murder, under the Penal Code, if the thirty-fifth Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code

is unreasonable and not in the public interest. The Court would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

Similarly, in Machhi Singh v. State of Punjab; (1983) 3 SCC 470, in para 38 the position was summed up as follows:

"In this background the guidelines indicated in Bachan Singh case, will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case.

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

The position was again reiterated in Devender Pal Singh v. State of NCT of Delhi; (2002) 5 SCC 234:

> "From Bachan Singh case and Machhi Singh case the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:
>
> The community may entertain such sentiment in the following circumstances:
>
> (1) When the murder is committed in an extremely brutal, grotesque, disabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> (2) When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> (3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large

number of persons of a particular caste, community or locality, are committed.

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

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

What is culled out from the decision noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up. **(State of Uttar Pradesh v. Sattan alias Satyendra and others; (2009) 4 SCC 736)**

◆ **S. 304-A – Causing death by negligence – Provision does not apply to cases where death has been voluntarily caused.**

Section 304-A speaks of causing death by negligence. This section applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or

illegal consequences may fall, but with a hope that they will not. **(State of Karnataka v. Muralidhar; AIR 2009 SC 1621)**

◈ **S. 304-A – Rash and negligent act – To fasten liability in criminal proceeding e.g. U/s. 304-A, IPC, the decree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceeding.**

A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. **(Martin F.D'Souza v. Mohd. Ishfaq; 2009(3) ALJ 165)**

◈ **Ss. 304-B – Ingredient of**

The question, as to what are the ingredients of the provisions of Section 304-B of the Penal Code is no longer res integra. They are: (1) that the death of the woman was caused by any burns or bodily injury or in some circumstances which were not normal; (2) such death occurs within 7 years from the date of her marriage; (3) that the victim was subjected to cruelty; or harassment by her husband or any relative of her husband; (4) such cruelty or harassment should be for or in connection with the demand of dowry; and (5) it is established that such cruelty and harassment was made soon before her death.

In T. Aruntperunjothi v. State; (2006) 9 SCC 467, the Court held:

"It is now well settled in view of a catena of decisions of the Court that what would constitute 'soon before her death' depends upon the facts and circumstances of each case." **(Devi Lal v. State of Rajasthan; (2009) 1 SCC (Cri) 785)**

◆ **S. 307 – Attempt to murder – Determinative question is intention and not nature of injury.**

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt. **(State of M.P. v. Kashiram & Ors.; 2009 Cri.L.J. 1530)**

◆ **S. 307, 323 and 34 – Attempt to murder – Absence of intention or knowledge on part of accused to commit murder – Accused cannot be held guilty U/s. 307**

To constitute an offence under Section 307 IPC two ingredients have to be established namely (i) intention or knowledge relating to commission of murder and (ii) the doing of act towards it. For an offence under Section 307 IPC presence of intention or knowledge is material and not the consequence of the actual act done for the purpose of carrying out the intention. In the absence of intention or knowledge there can be no offence of attempt to murder. The injured witnesses have not stated that the accused intended to kill them. The evidence showed that they received simple injuries. In the absence of intention or knowledge which is necessary ingredient of Section 307 IPC the accused cannot be held guilty for the offence under Section 307 IPC. The accused appellants having voluntarily caused simple hurt to the witnesses in furtherance of their common intention, they are liable for the offence under Section 323/34 IPC. **(Om Prakash & Ors.; v. State of U.P.; 2009(2) ALJ 478)**

◆ **S. 326 – Sentence – Delay in trial not always mitigating circumstance – Custodial sentence of accused cannot be reduced on that ground.**

Any inordinate delay in conclusion of a criminal trial undoubtedly has highly deleterious effect on the society generally and particularly on the two sides to the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence. Thus, where accused were convicted of the offence of causing grievous hurt, reduction of custodial sentence to modest fine in absence of any indication that accused or prosecution were responsible for the delay in trial, would not be proper. **(Mangal Singh v. Kishan Singh; 2009 AIR SCW 1040 (B)**

◆ **S. 364-A – Kidnapping for ransom – Proof of.**

In the instant case submission made by the learned amicus curiae was that there are contradictions in the statements of witnesses regarding the place of handing over ransom money to the accused Balbir Singh and his arrest. The Court have carefully gone through the statements of the witnesses examined by the prosecution. There is no material contradiction regarding the place of handing over ransom money to the accused and his arrest and on the basis of the minor contradictions, the reliable testimony of prosecution witnesses cannot be discarded.

On the basis of the foregoing discussion, Court comes to the conclusion that the prosecution has successfully proved beyond reasonable doubt that the accused received ransom money of Rs. 10,000/- from Smt. Yogesh Devi and thereafter kidnapped child Rahul was recovered on his pointing out from a vacant kothi situated at some distance from civil court, Bijnor. There is no scope to make any interference in the impugned judgement, as, the learned trial court has not committed any illegality in convicting the appellant-accused Balbir Singh on the charge of kidnapping complainant's son Rahul for ransom. **(Balbir Singh v. State of U.P.; 2009(2) ALJ 474)**

◆ **S. 376 – Rape – Proof of age of victim – School register is admissible evidence to prove date of birth.**

In State of Chhattisgarh v. Lekhram; 2006(5) SCC 736, it was held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872 (in short 'evidence Act'). It may be true that the entry of the school register is not conclusive but it has evidentiary value. **(Arjun Singh v. State of H.P.; 2009 Cri.L.J. 1332)**

◆ **S. 376 – Non-mention of name of accused in FIR – Not material for conviction of accused.**

It is to be noted that the prosecutrix did not know the name of the accused and, therefore, there was necessity for Test Identification Parade. The evidence of the prosecutrix is clear and cogent. In the instant case the accused is not personally known to the victim and therefore stating his name in the FIR did not arise. However, she has categorically stated that the rape was committed on her by the truck driver. After the arrest of the accused he was put in TI Parade and the victim had correctly identified him. That being so, the judgments of the trial Court and the High Court do not suffer from any infirmity to warrant interference. **(Mohan Chand v. State of Uttarakhand; 2009(3) ALJ 240)**

## Indian Stamp Act

◆ **S. 2(14) – 'Instrument' – What constitutes – Xerox copy of document would not fall within meaning of instrument.**

Xerox copy of document – Would not fall within meaning of instrument – Said document cannot be received as evidence even on condition of payment of stamp duty and penalty. **(Sunkara Surya Prakash Rao v. Madireddi Narasimha Rao; AIR 2009 (NOC) 1682 AP)**

◆ **S. 33 & 35 – Court impounded insufficiently stamped document – Whether any interference called for – Held, "No".**

Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The Court being an authority to receive a document in evidence is bound to give effect thereto.

The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The Court, therefore, was empowered to pass an order in terms of Section 35 of the Act. **(Avinash Kumar Chauhan v. Vijay Krishna Mishra; 2009 (2) AWC 1272 (SC)**

◆ **S. 35 – Document not duly stamped – Not admissible in evidence in terms of S. 35 and would not also be admissible for collateral purpose.**

The Parliament has, in S. 35 advisedly used the words "for any purpose whatsoever". Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the provisions.

The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The Court therefore, was empowered to pass an order in terms of S. 35. The plea that the document was admissible for collateral purpose would not be tenable. Thus, order directing impounding of said document was not liable to be interfered with.

Section 35 of the Act rules out applicability of provision under S. 49 of Registration Act, 1908 as it is categorically provided therein that a document of this nature viz., unregistered sale deed shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded the document would not be admissible for collateral purposes. **(Avinash Kumar Chauhan v. Vijay Krishna Mishra; 2009 AIR SCW 979)**

◆ **S. 47-A – Stamp Act – Deficiency of – Market value of land cannot be determined with reference to use of land intended by purchaser**

The market value of the land cannot be determined with reference to use of the land to which buyer intends to put it in use, has substance. The matter in depth has been examined by the Court.

In Smt. Neelam Gupta v. Commissioner, Kanpur Division, Manpur; 2007(1) ADJ 289: 2007(5) AWC 5363, wherein the Court has placed reliance upon on Para 19 of a judgment of the Apex Court in P. Ram Reddy v. Land Acquisition Officer, Hyderabad, JT 1995 (1) SC 593.

The question of future potential cannot be a factor for determining the market value of such a land for the purpose of stamp duty payable under the Stamp Act. **(Surendra Singh and another v. State of U.P. and Others; 2009(2) AWC 1060)**

◆ **S. 47-A (3) – Exercise of jurisdiction under – Collector may also sou-motu take action.**

The reading of section 47-A(3) shows that in two contingencies jurisdiction can be exercised i.e. on receipt of reference from the Inspector General of Registration or the Registrar of District. The Collector may also suo motu take action.

