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Administrative Law

Bias – Meaning and determination

The Court in the case of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and ors.; (2001) 1 SCC 182, having regard to the changing structure of the society, stated that modernization of the society with the passage of time had its due impact on the concept of bias as well. The courts have applied the tests of real likelihood and reasonable suspicion. These doctrines were discussed in the case of S. Partharasathi v. State of Andhra Pradesh (1974) 3 SCC 459. The Court found that ‘real likelihood’ and ‘reasonable suspicion’ were terms really inconsistent with each other and the Court must make a determination, on the basis of the whole evidence before it, whether a reasonable man would, in the circumstance, infer that there is real likelihood of bias or not. The Court has to examine the matter from the view point of the people. The term ‘bias’ is used to denote a departure from the standing of even ended justice. After discussing this law, another Bench of this Court in the case of State of Punjab v. V.K. Khanna, (2001) 2 SCC 330 finally held as under :-

“The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn there from. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise”.

(N.K. Bajpai v. Union of India & anr.; 2012 (2) Supreme 417)

Malice in law – What constitutes

Hon’ble Supreme Court has consistently held that the State is under an obligation to act fairly without ill will or malice – in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. “Legal malice” or “malice in law” means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is

taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for “purposes foreign to those for which it is in law intended.” It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (**Ravi Yashwant Bhoir v. District Collector, Raigad & ors.; 2012 (2) Supreme 507**)

Civil Procedure Code

S. 2(14) - Trust Act, Ss. 59, 72 and 73 – Provisions under - Meaning of

The expression “Original Petition” as such is not defined either in the Trust Act or in the Code of Civil Procedure. However, Rule 3(9) of the Code of Civil Procedure defines Original Petition as follows:

“3(9).“Original petition means a petition whereby any proceeding other than a suit or appeal or a proceedings in execution of a decree or order, is instituted in a court.”

Section 2(14) C.P.C. defines the term ‘Order’ which reads as under:

“2 (14). “Order” means the formal expression of any decision of a civil court which is not a decree;”

Section 59 of the Act confers a right upon the beneficiaries to sue for execution of the trust which would indicate that the beneficiaries may institute a suit for execution of the trust. Therefore, the above-mentioned provisions would show that in order to execute the trust, the right is only to file a suit and not any original petition. Under the Trust Act also for certain other purposes original petitions can be filed. Section 72 of the Trust Act provides for a trustee to apply to a principal civil court of original jurisdiction by way of petition to get himself discharged from his office. Similarly, section 73 of the Act empowers the principal civil court of original jurisdiction to appoint new trustees. Few of the provisions of the Act permit for filing of

original petitions. (**Sinnamani vs. G. Vettivel; 2012 (2) ARC 321(SC)**)

S. 9 - Provincial small cause courts Act, Ss.15 and 23 – Regular suit for recovery of arrears of rent and damages – Jurisdiction of Court (whether J.S.C.C. or Regular Civil Court) – It cannot be said that suit triable by J.S.C.C. court can under no circumstances be decided by regular civil court

In this regard reference may also be made to two Full Bench authorities of this Court first in *Manzural Haq v. Hakim Mohsin Ali* AIR 1970 All 604, and the other in *Bisheswar Prasad Gupta v. Dr. R.K. Agarwal*, AIR 1977 All 103, holding that J.S.C.C. is Court of Preferential jurisdiction and not of exclusive jurisdiction. Accordingly it cannot be said that a suit which is triable by JSCC can under no circumstances be decided by the regular civil court and the decision of regular civil court and the decision of regular civil court in such suits is a nullity.

Moreover in the Full Bench decision of *Bisheswar Prasad* (supra) and in *Lala Hari Shyam v. Mangal Prasad*, AIR 1983 All 275, it has been held that if question of jurisdiction in such matters (JSCC or regular civil court) is not raised before the trial court. It cannot be permitted to be raised before the appellate court in the instant case before the trial courts no such objection was raised. (**Trilok Nath Agarwal (D) through L.Rs. v. Bata India Ltd.; 2012(2) AWC 2813**)

Sec. 35 – Costs should be imposed judiciously

The Union of India, in this appeal is primarily aggrieved by the order passed by the High Court in imposing exemplary costs on two officers. Learned senior counsel appearing for the sole respondent would submit that in the facts and circumstances of the case, the High Court ought not to have imposed any costs. The statement of the learned senior counsel appears to be very fair and requires to be accepted. Therefore, the appeal is allowed to the extent of waiving of costs imposed on the two officers and to that extent the impugned judgment and order of the High Court is set aside. (**Sayed Darain Ahas @ Darain v. State of West Bengal & anr.; 2012 (92) Supreme 570**)

(i) S. 80 - Notice - Scope - Requirement of

In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC. **(Rekha (Smt.) vs. Smt. Veermati; 2012 (2) ARC 389 (All))**

(ii) S.80 - Notice - Object and waiver of

Referring to the judgment in Ishtiyaq Husain Abbas Husain Vs. Zafrul Islam Afzal Husain and others AIR 1969 All. 161 has also expressed the where the court view:

"It appears to me that the plea of want of notice is open only to the Government and the officers mentioned in section 80 and it is not open to a private individual. In this particular case the State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it."