Provision of section 47-A(3) does not specifically mention that the exercise of powers suo motu is to be done by him or it can also be at the instance of aggrieved party or any other person. Thus, it would be immaterial whether the Collector is moved by the Registrar or any person uninterested, interested or aggrieved. Thus, no fault can be found with the cognizance taken by the Collector under section 47-A(3) of the Act. **(Dharam Kaur v. State of Punjab and Others; 2009(106) RD 754)**

## Indian Succession Act

◆ **S. 63 – Evidence Act, Ss. 68, 69, 70 and 90 – Will – Nature of proof required – Propounder must offer reasonable explanation to remove suspicious circumstances.**

The provisions of Section 90 of the Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of

Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. **(Bharpur Singh v. Shamsher Singh; 2009 AIR SCW 1338)**

◆ **S. 63 – Requirements of a valid will – Attestation is mandatory requirement of valid will.**

The attestation of the will is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executants. The attesting witness should put his signature on the will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator. **(Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Others; (2009) 4 SCC 780)**

◆ **S. 63(c) – Evidence Act – S. 68 – Will – Proof of.**

Section 63 of the Indian Succession Act deals with execution of unprivileged Wills. It lays down that the testator shall sign or shall affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and on the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. Section 68 of the Evidence Act mandates examination of one attesting witness in proof of a Will, whether registered or not.

The requirements for proving a Will have been laid down in a large number of decisions.

In Janki Narayan Bhoir while dealing with the question elaborately, the Court held:

"To say Will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e. (a) the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction: (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a Will: (c) the most important point with which the Court is presently concerned in this appeal, is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

Even statutory requirements for proof of Will – Not complied with – Will in question not proved – Impugned judgment unsustainable – And set aside. **(Lalitaben Jayantilal Popat v.**

**Pragnaben Jamnadas Kataria and Others; 2009(2) AWC 1289 (SC)**

◈ **S. 213 – Will executed by Hindus outside city – Probate not necessary. (K. Subramani & Ors. v. P. Rajesh Khanna & Anr.; AIR 2009 (NOC) 1482 Mad.)**

## Interpretation of Statutes

◈ **Two or more enactments containing non obstante clause operating in same or similar direction – Court must in such cases find out intention of Legislature.**

A provision beginning with non obstante clause ("notwithstanding anything inconsistent contained therein in any other law for the time being in force") must be enforced and implemented by giving effect to the provisions of the Act and by limiting the provisions of other laws. But, it cannot be gainsaid that sometimes one may come across two or more enactments containing similar non obstante clause operating in the same or similar direction. Obviously, in such cases, the Court must attempt to find out the intention of the Legislature by examining the nature of controversy, object of the Act, proceedings initiated, relief sought and several other relevant considerations. **(KSL & Industries Ltd. V. Arihant Threads Ltd., M/s.; 2009 AIR SCW 1148 (A)**

## Juvenile Justice (Care & Protection of Children) Act

◈ **S. 2(h), 20 (since repealed) – Determination of age of juvenile – Person attains particular age at midnight of day preceding anniversary of his birthday.**

While calculating a person's age, the day of his birth must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday. A legal day commences at 12 O' clock midnight and continue until the same hour the following night. Thus, when the accused was born on 10.5.1978, the said day was to be counted as a whole day and it could not be said that he had attained the age of 16 years before 12 O'clock in the midnight of the previous

day, i.e. 9.5.1994. The offence being committed at about 1.00 p.m. on 9.5.1994 he was a juvenile at time of offence. **(Eerati Laxman v. State of A.P.; 2009 AIR SCW 1409)**

◆ **S. 2(k) – "Juvenile" – Determination of**

Applying the principle enunciated by the Hon'ble Supreme Court in the case of Pratap Singh; 2005 Cri.L.J. 3091, it has been held by the trial Court that on the date of incident A-2 Zaheer Abbas was 16 years, 4 months and 19 days as he was born on 4-7-1983, therefore, he was juvenile within the meaning and definition of the Act of 2000 and had not completed 18 years of age on 1.4.2000 and had not completed 18 years of age on 1.4.2001, therefore, he is entitled to get benefit of Act of 2000. The court is of the view that the impugned order and judgment passed by the trial court convicting and sentencing A-2 Zaheer Abbas for the offence punishable under Sections 302/34, 307/34, 324/34 and 352/34, IPC deserves to be quashed and set side. **(Sikander Khan & Anr. V. State of Rajasthan; 2009 Cri.L.J. 1596)**

◆ **S. 2(k) – Juvenile – Applicability of provisions of Act – provisions of Act not applicable to him if he failed to prove that he was less than 18 years of age on date of incident.**

The next contention raised by the learned counsel for the appellant/A.1 is that A.1 is a juvenile within the meaning of 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and therefore sentencing him to undergo imprisonment for life in jail, is unsustainable. The placed reliance on a decision in Upendra Kumar v. State of Bihar; (2005) 3 Supreme Court Cases 592 wherein it is held thus:

> "….It provides that notwithstanding anything containing in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act came into force in that area shall be continued in that court as if the Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the

juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

But, from a perusal of the record, it is clear that such a plea has not been taken by A.1 in the Trial Court, and it was taken for the first time in this appeal. In view of the fact that the Juvenile Justice (Care and Protection of Children) Act, 2000 is a beneficial piece of legislation, the Court called for report of the learned 1 Additional Metropolitan Sessions Judge in this regard. The Sessions Judge referred A.1 to Department of Forensic Science Medicine, for giving opinion with regard to age of A.1. A.1 was examined on 23.07.2008 and it was opined that, on general, physical, dental and radiological examination. A.1 was aged about 20 years as on 23.7.2008. The Sessions Judge also examined mother of A.1, who testified that A.1 was aged about 20 years. But, she has not produced any other proof to show that A.1 was aged about 20 years. Further, the evidence of Doctor is only opinion evidence and it cannot be taken as a conclusive proof with regard to the age of A.1. Even if a margin of two years on either side is taken to the opinion age given by the Doctor. A.1 may be aged about 15 years or 19 years, as on the date of the incident. Therefore, when the appellant/A.1 failed to show that he was aged less than 18 years of age, as on the date of the incident i.e. 11.05.2005, it cannot be said that the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, would apply to him. **(Satish Kumar & Anr. V. State of Andhra Pradesh; 2009 Cri.L.J. 1099)**

## Land Acquisition and Requisition

◈ **S. 11-A – Lapse of acquisition – Applicability of S. 11-A in a case in which possession of Land taken by state by invoking urgency clause.**

The Supreme Court in Satendra Prasad Jain; AIR 1993 SC 2517 has clearly observed that in a case where Section 17(1) is applied by reason of urgency. Government takes possession of the

land prior to the making of the award whereupon the land vests in the Government free from all encumbrances and, therefore, Section 11-A will have no application because the land has already vested in the Government. **(Suket Sarin v. State of U.P. & Ors.; 2009(3) ALJ 325)**

◈ **Ss. 17(4), 5A – Dispensation of enquiry not automatic in cases of 'urgency' or 'unforeseen emergency' – Govt. has to specifically exercise power U/s. 17(4) and dispense with enquiry.**

Section 17, no doubt, deals with special situations and exceptional circumstances covering cases of 'urgency' and 'unforeseen emergency'. In case of 'urgency' falling under sub section (1) of Section 17 or of 'unforeseen emergency' covered by sub-section (2) of Section 17, special powers may be exercised by appropriate Government but even in such cases, inquiry and hearing of objections under Section 5-A cannot ipso facto be dispensed with unless a notification under sub-section (4) of Section 17 of the Act is issued. The legislative scheme is amply clear which merely enables the appropriate Government to issue such notification under sub-section (4) of Section 17 of the Act dispensing with inquiry under Section 5-A if the Government intends to exercise the said power. The use of the expression 'may' in sub-section (4) of Section 17 leaves no room of doubt that it is discretionary power of the Government to direct that the provisions of Section 5-A would not apply to such cases covered by sub-section (1) or (2) of Section 17 of the Act. It cannot, therefore, be said that once a case is covered by sub-section (1) or (2) of Section 17 of the Act, sub-section (4) of Section 17 would necessarily apply and there is no question of holding inquiry or hearing objections under Section 5-A of the Act. Taking any other view will make sub-section (4) of Section 17 totally otiose, redundant and nugatory. **(Essco Fabs Pvt. Ltd. V. State of Haryana; 2009 AIR SCW 1074 (A)**

◈ **S. 28-A – Re-determination of compensation – Who can seek – Whether benefit of S. 28-A is limited to poor, ignorant persons.**

Against an award, if the Reference Court allows the application and awards any amount of compensation in excess of the amounts awarded by the Land Acquisition Officer under S. 11 of the Act, any person interested in the land covered by the same notification may make an application under S. 28-A of the Act within the period specified in the said section and may seek the same relief which has been granted to other land owners by the Reference Court. The benefit of S. 28-A to get compensation re-determined cannot be limited to a 'little Indian' who could not seek reference due to 'poverty or ignorance'. **(Kendriya Karamchari S.G.N. Samiti Ltd., Noida v. State of U.P.; 2009 AIR SCW 1207 (A)**

## Land Law

◆ **Assami Patta- Name of Pattedar expunged from revenue records without notice and opportunity of hearing –Violation of principles of natural justice – Order unsustainable and liable to be set aside.**

In the instant case impugned order dated 14.9.2007 has been passed without affording any opportunity of hearing the revisionist. It has been the consistent view of the Hon'ble High Court and the Court that the principles of natural justice must be followed and nobody should be condemned unheard. It has also been the view that though Asami Patta holders may be evicted in summary proceedings, they are entitled to hearing before eviction. Further, it has also been held that though the period for which the lease had been granted expired, show cause notice should have been given and opportunity of hearing should have been provided. But this has not been done by the learned Trial Court.

In view of the above, the Court is of the view that the order suffers from arbitrariness as no opportunity of hearing was provided to the revisionist. The impugned orders cannot be sustained in law. **(Radhey Shyam v. State of U.P.; 2009(106) RD 759)**

## Limitation Act

◈ **S. 5 – Constitution of India, Art. 136 – Delay in filing special leave petition – Delay has to be examined as to whether properly explained.**

The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of Limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.

For the aforestated reasons, the court holds that in each and every case the Court has to examine whether delay in filing the special leave petition stands properly explained. This is the basic test which needs to be applied. The true guide is whether the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition. In exercise of discretion under Article 136 to decide whether delay should be condoned or not, the Court is not bound by considerations applicable to an Appellate Court but nonetheless general principles which would weigh with the Appellate Court in determining sufficient cause can be the guiding factor/guideline. Therefore, it cannot be stated as a proposition per se that the prosecution of Review Proceedings would not be a sufficient cause at all for purposes of section 5 of the Limitation Act, 1963. **(R.B. Ramlingam v. R.B. Bhuvaneswari; 2009(106) RD 813)**

◈ **Delay – Condonation of – Courts take liberal view.**

The Courts take liberal view with regard to the condonation of delay. The reason being that by condoning the delay the parties get a right to get the matter adjudicated on merit. The same standard can not be applied for disposal of appeal. **(Dharam Kaur v. State of Punjab and Others; 2009(106) RD 754)**

## Motor Vehicles Act & Motor Accidents

◆ **S. 147 – Liability of insurer – Burden of proof lying on insurer on breach of policy condition – When can be said to have been discharged.**

The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to producer direct evidence to establish that the deceased and the injured passengers were gratuitous passengers. **(National Insurance Co. Ltd. v. Rattani & Ors.; AIR 2009 SC 1499)**

◆ **S. 147 – Liability of insurer – Driver had not renewed his licence on date of accident – Consequently owner would not be entitled to be indemnified by insurer. (Ramesh Chandra v. Smt. Shrivati & Ors.; AIR 2009 (NOC) 1421 MP)**

◆ **S. 168 – Assessment of compensation – Choice of multiplier – Age of deceased was 33 years at time of accident, therefore, appropriate multiplier to be adopted would be 15.**

When the husband of respondent No. 1 was going to Kanpur alongwith Ravi Wahaal in the Santro car of the letter bearing No. UP-32 AA 1188, the car met with an accident near Village Ashakheda, Police Station Sohramau, caused by truck No. UP-92-B-0141, which was coming from the opposite direction and was being driven rashly and negligently. On account of the accident, the husband of the respondent No. 1 received grievous injuries and he died on the spot. The husband of the respondent No. 1 expired on account of rash and negligent driving of the truck. On these allegations, a claim petition was preferred before the Motor Accident Claims Tribunal, claiming compensation. The Motor Accident Claims Tribunal proceeded to decide the claim and passed an award of Rs. 10,89,500/-. Feeling aggrieved with the said order, the appellant has filed this appeal.

So far the argument of the learned counsel for the appellant in regard to multiplier is concerned, he has submitted that the multiplier of 18 has wrongly been applied at the age of 33 years. To give force to his argument, he has placed reliance upon (2003) 7 SCC 197: (AIR 2003 SC 4172). (Divisional Controller, KSRTC v. Mahadeva Shetty and another) and (2006 (3) TAC 3: (2006 (5) ALJ 403) (U.P. State Road Transport Corporation v. Krishna Bala and others). On the strength of the aforesaid cases, he insisted that in Bala Krishna at the age of 36 years multiplier of 13 was applied by the Supreme Court and accordingly the multiplier of 18 which has been applied in the present case at the age of 33 years may be reduced.

In the case in hand multiplier of 15 may be applied and if applying multiplier of 15 the compensation is calculated, then it comes to Rs. 9,00,000. **(New India Assurance Company Ltd. V. Smt. Beena Bhatta & Ors.; 2009(2) ALJ 370 (DB)**

◆ **S. 170 – Permission to insurer to contest – Effect of – In absence of permission U/s. 170 of above Act, insurer cannot challenge quantum of compensation.**

Section 170. Impleading insurer in certain cases. – Where in the course of any inquiry, the Claims Tribunal is satisfied that:

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

This section has come up for consideration before the apex Court on number of occasions. It is well-settled by the Hon'ble Court that where an application under Section 170 of the Act had been

allowed by the Tribunal, it is open to the insurance company to challenge the award not only on the grounds of breach of insurance policy mentioned in Section 149(2) of the Act, but to contest the claim on merits, namely, quantum of compensation and all or any other grounds which were available to the owner of the vehicle. **(Oriental Insurance Co. Ltd. V. Kanchan Pandey and Others; 2009(2) AWC 1207)**

◆ **S. 170, 173(1) – Order rejecting of application U/s. 170 is not an award, hence not appealable U/s. 173(1).**

The insurance company can file appeal under S. 173(1) on all the ground which are available to the owner of vehicle and grounds mentioned in S. 149(2) of the Act if application under S. 170 has been allowed by the tribunal. But if application is rejected, the appeal can be filed only on the grounds available under S. 149(2) of the Act, as no appeal is provided against the order rejecting the application under section 170. An appeal under section 173(1) of the Act lies only against the award of the tribunal and the order under section 170 not being an award, no appeal would be maintainable against such an order. However order rejecting the application under section 170 of the Act can be challenged by the insurance company under the supervisory jurisdiction of the Court under Article 227 of the Constitution. **(Oriental Insurance Co. Ltd. V. Kanchan Pandey & Ors.; 2009(2) ALJ 648)**

## Narcotic Drugs and Psychotropic Substances Act

◆ **Ss. 8/21, 42(2) – Non-compliance of provision of S. 42(2) – Effect of.**

Respondent herein in the instant case was convicted for being found in possession of a huge quantity of Brown Sugar. On appeal, High Court acquitted respondent on ground of non-compliance with requirement of Section 42(2) of the Act.

Present appeal has been filed against said order of High Court.

Where High Court after referring to various factual aspects came to conclusion that provisions of Section 42(2) were not

complied with, conviction of respondent under sections 8/21 of Narcotics Drugs and Psychotropic Substances Act, 1985 could not be sustained. **(State of Rajasthan v. Babu Lal; 2009(4) Supreme 283)**

◆ **S. 37 – Cancellation of Bail – Validity of – If appellant failed to satisfy statutory requirements for purpose of cancellation of bail, order cancellation of bail liable to be set aside.**

The Act although is a self-contained Code, application of the provisions of the Code of Criminal Procedure, 1973, however, either expressly or by necessary implication, have not been excluded. There exists a distinction between an appeal from an order granting bail and an order directing cancellation of bail. While entertaining an application for cancellation of bail, it must be found that the accused had misused the liberty granted to him as a result whereof (a) he has attempted to tamper with evidence, (b) he has attempted to influence the witnesses, (c) there is a possibility of the accused to abscond and, therefore, there is a possibility that the accused may not be available for trial. It is true that the general principles of grant of bail are not applicable in a case involving the Act. The power of the Court in that behalf is limited. Held on facts, that appellant failed to satisfy statutory requirements for purpose of cancellation of bail. **(Sami Ullaha v. Superintendent, Narcotic Central Bureau; 2009 Cri.L.J. 1306)**

◆ **S. 50 – Applicability of**

Respondent 1-accused Manoj Sharma faced trial for alleged commission of offence punishable under Section 8 read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the Act"). Accused 2 Mohammed Rafiq was charged for offence punishable under Section 8 read with Section 29 of the Act for offence for abetment of commission of offence. The trial court convicted the accused persons. The High Court directed acquittal on the ground that there was inconsistency in the evidence and non-compliance with the provisions of Section 50 of the Act apart from other inconsistencies.