In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC. **(Rekha (Smt.) vs. Smt. Veermati; 2012 (2) ARC 388 (All))**

S. 100 - Special Relief Act, S-20 - Suit for Specific performance - Discretion as to decree suit - Exercise of powers - Legality of

(a) Court has observed that the Court can exercise jurisdiction only on the basis of substantial question of law framed at the time of admission as held by this Court in Dnyanoba Bhaurao Shemade vs.

Maroti Bhaurao Marnor reported in (1999) 2 SCC 471. But in the present case, the High Court framed more issues at the time of hearing without giving any opportunity to the parties to lead their respective evidence.

(b) The question whether the plaintiffs were always ready to perform their part of the contract and entitled for a decree for specific performance does not raise any question of law, (Refer: Harjeet Singh vs. Amrik Singh reported in (2005)12 SCC 270), but such questions have been framed and concurrent finding of trial court and the first appellate court has been reversed by the impugned judgment.

(c) The question whether a proceeding was collusive or not is essentially a question of fact, and it cannot be considered in a second appeal, as held by this Court in Nagubai Ammal and others vs. B. Shama Rao and others reported in AIR 1956 SC 593, but by the impugned judgment learned Single Judge decided such questions though there was no such issue framed.

(d) In a second appeal the re-appreciation of evidence and interference with the finding of fact ignoring the question of law is not permissible but such interference has been made by the impugned judgment. **(Sinnamani vs. G. Vettivel; 2012 (2) ARC 321(SC))**

S. 100 – Substantial question of law consideration of

The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High Court has a duty to formulate -the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are: Kshitish Chandra Purkait v. Santosh Kumar Purkait and Others, and Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor. It needs to be clarified immediately that in view of sub-section (5) of Section 100, at the time of hearing of second appeal, it is open to the High Court to re-formulate substantial question/s of law or

formulate fresh substantial question/s of law or hold that no substantial question of law is involved. This Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court cannot proceed to hear the second appeal without formulating a substantial question of law in light of the provisions contained in Section 100 CPC.

In *M.S. vs. Raja*, this Court found that the High Court in paragraph 22 of the judgment under consideration therein had dealt with substantial questions of law. The Court further observed that the finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It was further observed that the other questions considered and dealt with by the learned Judge were substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it was held by this Court that it could not be said that the substantial questions of law did not arise for consideration and they were not formulated. The sentence 'maybe substantial questions of law were not specifically and separately formulated' in *M.S.vs. Raja* must be understood in the above context and peculiarity of the case under consideration. The law consistently stated by this Court that formulation of substantial question of law is a sine qua non for exercise of jurisdiction under Section 100 CPC admits of no ambiguity and permits no departure. (**Hardeep Kaur vs. Malkiat Kaur; 2012 (2) ARC 135 (SC)**)

S.100 – Second Appeal - Considerations for

The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High has a duty to formulate the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are; *Kshitish Chandra Purkait v. Santosh*

Kumar Purkait and others, (1997) 5 SCC 438, and Dnyonoba Bhaurao Shemade v. Maroti Bhaurao Marnor, (1999) 2 SCC 471. It needs to be clarified immediately that in view of sub-section (5) of Sec. 100, at the time of hearing of second appeal; it is open to the High Court to re-formulate substantial question/s of law formulate fresh substantial question/s of law or hold that no substantial question of law is involved. The Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court can not proceed to hear the second appeal without formulation a substantial question of law in light of the provisions contained in Sec. 100 CPC. **(Hardeep Kaur v. Malkiat Kaur; (2012 (2) Supreme 551)**

Inherent powers of the court - S.151 CPC - Power to correct is always inherent in every court. Even purely executive authority cannot refuse to correct a calculation error whenever pointed out

In courts' opinion appeal of the State was wrongly allowed on highly technical grounds. The application prayer for correction of calculation error which had been allowed by the Prescribed Authority through the subsequent order (challenged in the appeals giving rise to the instant writ petition) was held to be barred by time. Even if the objection was raised beyond time still an error of calculation could be corrected by the Prescribed Authority at any time. Such power is always inherent in every Court, tribunal, judicial or quasi judicial authority. Even purely executive authority also cannot refuse to correct a calculation error whenever pointed out. **(Shyam Behari Lal v. State of U.P.; 2012 (116) RD 34)**

O. 1, R. 10(2) - Question of title not to be decided in summary proceedings

8. "In the present case, undisputed position is that JSCC Suit No. 43 of 2000 had been filed against defendant-respondent No. 1 for recovery of arrears of rent and ejection. In the said suit, defendant-respondent No. 1 filed written statement, denying landlord-tenant relationship. The case in hand has to be decided on the basis of the facts disclosed in the plaint. Merely because Shakil Ahmad claims that

he is owner of the property and he has filed suit for declaration of his rights, then ipso facto, it is not necessary to implead him as party in JSCC suit, which has to be decided on its own merit. Revisional Court has clearly erred in law in directing impleadment of Shakil Ahmad in JSCC suit. JSCC suit has to be decided on its own merit as to whether there existed any landlord-tenant relationship inter se parties. In case petitioner fails to substantiate the said fact that he is not landlord, his suit would fail. Revision has been wrongly allowed." (**Smt. Krishna v. Ram Kumar and others; 2012(115) RD 734**)

O.1, R.1 and O. VI, R.17 - Amendment and Impleadment Application - Who may be joined as plaintiff

Order VI, Rule 17 of the Code enables the parties to make amendment of the plaint which reads as under;

“17. 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.”

Order I, Rule 1 of the Code speaks about who may be joined in a suit as plaintiffs. Learned senior counsel for the appellant, after taking us through the agreement for sale dated 02.02.2006, pointed out that the parties to the said agreement being only Rameshkumar Agarwal, the present appellant and Rajmala Exports Pvt. Ltd., respondent No.1 herein and the other proposed parties, particularly, Plaintiff Nos. 2 & 3 have nothing to do with the contract, and according to him, the Courts below have committed an error in entertaining the amendment application. In the light of the said contention, court has carefully perused the agreement for sale dated 02.02.2006, parties to the same and the relevant provisions from the Code. Court has already pointed out that the learned single Judge himself has agreed with the

objection as to proposed defendant Nos. 3-5 and found that they are not necessary parties to the suit, however, inasmuch as the main object of the amendment sought for by the plaintiff is to explain how the money was paid, permitted the other reliefs including impleadment of plaintiff Nos. 2 & 3 as parties to the suit.

In *Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr.* (2008) 14 SCC 364, this Court considered the scope of amendment of pleadings before or after the commencement of the trial.

In paragraph 18, this Court held as under:-

“.....It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation.....”

It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. (**Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd.; 2012(2) ARC 891(SC)**)

O. IV-A - Consolidation of suits and proceedings - Legality of

The petitioner, who is defendant no.3 in Original Suit No. 641 of 2005, moved an application to consolidate the aforesaid two suits together on the grounds that in both the suits the matter in issue is common; that the suits are pending between the same parties and that the evidence to be led in the suit would be common as well as that

common questions of facts and law are involved and have to be adjudicated upon in both the suits. If the parties file documentary evidence separately in both the suits and lead oral evidence therein twice, that would unnecessarily waste the time of the court, therefore, both the suits be consolidated.

In view of the judgment rendered by this Court in Writ Petition No. 336 of 2010 (M/S) and as per provisions of Order 4-A of the Code of Civil Procedure, the learned trial court, should have considered the fact that the property in question in both the suits is the same, the parties to the suit are the same and the vendor is the same and that the evidence to be led in both the suits is similar, therefore, to avoid conflicting judgments in both the suits and in the interest of justice both the suits ought to have been consolidated together. In this view of the matter, the trial court has committed a manifest error of law in not consolidating the two suits. Consequently, the writ petition deserves to be allowed. (**Peter Succoro Vaz s. Karanjit Singh; 2012 (2) ARC 171 (Uttarakhand)**)

O. 6, R. 17 - Amendment of pleadings - Scope and object of

It is well settled law that an amendment ought to have been allowed if it does not change the nature of the suit nor intends to add a claim which is barred by limitation nor takes away the claim of the other party nor amounts to a fresh cause of action nor otherwise prejudice the other side. Instead of adding several authorities on this aspect, Court intend to refer to the decision of Apex Court in **North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (D) by Lrs.; AIR 2008 SC 2139** where the Court held:

“Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In **Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors. 1957 (1) SCR 595** which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b)

of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. [Also see: **Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar (1990)1 SCC 166**”

From the above, the law discern is that in the matter of seeking amendment in the pleadings, Courts must have taken a pragmatic view as to whether amendment would delay the proceedings, will change the nature of the proceedings, will have the effect of giving new cause of action and so on but otherwise where the plaintiff himself has sought amendment in the plaint. (**Bhulai vs. Additional District Judge Vth Pratapagarh; 2012 (2) ARC 61(All. Lucknow-Bench)**)