So far as the alleged non-compliance with the requirements of Section 50 is concerned, the Court in several cases held that the provision has no application when the search is not of a person. In the instant case, the seizure was not from the person of accused, but from inside the house. That being so, Section 50 of the Act had no application to the facts of the case. The High Court does not appear to have kept in view the definite evidence laid by the State to show that how it was not possible to get any independent witness. That being so, the acquittal of accused Manoj Sharma cannot be maintained. **(State of Rajasthan v. Manoj Sharma and Another; (2009) 4 SCC 767)**

## Negotiable Instruments Act

◈ **Cognizance of offence for dishonour of cheque – Cognizance of offence can be taken if cheque is has been presented beyond stipulated 6 months period – Number of times it is presented is immaterial.**

Indisputably, by reason of Section 138 of the Act a penal provision has been laid down that the issuer of any cheque would commit an offence if the cheque when presented is dishonoured.

For the said purpose a legal fiction was created. The proviso appended to the said provision, however, restricts the application of the main provision by laying down the conditions which are required to be complied with before any order taking cognizance can be passed which are; (i) that the cheque must be presented within a period of six months from the date on which it is drawn; (ii) on the cheque being returned un-paid by the banker, a notice has to be issued within thirty days from the date of receipt of information by him from the bank regarding the cheque being unpaid; (iii) in the event, the drawer of the cheque fails to make payment of the said amount of money to be paid within 15 days from the receipt thereof, a complaint petition can be filed within the period prescribed in terms of Section 142 thereof.

The question which arises for our consideration is as to whether the aforementioned legal requirements have been complied with by the respondent herein so as to enable him to maintain the complaint petition or not.

What is prohibited is presentation of the cheque within the aforementioned period and not the number of times it is presented. It is, therefore, immaterial whether for one reason or the other the complainant had to present the cheque for the third time or not. **(S.L. Construction & Anr. V. Alapati Srinivasa Rao & Anr.; AIR 2009 SC 1538)**

## Payment of Gratuity Act

◈ **S. 4 – Claim for payment of gratuity – Locus standi – Govt. employee who is governed by separate Act and Rules relating to payment of gratuity is not entitled to file application under above Act.**

Section 2(e) of the Payment of Gratuity Act defines as under:

"(e) "employee" means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, (and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is government or a State Government and is governed by any other Act or by an rules providing for payment of gratuity."

A perusal of the aforesaid definition of the word employee clearly indicates that employee in an establishment; factory, etc. will not include a person who holds a post under a State Government and is governed by any Act or by any Rules which provides for the payment of gratuity. The amount of gratuity under the Act is determined under Section 7 and only a person who is eligible for payment of gratuity can file such an application. Section 4 of the Act contemplates that gratuity shall be payable to an employee on termination of his employment. A conjoint reading of Section 4 read with Section 7 of the said Act coupled with the definition clause of the word "employee" as defined in Section 2(e) will make it absolutely clear that a Government employee who is governed by separate Act

and Rules relating to payment of gratuity is not entitled to file an application under the Payment of Gratuity Act. Consequently, the impugned order passed by the controlling authority cannot be sustained and is quashed. The writ petition is allowed. **(State of U.P. & Anr. v. Ram Chandra Ram & Anr.; 2009(3) ALJ 281)**

## Payment of Wages Act

◆ **S. 1(6) – Applicability of.**

The provisions of 1936 Act are applicable to only those employees who are covered by that Act and employees of any establishment or class of establishments to whom provisions of 1936 Act are extended by notification issued by State Government U/s. 1(5) of 1936 Act alone and not to employees of other establishment. However, by virtue of provisions of S. 22-F of 1948 Act, it could be extended to employees of scheduled employment under 1948 Act also. But it does not mean that by virtue of a notification issued under provisions of S. 22-F of 1948 Act, the class of employees who are expressly excluded from operation of provisions of the 1936 Act, may also be included by such notification under provisions of 1948 Act, which is subordinate legislation. **(Merind Ltd. & Anr. V. Prescribed Authority (Under Payment of Wages Act), Bijnor and Assistant Labour Commissioner & Anr.; 2009(3) ALJ 50)**

## Prevention of Corruption Act

◆ **S. 5 – Cognizance of offence – Special Judge can take cognizance of offences under P.C. Act on complaints of private persons.**

Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straight-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. There is nothing in the P.C. Act, 1988 that private person cannot file complaint regarding the commission of the offences under that Act. Therefore, the application under S. 156(3)

could not be rejected on the ground that only the Magistrate can treat the application under S. 156(3) Cr.P.C. as complaint, as there is no legal bar for the Special Judge under the P.C. Act to take cognizance of the offences under that Act on the complaint of private persons. **(Mahipal v. State of U.P. & Ors.; 2009 Cri.L.J. 983)**

◈ **S. 19 – Want of sanction – Effects of – Application u/S. 156(3) Cr.P.C. filed disclosing commission of cognizable offence – Cannot be rejected for want of sanction.**

'Sanction' of appropriate Government or authority is required at the time of taking cognizance of the offences punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by the public servant and not at the time of passing the order under Section 156(3) Cr.P.C. for registration of the FIR, or lodging the FIR about such offences directly at the police station. Therefore, the application under Section 156(3) Cr.P.C. cannot be rejected on the ground that 'sanction' of appropriate government or authority would be required at the time of taking the cognizance. **(Mahipal v. State of U.P. & Ors.; 2009 Cri.L.J. 983)**

## Probation of Offenders Act

◈ **S. 3 – Benefit of Probation – Determination of**

At the time of inspection, large quantity of stocks and/or products was stored. Though the allegations inter-alia were that no licence was obtained, proper books of accounts were not maintained and adulterated lubricating oil was stored.

The rehabilatory purpose of the Probation Act is pervasive enough technically to take within its wings an offence even under the Act. The decision in Ishar Das v. State of Punjab; 1973 (2) SCC 65 is authority for this position. Certainly, "its beneficial provisions should receive wide interpretation and should not be read in a restricted sense". But in the very same decision the Court indicated one serious limitation.

The kind application of the probation principles is negatived by the imperatives of social defence and the improbabilities of moral

proselyte-sation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive – not easily humanised by the therapeutic probationary measure. It is not without significance that the 47th report of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments. **(M/s. Precious Oil Corporation & Ors. V. State of Assam; 2009 Cri.L.J. 1330)**

## Prohibition of Immoral Traffic Act

**S. 18(1) – Nature of – Power of Magistrate to close brothel run near public place is preventive in nature.**

Section 18(1) refers to a magistrate, and on receipt of information from police or otherwise that certain premises were being run as a brothel within two hundred metres of any place mentioned in Section 7, he can issue notice to lessor, landlord, tenant or agent of such premises to show cause as to why the property should not be attached and then pass appropriate orders under clause (b) of sub-section (1) of Section 18. The same order, which a magistrate can pass under clause (b) of sub-section (1) of Section 18 after issuing a show-cause notice and giving a hearing to the concerned person, can also be passed under Section 18(2) without giving a show-cause notice and without hearing such person; but the requirement would be that such a person should have been convicted under Section 3 or Section 7 of the Act. The trial under Section 22 has to be conducted by a Magistrate or a Judicial Magistrate, whereas under Section 18(1), the power has to be exercised by a District Magistrate or a Sub-Divisional Magistrate in terms of the Schedule of the Act. Therefore, the legislature has taken note of the fact that whereas power under Section 18(1) is a preventive power, power under other Section like Sections 3, 4, 5, 6, 7 or 8 is of penal nature, which should be given to the Judicial