O.VI, R. 2(2) and 2(3) – Provisions under - Explanation of

Order VI Rule 2 of the Code of Civil Procedure, 1908 makes it clear that every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. Sub-rule (2) of Rule 2 makes it clear that every pleading shall be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Sub-rule (3) of Rule 2 mandates that dates, sums and numbers shall be expressed in a pleading in figures as well as in words. (**Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd.; 2012(1) ARC 891(SC)**)

Pleading - Importance of

The truth should be the guiding star in the entire judicial process.

Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. (**Maria Margarida Sequeria Fernandes vs. Erasmo Jack de Sequeria (dead); 2012 (2) ARC 325 (SC)**)

O. VII, R. 10 – Effect of not proving affidavit and not filing written statement

The core question which requires determination in this appeal is whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court?

Further question which is related to the issue is whether the defendant-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits of the decree in his favour?

Yet another important question which arises herein and frequently crops up before the trial court is whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straight way pass a decree in favour of plaintiff without entering into the merits of the plaintiff's case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the plaintiff's case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff? (**C.N. Ramappa Gowda v. C.C. Chandregowda (D) by LRs & anr.; 2012 (3) Supreme 138**)

O-IX, Rule 7 and 13 - Rejection of application under - Legality of

This writ petition is directed against orders passed by the courts below rejecting petitioners' restoration application under Order IX Rule 13 CPC. First order was passed on 16.10.2004 by 1st Additional Civil Judge (Senior Division), in Misc. Case No. 29-C of 2000 rejecting petitioners' restoration application through which ex-parte decree dated 5.7.2000 passed in original Suit No. 51 of 1982 was sought to be set aside. Against the said order petitioners filed Misc. Civil Appeal No. 202 of 2004 which was dismissed by Additional District Judge, 12.7.2006 hence this writ petition.

On 22.12.1998 application was filed by the petitioners under Order -IX Rule 7 C.P.C. for recalling the order dated 27.7.1998. The said application was rejected on 24.4.2000. Thereafter ex-parte decree was passed on 5.7.2000. Restoration application under Order-IX Rule 13 C.P.C. was filed on 25.7.2000 which was rejected by the impugned order and appeal filed against the same was also dismissed as stated above.

Learned counsel for the plaintiff-respondent has argued that as against order dated 24.4.2000 rejecting the application of the petitioners under Order-IX Rule 7 C.P.C. no revision etc was filed hence subsequent restoration application was not maintainable. This is not correct legal position. Supreme Court in Arjun Singh vs. Mahendra Kumar A.I.R. 1964 S.C. 993 has held that "an order rejecting the application under Order-IX Rule 7 is not of the kind which can operate as res-judicate so as to bar the hearing on the merits of an application under Order IX Rule 13". **(Mujizun Nisan (Smt.) Additional District & Sessions Judge; 2012(2) ARC 451) (All. Lucknow-Bench)**

O. XV, R.5 - Made of applicability - Provisions under observed to be divided into parts - Explained

On a careful analysis of the provisions of Order XV Rule 5 CPC it is seen that it is divided in two parts. The first part deals with the deposit of the "entire amount admitted by him to be due" together with interest at or before the first hearing of the suit. The second part deals with the deposit of "monthly amount due" which has to be made throughout the continuation of the suit.

It is, therefore, clear that Order XV Rule 5 CPC is in two parts.

The first part deals with the deposit of the "amount admitted by him to be due" while the second part deals with the "monthly amount due" whether or not the tenant admits any amount to be due. Thus, in a case where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the "monthly amount due" within a week from the date of its accrual throughout the continuation of the suit because such deposit has to be made whether or not he admits any amount to be due. (**Yusuful Haq Alias Yusuf vs. Smt. Ghayyur Fatima; 2012(2) ARC 149 (All.)**)

O. XXI, R. 68 - As amended a period of 15 days provided in place of 30 days - Explained

As regard the auction before the expiry of 30 days, the assertion of the petitioner is wholly misconceived. The period of 30 days mentioned in Rule 68 of Order 21 is not mandatory. It could be less than 30 days as per consent of parties. It is relevant to point out that Rule 68 of Order 21 has been amended by Act No. 104 of 1976 and a period of 15 days has been prescribed in place of 30 days. Moreover, the petitioner had an opportunity of filing objection under Rule 90 of Order 21, which he failed to avail. (**Ganga Prasad (dead) through Lrs. vs. Hind ADJ, Sultanpur; 2012(2) ARC 305 (All. Lucknow-Bench)**)

O.XXXIV, Rules 1 and 2 – Temporary injunction – Grounds for granting – Temporary injunction can be granted if three ingredients (Prima Facie Balance of convenience and irreparable loss) are in favour of plaintiff

In present case court has held that the appellant has miserably failed to establish a prima facie case.