Magistrates. But if a Magistrate does not take action under Section 18(1), the Judicial Magistrate empowered to conduct trial under the amended provisions of Section 22 may still take action under Section 18(2) after a person is convicted by such a Judicial Magistrate under Section 3 or 7. In view of a drastic shift that has occurred in the jurisdiction/power to conduct trials u/ss. 3 and 7 of the Act due to amendment of S. 22 of the Act made effective from 2nd October 1979, whereby words "a Magistrate as defined in clause (c) of Section 2" have been substituted by words "a Metropolitan Magistrate or a Judicial Magistrate of First Class. **(Sunny Kamalsingh Mathur v. Office of Commissioner of Police for Greater Mumbai & Ors.; 2009 Cri.L.J. 1465)**

## Protection of Women from Domestic Violence Act

◆ **S. 20 – Monetary relief – Whether maintenance to aggrieved person in case of domestic violence is permissible – Held, "Yes", Court is competent to award maintenance to aggrieved person U/s. 20 of above Act.**

The golden rule of interpretation of statutes is that the words of a statute must prima facie be given their ordinary meaning. The words of provisions u/s. 20 of the Act are clear, plain and unambiguous. The provisions are independent and are in addition to any other remedy available to the aggrieved under any legal proceeding before the civil Court, criminal Court or family Court. The provisions are not dependent upon S. 125 of Criminal P.C. or any other provisions of the Family Courts Act, 1984 or any other Act relating to award of maintenance. In case of award of maintenance to the aggrieved person under the provisions of the Act, the Court is competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of S. 20 of the Act. Aggrieved person is not required to establish his case in terms of S. 125 of Criminal P.C.

Relief of maintenance to wife and children is available under his entitlement and liability of the person against whom relief is claimed U/s. 125 of Criminal P.C., when such person is unable to

maintain herself and the person against whom relief is claimed is under obligation to maintain and having sufficient means to maintain, but fails to maintain the applicants. But in case of domestic violence, the Court is empowered to grant such relief if the person is aggrieved as a result of the domestic violence and may grant monetary relief in terms of maintenance which would be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved party is accustomed and also empowered to grant lump sum or monthly maintenance or to direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries. However, the Magistrate is not empowered to grant relief in such form in accordance with S. 125 of Criminal P.C. At the time of interpretation of statutes, the Court is required to see whether the provisions of the statute are plain, unambiguous and capable of giving their ordinary meaning. **(Rajesh Kurre v. Safurabai & Ors.; 2009 Cri.L.J. (NOC) 446 (Chhatisgarh)**

## Provincial Insolvency Act

◆ **S. 7 – Petition for insolvency – Withdrawal of – Leave of court mandatory for – Seeking withdrawal.**

Petition for insolvency-Withdrawal of-Leave of Court mandatory for seeking withdrawal-Leave was granted to withdraw insolvency petition without affording an opportunity of hearing to creditors stating that there was no need to hear creditors-Illegal. **(I.R. Narayana Reddy v. Yaram Ramana Reddy & Anr.; 2009(2) ALJ (NOC) 299 Kar)**

## Registration Act

◆ **S. 17 – Transfer of Property Act - Section 58(f) – Memorandum of deposit of title deeds – Whether it is compulsorily registrable U/s. 17 of above act.**

The mandate under sections 58(f) and 59 of the Transfer of Property Act, 1882 with reference to section 17 of the Indian Registration Act, 1908 was highlighted by the apex Court in United

Bank of India Ltd. V. Messrs. Lekharam Sonaram and Co. and Others; AIR 1965 SC 1591. The relevant paragraph (Paragraph No. 7) in the said decision is extracted below:

> "When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under section 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under section 17 of the Indian Registration Act, 1908 as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either."

The above legal position has been crystallized by virtue of subsequent decision of the Apex Court in Veeramachineni Gangadhara Rao v. The Andhra Bank Ltd. And Others; AIR 1971 SC 1613, as well.

It is very much clear from Ext. A2 that the parties wanted to reduce the bargain into writing and it was in the said circumstances, that the said document was executed by depositing the title deeds creating an equitable mortgage over the same. Ext. A2 being a self contained document, creating rights/charges over the property, makes

it liable to be registered. **(Hubert Peyoli v. Santhavilasthu Kesavan Sivadasan; 2009(106) RD 807)**

◆ **Ss. 17 and 71 – Document of agreement of divorce could not be refused to registration.**

All other documents not required to be registered compulsorily can also be registered at the option of the executants. No provisions in the Act which empowers the registering authority to refuse to register a document on the ground that it is illegal, invalid or unenforceable. Rule 67 contains a specific provision to above effect. Hence, the document purporting to be an agreement of divorce presented by the petitioner for registration could not be refused to be registered by the registering authority. **(Sulabha v. Suseela and Others; 2009(106) RD 770)**

◆ **S. 40 – Registration of Will – Who cannot oppose registration of Will – Person claiming as executor after death of testator has no right to oppose registration of "Will".**

Since the registration of "Wills" is optional in nature and there is no obligation upon the registering authority to register "Wills", it does not appeal to reason to compel the registering authority to register the same when the act does not provide for its mandatory registration. The person presenting a "Will" for registration as such has no legally enforceable right to get a 'Will' registered. Therefore, logically the provisions of Section 77 of the Act enabling a party presenting a document for registration to maintain a suit in the event its registration is refused by the registering authority and the District Registrar, would not be applicable where the document presented for registration is a 'Will'. Therefore, by a necessary implication Section 77 of the Act providing for a suit for a decree directing for the registration of documents is confined only to documents which are set out for compulsory registration under Section 17 of the Act and not to any other document covered by Section 18 of the Act. Therefore a suit under Section 77 of the Act for a decree directing posthumous registration of 'Will' is not maintainable. **(Ramapati Tiwari v. District Registrar, Allahabad & Ors.; 2009(3) ALJ 5)**

**◆ S. 47-A(1)(a) – Determination of market value – Market value to be determined by applying general principles.**

In the present case admitted position is that at the point of time when sale deed in question had been registered in favour of petitioner land in question was shown as agricultural and thereafter petitioner applied for change of nature of land from agricultural to industrial (commercial) and declaration under section 143 of U.P.Z.A. & L.R. Act was allowed on 25.11.2004. Ex parte inspection has been carried out on 9.10.2006 by DIG (Registration) Kanpur Nagar, Kanpur and thereafter proceedings in question have been undertaken. Entire basis for fixing market value in the present case is circle rate which has been prescribed and the ex parte report of DIG (Registration) Kanpur Nagar. It has also been mentioned that nature of land was parti and not agricultural and normally it is used for residential purpose, and its subsequent user fortifies this situation. It has also been mentioned that it is situated in the area developed by U.P.SIDC, with various facilities. Market value is to be factually ascertained qua the date when instrument in question was presented for registration. In the present case no real exercise has been undertaken to determine the market value of the land on the date when instrument in question had been executed. Market value has to be determined applying general principles of determination of market value. **(M/s. Sunny Motors Pvt. Ltd. V. State of U.P. and Others; 2009(106) RD 793)**

## Rent Control & Eviction

**◆ S. 12 – Order for declaration of vacancy without giving notice to Landlord – Tenant – Order declaring vacancy liable to be set aside.**

In the instant, inspection on two occasions had been carried out by Inspector and Chief Inspector in the absence of landlord and tenant both and at no point of time landlord and tenant were informed of the date and time by Inspector/Chief Inspector when they were proposing to inspect the premises in question. Coupled with this, once proceedings had been commenced on the premises, that shop in question was lying locked and unused by tenant then sending of notice

at the address of the shop, cannot be subscribed by any means, and the said notice ought to have been send at the residential address, so that tenant could have turned up and could have contested the proceedings, in case he so desired. In this background inevitable conclusion is that vacancy has been declared without following procedure as envisaged in Rule 8 and release orders have been passed in breach of the provision as contained under the proviso to S. 16(1)(a) i.e. without providing opportunity of hearing to petitioner. **(Jyoti Prasad Gongal v. 3rd Additional District Judge, Agra & Ors.; 2009(3) ALJ 19)**

## Right to Information Act

◆ **S. 8(R) - Exemption from disclosure of information – Information asked for by petitioner qua place of his arrest would be covered by S. 8(h) – There is no right of petitioner to ask for such information under above Act.**

Exemption from disclosure of information – Petitioner was facing prosecution in criminal case – Information asked for by petitioner qua place of his arrest would be covered by Section 8(h) – There is no right of the petitioner to ask for such information under Right to Information Act. **(Vikram Simon v. State Information Commissioner, U.P. State Information Commission, Lucknow & Ors.; 2009 Cri.L.J. (NOC) 450 (All)**

## Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

◆ **S. 3(1) (x) and S. 20 – Offence U/s. 3 – Whether Magistrate can take cognizance on private complaint – Held, "Yes".**

The Court has held that an offence committed under the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 can very well be taken cognizance of by a Magistrate on a private complaint and that hence the challenge made to the order of the Magistrate on the ground that a private complaint alleging commission of offences punishable under the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)

Act, 1989 is incompetent, cannot be sustained. **(C. Sathiyanathan v. Veeramuthu; 2009 Cri.L.J. 1512)**

◆ **S. 3(2)(v) – Sentence – S. 3(2)(v) does not constitute substantive offence – Accused cannot be convicted and sentenced for offence U/s. 3(2)(v) simplicitor.**

From the language used by the Legislature in section 3(2)(v) SC/ST Act, it is clear that this section does not constitute any substantive offence and if any person not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Penal Code punishable with imprisonment for a term of ten years or more against a person or property on ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belongs to such member, then enhanced punishment of life imprisonment would be awarded in such case, meaning thereby that conviction and sentence under section 3(2)(v) SC/ST Act simplicitor is not permissible and in cases where an offence under the Penal Code punishable with imprisonment for a term of ten years or more is committed against a person or property on ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, then in such case the accused will be convicted and sentenced for the offence under Penal Code read with Section 3(2)(v) SC/ST Act with imprisonment for life and also with fine. **(Narain Trivedi & Ors. V. State of U.P.; 2009(2) ALJ 550)**

## Service Law

◆ **Rule 18 – Lien – Lien of a government employee over the previous post ends only if he is appointed to another permanent post on permanent basis.**

It is very well settled that when a person with a lien against the post is appointed substantively to another post, only then he acquires a lien against the latter post. Then and then alone the lien against the previous post disappears. Lien connotes the right of a civil servant to hold the post substantively to which he is appointed. The lien of a government employee over the previous post ends if he is appointed to another permanent post on permanent basis. In such a case the lien

of the employee shifts to the new permanent post. It may not require a formal termination of lien over the previous permanent post. The Court in Ram Lal Khurana v. State of Punjab; [(1989) 4 SCC 99] observed that lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed. **(State of Rajasthan & Anr. V. S.N. Tiwari & ors.; 2009(4) Supreme 293)**

◆ **Constitution of India Article 14 – Employment – Punishment – Imposing of major penalty on permanent employee without holding regular enquiry is not sustainable.**

The petitioner was Reader-cum-Ahalmad working in the office of Special Land Acquisition Officer, Unnao. During the course of employment, he was served with a charge-sheet dated 14.3.1992, broadly containing two charges – the first relates to absence from duty from 25.5.1990 to 29.10.1990 and second in regard to irregularity committed for grant of selection grade. After receipt of the charge-sheet, the petitioner submitted a reply dated 30.4.1992 and submitted that during the period in question, the petitioner was on medical leave and on account of serious illness, he could not attend the duty. He denied that he committed any illegality in accepting, selection grade. After receipt of reply to the charge-sheet, the enquiry officer submitted a report dated 4.8.1992 and in consequence thereof, the petitioner has been punished by the order under challenge.

The petitioner's counsel submits that being permanent employee, it was incumbent on the opposite parties to hold regular enquiry. Punishment awarded to the petitioner amounts to major penalty which is not sustainable under law. No date, time or place was fixed by the enquiry officer. Copy of the enquiry report was also not provided to the petitioner and straightaway, after receipt of the reply to the charge-sheet, the disciplinary authority passed the impugned order of punishment.

In the present case, once the respondents have proceeded on the basis of the reply submitted to the charge-sheet, then the only way before the disciplinary authority was to complete the entire enquiry

proceedings in accordance with the procedure provided for major penalty.

Now, it is trite in law that the delinquent employee shall be entitled for the copy of the enquiry report alongwith show cause notice which has been denied to the petitioner. Accordingly, the impugned order of punishment is not sustainable on this ground. **(Kamla Charan Misra v. State of U.P. and Others; 2009(2) AWC 1259 (LB)**

◆ **Employment – Punishment – Whether erroneous Bail order can provide ground for imposing punishment on officer who has granted bail – Held, "No".**

If bail is granted without observing those principles it may be said that the order granting bail passed by the judicial officer is, erroneous. None of the cases cited by the learned standing counsel are upon the point as to when misconduct on the part of the judicial officer can be inferred from an erroneous order. The cases cited are therefore, distinguishable.

In the present case all that can be said against the charged officer in regard to the bail order passed by him is that the said order was erroneous. From this fact alone the charge cannot be even partly proved.

In the result, the writ petition is allowed. The punishment resolved by the Full Court dated 16.11.2002 and as clarified on 6.9.2003 communicated to the petitioner by letter dated 27.11.2002 and 23.10.2003 of the Joint Registrar is quashed. **(Vijendra Pal Singh v. High Court of Judicature at Allahabad and Others; 2009(2) AWC 1243)**

◆ **Regularisation – A person appointed periodically does not acquire a right to become a permanent employee – Regularisation notwithstanding long period of service is impermissible.**

Regularization of services, as is well-known, is impermissible in law. Though belatedly respondents had taken steps to fill up the existing vacancies in terms of the recruitment rules and upon

following the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India.

Contention of the appellant that as he has been working for a long time, should have been given preference over said Shri Mohan Lal in the considered opinion of court, cannot be accepted.

The Apex Court also observed that the life of selected list is one year and Appellant cannot be appointed on the basis of select list of 1995 **(Man Singh v. Commissioner, Garhwal Mandal, Pauri & Ors.; 2009(4) Supreme 358)**

◈ **Article 16 – Transfer – Order of transfer passed in lieu of punishment would liable to be set aside being wholly illegal.**

Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds – one malice in fact and the second malice in law.

The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal. **(Somesh Tiwari v. Union of India & ors.; AIR 2009 SC 1399)**

◈ **Constitution of India – Article-16 – Scheme for absorption/regularisation of reservations – Fixation of cut-off date one after another – Legality of.**

A ‘State’ is entitled to fix a cut off date. Such a decision can be struck down only when it is arbitrary. Its invalidation may also depend upon the question as to whether it has a rational nexus with

the object sought to be achieved. 2.5.1997 was the date fixed as the cut off date in terms of the scheme for absorption/regularisation of researchers in CSIR. The reason assigned therefore was that this was the date when Supreme Court directed the appellants, authorities to consider framing of a regularisation scheme. They could have picked up any other date. They could have even picked up the date of the judgment passed by the Central Administrative Tribunal. Thus, by choosing 2.5.1997 as the cut off date, no illegality was committed. Ex facie, it cannot be said to be arbitrary. The High Court, however, proceeded on the basis that the cut off date should have been the date of issuance of the notification. The employer in this behalf has a choice. Its direction can be held to be arbitrary but then the High Court only with a view to show sympathy to some of the candidates could not have fixed another date, only because according to it, another date was more suitable. In law it was not necessary. The Court's power of judicial review in this behalf although exists but is limited in the sense that the impugned action can be struck down only when it is found to be arbitrary. It is possible that by reason of such a cut off date an employee misses his chance very narrowly. Such hazards would be there in all the services. Only because it causes hardship to a few persons or a section of the employees may not by itself be a good ground for directing fixation of another cut off date. **(CSIR & Ors. V. Ramesh Chandra Agrawal & Anr.; 2009(3) ALJ 222)**

◆ **Article 311 – Disciplinary proceedings – Appointment of inquiry officer – Chief Vigilance Officer cannot be appointed as I.O. since charge framed on delinquent in consequence of raid by vigilance department.**

The disciplinary proceedings were initiated only after a raid was conducted by the Vigilance Department. The enquiry officer was the Chief of the Vigilance Department. He evidently being from the Vigilance Department, with a view to be fair to the delinquent officer, should not have been appointed as an enquiry officer at all. **(Union of India & Ors. v. Prakash Kumar Tandon; AIR 2009 Supreme Court 1375)**

**Article 311 – Compulsory retirement – Validity of.**

The petitioner (since deceased) challenged his order of compulsory retirement dated 25.9.1992. While working with the Food Corporation of India, he was compulsorily retired by order dated 25.9.1992.

Since at the time of filing of petition, no interim order was passed in the writ petition therefore, he stood retired compulsorily of course subject to any order which might be passed in the writ petition.

So far the challenge to the order of compulsory retirement is concerned, the report of the screening committee has been placed before us by Shri A.K. Singh learned counsel for the FCI and the material which was placed before the screening committee has also been mentioned in paragraph 4 of the counter affidavit filed by the FCI.