The counsel for the appellant submitted that the balance of convenience is in favour of the appellant. He submitted that in case the injunction is not granted in favour of the appellant, the appellant will have greater loss in comparison to respondent No.1.

Now it has to be seen whether the appellant will suffer irreparable loss. Before granting injunction the Court has to satisfy that

non-interference by the Court would result in irreparable loss to the party seeking relief. In the present case, the trial court has recorded a finding that the appellant will not suffer any irreparable injury in case the injunction is not granted in his favour. This finding of the trial court has been recorded after weighing the competing possibilities or probabilities or likelihood of injury to both the parties. This finding suffers from no illegality or irregularity.

Since all the three ingredients for granting temporary injunction are not in favour of the appellant and the order of the trial court refusing to grant temporary injunction suffers from no illegality, we find no justification to interfere with the order of the trial court. (**Savy Homes (P) Ltd. v. Nikhil Indus Infrastructure Ltd. and others; 2012(2) AWC 2714**)

O. XXXIX, R. 2A and Section 151- Remedy to non compliance of courts order by the district authorities

The Trial Court has ample power to enforce its order by issuing appropriate direction to the district authorities. Needless to say that in case the district authorities do not implement the order passed by the trial Court the latter has ample power to refer the matter to this Court. We reiterate the proposition of law discussed in the case of Mohd. Hamja and permit the petitioner to approach the trial Court by moving appropriate application. The Trial Court shall ensure that the order passed by it is complied with in its letter and spirit by the district authorities.

It shall be obligatory on the part of the district authorities to implement the order passed by the Trial Court. Attention of this Court has been invited to the order dated 14.7.2011 (Annexure-6). In case the private respondents have got any grievance against the order passed by the trial Court, then option is open to them to approach the higher forum like revisional or appellate jurisdiction but there shall not be any connivance between the private respondents and the district authorities in complying the order passed by the Trial Court. Non-compliance of the Court's order by the district authorities is a symptom which shows the breakage of the constitutional machinery.

We hope and trust that the district authorities including the Superintendent of Police, Lucknow shall enforce the order passed by the Trial Court in its letter and spirit. **(Hari Om Rastogi and another v. State of I.P. through its Secretary Home, Lucknow and others; 2012(115) RD 728)**

O. XXXIX, R. 4 - Two fold remedy provided to the incumbent against when such injunction may be discharged

On the parameters of judicial pronouncements as noted above and the statutory provisions as quoted above, the situation which emerges in the present case, that two fold remedy has been provided for to an incumbent against whom injunction order has been passed and who is dissatisfied with the said order of injunction. Rule 4 of Order XXXIX provides that an order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Order XLIII, Rule 1(r) provides that an appeal shall lie from an order under Rules 1, 2 and Rule 4 of Order XXXIX. The Legislature deliberately and consciously has provided the forum of appeal against the order passed under Rules 1, 2 and 4 of Order XXXIX, the stages being different. Under Order XIX Rule 1 of the Code whenever an ex parte order of injunction is passed, against the same also appeal is maintainable under Order XLIII Rule 1 (r) and at the point of time said appeal is decided, the question to be agitated is as to whether in the facts of the case Trial Court was justified in issuing injunction order and no new material can be taken into consideration until application under Order XLI, Rule 27 of the Code is taken on record and allowed. Said appeal in question has to be confined on the material which was available before the Court at the point of time when an injunction order had been granted ex parte. As far as proceeding under Order JLXXIX, Rule 4 of the Code is concerned; a person who is dissatisfied with the order of injunction has a right to apply for revocation. variation or for rescinding the order of injunction and therein all necessary material particulars can be placed before the Court in respect of his claim preferred under Order XXXIX Rule 4 of the Code, and the Court has to consider the claim of a party on the premises as to whether it would be just and in the interest of justice to continue with injunction order or not in the facts of the case and even against the said order passed either way, remedy of appeal has been provided for against the order passed under Order XXXIX, Rule 4 of the Code. Appeal is maintainable both against grant of ex parte injunction order as well as against the order passed after hearing both the parties.

Thus, there is procedural difference in the two and the stage of the appeal is also different, for the simple reason that while considering the appeal under Order XLIII Rule 1(r) against the order passed under Order XXXIX, Rule 1 of the Code, only material on which injunction order has been passed is taken into consideration, whereas in the appeal preferred under Order XLIII, Rule 1 (r) against the order passed under Rule 4 of Order XXXIX entire material has to be taken into consideration, including the documents which have been submitted by the defendant at the said stage of the proceeding. There is no statutory embargo, whatsoever imposed upon the defendant to invoke the two proceedings simultaneously. Apex Court in the case of *Transcore v. Union of India*, AIR 2007 SC 212, has considered at length, the doctrine of election of remedies by mentioning that said doctrine is evolved by Courts on equality, and there are three elements of election, namely existing of two or more remedies; inconsistencies between such two remedies and choice of one of them. If one of the three elements is not there, the doctrine will not apply. Here the remedies provided for are not at all inconsistent to each other rather both the remedies recognize existence of same facts. Both, the application under Order XXXIX, Rule 4 as well as appeal under Order XLIII, Rule 1 (r) are to be decided on different parameters as already noted above. In view of this the proposition that the appeal in question is not maintainable, cannot be accepted, for the simple reason that right of appeal is statutory right and such right cannot be curtailed unless the statute expressly or by necessary implication says so. The sentence "the choice is for the party affected by the order either to move the appellate Court or to approach the same Court which passed ex parte order for any relief" as mentioned in the case of *A. Venkatasubbiah Naidu v. S. Chellappan and others*, 2007(7) SCC 695, has to be read and understood, in the backdrop of the issue before Apex Court. At no point of time, the issue of simultaneous election of remedy was ever engaging the attention of Court, moreover judgments cannot be substitute of statutory provisions, and same has to be seen, in the facts and circumstances of each case. Here, scheme of things provided for do not reflect that by necessary implication or by express statutory

provision, appeal in question is in any way prohibited on application also being moved under Order XXXIX, Rule 4 of the Code. It is well known rule of construction, that a Court must construe a section unless it is impossible to do so, to make such provision workable rather proceeding to make it unworkable. No word can be rendered ineffective or purposeless. Courts are required to carry out legislative intent fully and completely while construing provisions, full effect is to be given to the language used therein giving reference to context and the other provisions of the Statute and by construction a provision shall not be reduced as dead letter. Here the language used in C.P.C. is very clear and does not require any interpretation, as there is no ambiguity in it, rather the same is clear and specific. Dual remedy provided for, cannot be made redundant and otiose merely because one of the remedies has been availed of. However, when both the remedies are opted and the matter is inter se parties, then whatsoever, decision is taken, such decision has to be taken into account by the Court dealing with such cases and the said Court will weigh the impact of the decision, which has been taken at the earlier point of time. In view of this the objection so raised is unsustainable. **(Anil Agarwal v. Indian Oil Corporation Ltd. Mumbai and others; 2012(115) RD 746)**

Consolidation of Holdings Act

Ss. 9A(2), 11 and 48 – Right in and title to agricultural land – Consideration of

The main aspect of the case is that the S.O.C. while reversing the judgment of the Consolidation Officer has totally ignored the fact that the petitioner failed to appear in the witness box to avoid his cross-examination. Instead, he produced his son of young age who is not supposed to have any knowledge about partition. This is one of strong circumstances which was taken against the petitioner but has been ignored by the S.O.C.

By ignoring all the material circumstances, available on record, the S.O.C. on the basis of presumptions and assumptions had rejected the plea that the entire land at Paharpur was not allotted to the branch of

the petitioner in partition. Obviously, the conclusion reached at by the S.O.C. is not legally supportable. It is based on ignorance of material facts and circumstances of the case and therefore, it is an improper order. Deputy Director of Consolidation rightly exercised his power. Under Section 48 of the Act, the order of the S.O.C. falls within ambit and scope of 'correctness', legality or propriety of the order. **(Vishwanath v. D.D.C., Varanasi and others; 2012(2) AWC 1877)**

Constitution of India

Art. 14 - Restricting a candidate to apply for only five districts in U.P. in his or her choice is illegal and ultravires of the statute

It is well settled that in the matter of selection and appointment etc. the policy decisions can be taken by the State and the same are not lightly to be interfered by the Court in judicial review but if such policy decision is ex facie irrational, illogical and arbitrary, it can be axed by the Courts while going for judicial review. The respondents in the absence of the counter- affidavit had the opportunity to show deliberation available on record, if any, made while formulating the above policy to show justification or rationality for restricting a candidate in applying in only five districts but that option has not been availed by the respondents though they have opportunity to do so. No such request was made. It appears that on this aspect there is not even deliberation on the part of the respondents. In a sheer momentary flash this condition has been made part of the process of selection without applying mind to its logic and rationality. It is also not discernible as to whether any rational object the respondents intent to achieve by making this restriction. The said condition also fails ex facie to show any nexus with the undisclosed objectives sought to be achieved. It is well settled that any policy decision, which is ex facie arbitrary, irrational or illogical is violative of Article 14 and cannot sustain. (**Sarita Shukla v. State of U.P.; 2012(2) ESC 963 (All)**)