The committee has found that his order of promotion was wrongly issued and before the said order could be implemented, it was withheld as he did not fall within the field of eligibility nor his name did figure in the Agenda of Regulation under Regulation 22(2) of the FCI (Staff) Regulations, 1971 at the time of SRC Meet.

On the perusal of the record, the committee took into consideration various ACRs which contain adverse remarks establishing that the overall performance of the officer has not been found satisfactory and these remarks have been communicated to the petitioner. In his CRs for 1980 and 1988, he was communicated adverse remarks. During 1983 and 1984, he was graded only 'Fair' and in 1985, his performance was reported below average which again is an adverse remark and the same was communicated to him. For the year 1986, his performance has been rated as of moderate efficiency. The record also shows the petitioner's involvement in the vigilance cases. It was observed that the official is involved in vigilance cases warranting major as well as minor penalties. On consideration of the entire record, it recommended for the compulsory retirement.

The Court does not find any illegality in the order of compulsory retirement, passed against the petitioner (since deceased). **(B.K. Gupta v. Union of India & Ors.; 2009(3) ALJ 66)**

◆ **Constitution of India – Art. 311 – Railway Establishment Code, R. 2046(k) – Compulsory retirement – Order of compulsory retirement having been passed without any authority-liable to be set aside.**

The question of scrutinizing the service record would have only arisen in case there was power with the Railways to retire the petitioner compulsorily. If the Railways, unfortunately lack the said power, the service record had no relevance in determining the dispute. Of course, if the petitioner was not an employee fit for being retained in service in the absence of provisions of compulsory retirement, the Railways could have adopted any other measure for terminating his service in accordance with law, but could not have taken any such action, for which it had no authority. **(P.N. Shukla v. Union of India & Ors.; 2009(2) ALJ 593)**

## Society Registration Act

◆ **S. 25 (U.P.) – Dispute as to election or continuation in office of office bearers of society – Adjudication of.**

The provisions of Section 25 of the Act as is amended by the State Legislature provides comprehensive code and creates designated forum or the Tribunal for adjudication in a summary manner of all disputes or doubts in respect to the election or continuance in office of the office bearers of the Society. There is no other provision, express or otherwise, providing for determination of such disputes specifically. It is settled law that where, as here, the legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the statute, such disputes can be determined only in that forum and in the manner prescribed thereunder and not otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same, has to be decided only by the Prescribed Authority under Section 25(1).

**(Ittahadul Muslemeen Maktab Islami School & Anr. v. Registrar, Firms, Societies & Chits, U.P. & Ors.; 2009(3) ALJ 1)**

## Specific Relief Act

◈ **S. 16 – Readiness and willingness to perform contract – Proof of – To be in spirit and substance and not in letter and form.**

Plaintiff had averred in plaint that he is and was always ready and willing to perform his part of contract – Plaintiff had further stated on oath that he had repeatedly requested defendant to execute a sale-deed of suit property in his favour after receiving remaining consideration which he was always ready and willing to pay – Plaintiff had established requirement of law for proving readiness and willingness to perform his part of contract – Entitled to a decree for specific performance of contract. **(Jagdish Prasad Bansal v. Mst. Guruwari Bai; AIR 2009 (NOC) 1680 Chh.)**

**Tort**

◈ **Medical Negligence – Mere misjudgment of error in medical treatment by itself would not constitute negligence.**

It is clear that a mere misjudgment or error in medical treatment by itself would not be decisive of negligence towards the patient and the knowledge of medical practice and procedure available at the time of the operation and not at the date of trial, is relevant. It is also evident that a doctor rendering treatment to a patient is expected to have reasonable competence in his field. (Bolam's principle). **(Nizam Institute of Medical Sciences v. Parasanth S. Dhananka & Ors.; 2009(4) Supreme 165)**

◈ **Negligence – Medical Negligence – Liability on doctors when can be fastened.**

In State of Punjab v. Shiv Ram; (2005) 7 SCC 1, a three-Judge Bench of the Court while dealing with the case of medical negligence by the doctor in conducting sterilisation operations, reiterated and reaffirmed that unless negligence of doctor is established, the primary liability cannot be fastened on the medical practitioner. In para 6 of the judgment it is said:

"Very recently, the Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be had to Jacob Mathew v. State of Punjab; (2005) 6 SCC 1. The Court has approved the test as laid down in Bolam v. Friern Hospital Management Committee; (1957) 2 All ER 118, popularly known as Bolam test, in its applicability to India." **(Ins. Malhotra (Ms) v. Dr. A. Kriplani and Others; (2009) 4 SCC 705)**

## Transfer of Property Act

◆ **S. 8 – Construction of agreement – Heading of agreement not conclusive of its character, intention of parties must be gathered from document by reading document in its entirety.**

A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefore circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety. **(C. Cheriathan v. P. Narayanan Embranthiri; AIR 2009 SC 1502)**

◆ **S. 43 – Applicability of**

The division Bench in the said judgment has laid down the applicability of section 43, cannot be ruled out with regard to transfer of Sirdari right, there cannot be any dispute with the said preposition that a person with non-transferable right, if acquire certain rights subsequently, section 43 may come into play but the present case is a case where section 167(1)(a) is applicable which contains a deeming clause declaring the subject matter of the sale to vest in the State from the date of transfer. Thus, in the present case, section 43 is not applicable because of the fact that there was no right subsisting in the lessee to acquire any interest subsequently. **(Smt. Ram Kali v. State of U.P. and Others; 2009(106) RD 757)**

**◆ S. 58(c) – Document, whether it is mortgage by conditional sale or sale with condition of repurchases? – Determination of.**

Whether a document is a mortgage by conditional sale or a sale with a condition of repurchase is a vexed question.

Section 58(c) of the Transfer of Property Act, 1882 reads thus:

"Section 58 – "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined-

(a)……

(b)……

(c) Mortgage by conditional sale.- Where, the mortgagor ostensibly sells the mortgaged property –

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller.

The transaction is called a mortgage by conditional sale and the mortgagee 'a mortgagee by conditional sale':

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

One of the ingredients for determining the true nature of transaction, therefore, is that the condition of repurchase should be embodied in the document which effects or purports to effect the sale. **(C. Cheriathan v. P. Narayanan Embranthiri; 2009(2) AWC 1283 (SC)**

## U.P. Consolidation of Holdings Act

◆ **S. 6 – Consolidation of notification – Constitution of India – Article 226 – Whether writ U/Article 226 of Constitution of India can be issued for quashing notification – Held, "No".**

In Jagpal Singh v. DDC; 2000 ALJ 362 it has been held that notification issued under section 6 of the Act, can be cancelled by the State Government only and the writ petition was held to be non-maintainable.

Viewed as above, the preponderance of judicial opinion is that in such matters the writ as claimed by the petitioners for quashing the notification issued under section 6 of the Act, cannot be issued. **(Ramesh Chandra & ors. V. State of U.P. & Ors.; 2009(3) ALJ 189)**

◆ **S. 49 – Bar to civil suit – Suit in respect of agricultural land – Jurisdiction of civil court clearly barred.**

Jurisdiction of the civil court not only in respect of the matters which are specified therein but also the matters which could and ought to have been the subject-matter of the proceedings under the said Act is barred.

The words of the said section are absolutely clear and unambiguous.

In Audhar and Others v. Chandrapati and others; (2003) 11 SCC 458, a Division Bench of the Court upon noticing Section 49 of the 1953 Act, opined that Section 49 of the 1953 confers exclusive jurisdiction under the Act and the jurisdiction of the civil court is barred. **(Madan Mohan Mishra v. Chandrika Pandey (D) through L.Rs.; 2009(2) AWC 1135 (SC)**

## U.P. Electricity Reforms Act

◆ **S. 18 – Condition of licence – Licence can be revoked on ground of failure to comply with.**

The matter as regards fulfilment of the conditions of licence granted by the Corporation favour of the licensee is a matter between the parties thereto. If the consumer fails to comply with any of the

conditions laid down in the licence or violates the tariff, the licence of the licensee may be revoked. A penal action may also be taken. But the same would not mean that the licensee can be permitted to take advantage of its own wrong. It can approbate and reprobate, particularly when it is the beneficiary thereof. **(M/s. Badri Kedar Paper Pvt. Ltd. V. U.P. Electricity Regulatory Commn. & Ors.; 2009(2) ALJ 565)**

## U.P. Industrial Disputes Act

◆ **S. 4-K and 10 – Employment – Daily wager is not entitled to back wages when directed to be reinstated in industrial adjudication.**

Insofar as back wages are concerned, it is admitted by the parties that the workman concerned was a daily wage employee. He has not shown that he was not gainfully employed during the pendency of dispute. In recent judgment, the Apex Court has held that the daily wager is not entitled to any back wages or continuity of service.