Records show that this marks sheet was not forged - After issuing marks-sheet, it was found by University that in Military Science paper, University has given wrong marks - Therefore, University corrected its mistake- Due to this correction 14 marks from petitioner's total marks of 439 were reduced after two years - This fact was not informed by University to petitioner-After two years of his appointment during verification by Board, this fact came to knowledge of Board - Thereafter, Board issued show-cause notice to petitioner in which it was mentioned that he obtained appointment by submitting fabricated marks-sheet of B.A. - Petitioner submitted his reply, clarifying facts - But Basic Siksha Adhikari, without considering his explanation terminated him from service-Such

step of B. S.A. in terminating petitioner from service in casual manner and without considering his explanation - Deprives him from his livelihood and has serious civil consequences

On a close perusal of the pleadings exchanged by and between the contesting parties I am of the firm view that in this case the petitioner has been made to suffer without of his fault. To my judgment there was no fault of the petitioner much less any fraud on his part. The in-advertent mistake of the Examiner has been corrected by the University. However, from the stand taken by the University in its counter affidavit it is evident that the University did not take any steps to inform the concerned College and the students regarding the correction made by it. Thus, the concerned College VSSD College, Kanpur where the petitioner was a student of B.A. as well as the students of that College had no knowledge that the University had corrected their marks-sheet. From the facts it is clear that the action of the University authorities was casual.

Another important aspect of the matter is that the petitioner belongs to a Schedule Caste category and he applied for the post on the basis of his unamended mark-sheet in which he secured 285.5 Quality Point Marks. The cut of marks for the Schedule Caste category candidate was 280.03 marks. After the reduction of his marks his Quality Point Marks is 285.20. Thus his Quality Point Marks even after reduction of his marks in Military Science is much above the cut of marks. It was obligatory on the part of the District Basic Education Officer, Kannauj that when the petitioner has stated correct facts in his reply and there was no allegation of fraud by the University, he was not justified in using the strong words like fraud, forgery etc. in the impugned order while terminating the services of the petitioner.

Termination of service of an Assistant Teacher ensue a serious civil consequences as it deprives a person of his source of livelihood. The BSA before passing the impugned order ought to have considered the explanation submitted by the petitioner and other materials objectively, which he has miserably failed to do so. In my judgment the District Basic Education Officer, Kannauj has acted in most casual

manner by terminating the services of the petitioner on the ground of fraud and further directing to recover the salary paid to the petitioner.
(Ram Kumar v. State of U.P.; 2012(2) ESC 982 (All))

Art. 14, 16(1) & 141 - Article 16(4) which protects the interest of certain Sections of the Society has to be balanced against the Article 16(1), which protects the interest of every citizen of the entire society - They should be harmonized because they are restatements of the principle of equity under Article 14 of the Constitution

Held -

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4A). Therefore, Clause (4A) will be governed by the two compelling reasons- "backwardness" and "inadequacy of representation", as

mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling-limit on the carryover of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment. (**U.P. Power Corporation Ltd. v. Rajesh Kumar; 2012(2) ESC 233 (SC)**)

Arts. 16 and 226 – Seniority – Work charge status – Workman

**granted reinstatement with full back seniority but without back wages
– Legality of**

The petitioner was appointed as daily waged Beldar in the year 1984. In the year 1987, his services were terminated and thereafter, the petitioner filed a Reference Petition and the same was referred for decision to the Presiding Judge of the H.P. Industrial Tribunal who vide her order dated 19.3.2001 held that the termination of the services of the petitioner was in violation of Section 25-F of the Industrial Disputes Act, 1947 and further held that the petitioner is entitled to reinstatement with full back seniority but without back wages.

Now, the claim of the petitioner in this case is that the entire period has to be taken into consideration for working out his seniority and to fix the date when he should be given work charge status.