Hence, the award insofar as reinstatement in service with continuity of service is concerned, appears to be bad in law. However, in the peculiar facts and circumstances of the case and that the workman has been reinstated in service and after his disappearance his wife has been granted fresh appointment, this question does not appear to be very material at this stage. **(State of U.P. and another v. Presiding Officer, Industrial Tribunal No. 1 U.P., Allahabad and Another; 2009(2) AWC 1305)**

◆ **S. 4-K – Reference – Refusal by Dy. Labour Commissioner on the ground that petitioner was not workman was improper.**

State Government was not competent to hold that the petitioner was not a workman within the meaning as defined under the U.P. Industrial Disputes Act. Such a matter could only be adjudicated or decided by the Tribunal or the Labour Court on the basis of the material placed before it by the parties.

The Court is of the opinion that the State Government exceeded its jurisdiction and has attempted to usurp the power of the Tribunal by adjudicating a dispute which power was not vested with the Government.

In view of the aforesaid, the impugned order, passed by the Deputy Labour Commissioner, declining to refer the dispute cannot be sustained and is quashed. The writ petition is allowed. **(Shahid Ahmad Khan v. Deputy Labour Commissioner, Agra, and Anr.; 2009(3) ALJ 256)**

## U.P. Panchayat Raj Act

◆ **S. 95(1)(g) – Order for withdrawal of financial and administrative power from Gram Pradhan on the ground other than which mentioned in show cause notice to petitioner – Order is unsustainable and liable to be quashed.**

If the District Magistrate gives show cause notice on one ground and proceeds to pass an order on some other ground, the very purpose of issuance of the show cause notice would frustrate. The same cannot be permitted. The purpose for giving show cause notice is that in case of any alleged irregularity, the concerned person may have an opportunity to give his reply. In the present case, the petitioner had given his reply which was confined to the grounds taken in the show cause notice. He was not expected to give explanation with regard to certain other grounds which may have come to light subsequently. As such, the impugned order, having been passed on the ground other than the one given in the show cause notice, for which the petitioner did not have any opportunity, would be liable to be set aside. **(Shiv Charan Singh, Pradhan v. State of U.P. and Others; 2009(2) AWC 1070)**

## U.P. Public Money Recovery of Dues Act, 1972

◆ **S. 3 – Recovery of dues – Both modes of recovery as provided in recovery of debts due to banks and financial institutions Act and above Act can be made.**

The State Law i.e. U.P. Act of 1972 has not been declared ultra vires as yet. State has its responsibility to recovery the loan, not only as per S. 3 of U.P. Act, 1972, but also under Section 32-G of Corporation Act, 1951. Corporation Act, 1951 is a self-contained code, therefore, the legal prescription by Act of Parliament or Legislative Assembly, cannot be ignored by virtue of any unsettled position as yet. On existing law an interpretation by Court of law, already made, will have prevailing effect so far as the cases are concerned.

Furthermore, the Corporation Act, 1951 itself provides various stages to follow principles of natural justice being self-contained code. The earlier judgment of Supreme Court speaks both modes of recovery can be made applicable, the later judgment speaks about exclusive jurisdiction under the Debt Recovery Act, 1993. Therefore, earlier judgment having binding effect can prevail now and hence, by issuing notice to recover the amount as arrears of land revenue, under S. 3 of 1972 Act the respondents have not committed any mistake. **(M/s. Mak Plastic (P) Ltd. & Ors. Etc. v. U.P. Financial Corporation & Ors.; 2009(2) ALJ 515)**

## Wakf Act, 1995

◈ **S. 3A – Beneficiary – Who is – Daughter of son of wakif being one of heir would fall within ambit of "beneficiary" as defined U/s. 3-A of above Act.**

In the instant case the contents of the wakf deed read as a whole amply demonstrated that intention of wakif in crating the wakf-alal—aulad was for benefit of his family and all his heirs. It provided that so long as his sons and grandsons remained mutwalli of wakf all the income of the wakf, after meeting out the expenses detailed in earlier part of wakf, would be shared and divided amongst all the heirs, i.e. his sons, daughters and wife in accordance with the law of inheritance but the heirs of his daughters and wife would not be entitled to any share. The reference to all heirs therein to mean his sons, daughters and wife is only illustrative in nature and is not exhaustive in nature. It specifically excludes the heirs of his wife and

daughters from the benefit of the wakf but does not exclude the children of his sons which shows that the intention of the wakif was to bestow the benefit of the wakf to all his grant children (son's children) irrespective of their sex i.e. to say he had no intention to exclude grand daughters from its benefit. This is particularly clear from the extracts of the wakf deed. The words "in accordance with law of inheritance" had only been referred to in context of determination of the share of each of the heirs in the income of the wakf. It did not provide that his legal heirs were to be construed in manner provided to by Shariyat or Mohammedan law. The heirs were to be determined as per language of wakf deed which clearly spelt out that heirs include his sons, daughters and wife and exclude the heirs of daughters and wife but not that of sons. Therefore by implication the daughters of sons or sons of sons had not been excluded. Accordingly, as per language used in wakf deed the daughter of the son of wakif is included within legal heirs of wakif and, as such, is one of beneficiaries under the wakf deed.

Therefore, applying the "doctrine of cypress" which means 'as nearly as possible' the income of the wakf should be applied and spent in furtherance of the intention of the wakif as nearly as possible which eventually was to benefit the children of his sons including sons' daughters. Therefore, the defendant/appellant who is none other than the daughter of one of sons of the wakif would be one of the heirs who falls within the ambit of a 'beneficiary' as defined under Section 3-A of the Wakf Act.

Plea that the defendant/appellant is not the heir of the wakif according to Shariyat cannot be accepted. The defendant/appellant is held to be one of the heirs of the wakif and beneficiary under the wakf. **(Smt. Faiqa Khatoon v. Riyazur Rahman Khan Sherwani & Anr.; AIR 2009 (NOC) All)**

## Words and Phrases

### ◆ "Bail" – Meaning and Connotation of

"Bail" remains an undefined term in Cr.P.C. Nowhere else has the term been statutorily defined. Conceptually, it continues to be

understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary spells out certain other details. It states:

> "……..when a man is taken or arrested for felony, suspicion of felony, indicated of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed-that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devaluates upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice. **(Vaman Narain Ghiya v. State of Rajasthan; (2009) 1 SCC (Cri) 745)**

### ◈ Expression "due diligence" means reasonable diligence.

The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word 'diligence' means careful and persistent application or effort. "Diligent means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence, reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a

legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. **(Chander Kanta Bansal v. Rajinder Singh Anand; 2009(106) RD 763)**

- **"Interested" and "Interested witness" – Meaning**

A witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or other convicted due to animus or for some other oblique motive. It is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. **(Namdeo v. State of Maharashtra; (2009) 1 SCC (CRI) 773)**

- **"Maintenance and Support"**

Apart from the provisions of the Hindu Marriage Act, 1955 or the Hindu Adoptions and Maintenance Act, 1956, the two expressions, "maintenance" and "support" in the Special Marriage Act, 1954 are comprehensive and of wide amplitude and they would take within their sweep medical expenses. The contention that no relief can be claimed under one statute relying on the provisions of the other statute as the Special Marriage Act, 1954 does not provide for medical expenses is not tenable. Reading the scheme of the Special Marriage Act, 1954, it is clear that a wife is entitled to "maintenance and support". The two terms "maintenance" and "support" are comprehensive in nature and of wide amplitude. **(Rajesh Burman v. Mitul Chatterjee; (2009) 1 SCC (Cri) 506)**

## Workmen Compensation Act

◆ **S. 4-A(3) and (1) – Interest – Award of – Starting point of award of interest would be governed by law laid down in case of Mubasir Ahmed case; (2007) 2 SCC 349.**

Interest is payable under Section 4-A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4-A was dealt with by the Court in Mughar Singh v. Jashwant Singh; (1998) 9 SCC 134. By amending Act 30 of 1995, Section 4-A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as to when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4-A(1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section (2) of Section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is 'falls due'. Significantly, legislature has not used the expression 'from the date of accident'. Unless there is adjudication, the question of an amount falling due does not arise. **(Kamla Chaturvedi v. National Insurance Company and Others; (2009) 1 SCC (Cri) 550)**

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