The stand of the state is that the period during which the petitioner did not actually work cannot be counted. The respondents cannot be permitted to take such a stand. They were parties before the learned Industrial Tribunal and the award of the learned Industrial Tribunal has been upheld by this Court in CWP No. 302 of 2002 titled State of H.P. v. Nanda Ram and the Department cannot sit over the order of the Labour Court or the Judgment of this Court itself, For the purpose of grant of work charge status, the entire period from the date of initial appointment of the petitioner, i.e. in March, 1984 shall have to be counted and the respondents cannot discard the period during which the petitioner was not in service because the order is very clear in this regard. (**Nanda Ram v. State of H.P.; 2012 (2) SLR 750**)

Art. 21-A – Right to education flows from and is a fundamental right u/A 21

Education is a process which engages many different actors : the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education. The 2009 Act makes the Right of Children to Free and Compulsory Education justiciable. The 2009 Act envisages that each child must have access to a neighbourhood

school. The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all. The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children upto the age of 14 years. The said Act provides for right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbourhood school. The word “Free” in the long title to the 2009 Act stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling. The word “Compulsory” in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21 and Article 21A of the constitution, the Parliament has enacted the 2009 Act. (**Society for Un-aided Private Schools of Rajasthan v. U.O.I. and anr.; 2012 (3) Supreme 305**)

Arts. 22(4), (5), (6) and (7) – Preventive detention – Meaning and object

There is a clear distinction between the principles governing the evaluation of a dying declaration under the English Law and the Indian Law. Under the English Law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English Law, for its admissibility, the declaration should have been made when in his actual danger of death and that the declaring should have had a full apprehension that his death would ensue. However, under the Indian Law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of *nemo meritorius praesumuntur mentiri* (a man will not meet his maker with a lie in his mouth). (**Bhajju v. State of M.P.; 2012 (77) ACC 192 (SC)**)

Art. 226 – Grant of anticipatory bail – Consideration of

Instant case was not a fit case for invoking doctrine of

prospective overruling as that would result in conferring legitimacy to the influence of money power over the rule of law, which is the edifice of our Constitution. Unscrupulous elements in the society use money and other extraneous factors for influencing the decision making process by Executive. In this case also Estate Agent, with whom appellant had entered into an agreement had played crucial role in acquisition of land. Estate Agent charged huge money from appellant for getting notifications issued under Sections 4(1) and 6(1) of the 1894 Act and sanction of layout plan by the BDA. Not too difficult for any person of reasonable prudence to presume that appellant had parted with crores of rupees knowing fully well that a substantial portion thereof would be used by Estate Agent for manipulating the State Apparatus. Hence held that there was no justification to invoke the doctrine of prospective overruling and legitimize what had been found by High Court to be ex-facie illegal. **(Bangalore City Cooperative Housing Society Ltd. v. State of Karnataka & ors.; 2012 (3) Supreme 209)**

Art. 227 – Writ – Maintainability of – whether High Court can interfere by exercising its supervisory jurisdiction when award passed by tribunal highly excessive or compensation has assessed without following norms or assess without giving reason – Held, “Yes”.

Normally this court is loathed to exercise the supervision jurisdiction vested in it under art. 227 of the Constitution of India to correct the orders passed by the Motor Accident Claims Tribunal. However, when an award is highly excessive or the tribunal throws to the winds all norms relating to assessment of damages and assesses damages without giving any reasons, then this court has no option but to exercise its supervisory jurisdiction. In fact, in such a case, it is the duty of this court to interfere and set aside such orders which lower the esteem of the judicial system. **(Iffco Tokio General Ins. Co. Ltd. v. Kamla Devi; 2012 ACJ 1105)**

Art. 311 – Removal from service without observing natural justice – Effect of

Counsel for the petitioner has submitted that the impugned order passed by the Board (Appellate Authority) is without any reasons and, therefore, suffers from non-application of mind and cannot be

sustained in law. Similarly, the petitioner was not given personal hearing by the Board before passing the impugned order and, therefore, the same cannot be sustained in law.

But counsel for the respondents, on the other hand, supported the impugned order and submitted that the Board has discussed the pros and cons in details before confirming the punishment awarded by the Disciplinary Authority. It is submitted that the minutes of the meeting of the Board of Directors would show that all facets of the issue were considered by the Board and it is only thereafter the impugned order was passed by the disciplinary. Authority which is just and proper and the punishment awarded are also sustainable in law. Court has observed that it is not in dispute that the Board (Appellate Authority) passed the impugned order without granting reasonable opportunity of hearing to the petitioner. Similarly, the Board did not give any reasons for confirming the punishment awarded by the Disciplinary Authority.

The impugned order, therefore, on the face off shows that it is without reasons and in violation of the principles of natural justice. The contentions canvassed by the learned counsel for the respondents that the members of the Board of Directors have discussed the issue in details in the meeting held for deciding the appeal of the petitioner cannot justify the passing of the cryptic order without giving any reasons. It is equally well settled that the reasons must be reflected in the order of the Appellate Authority itself and the same cannot be demonstrated by filing an affidavit before the Court. In view of the decision of the Full Bench (supra) based on the decision of the Apex Court the expression :”consider” includes within its sweep the application of mind, personal hearing and records of reasons. It is, therefore obligatory on the part of appellate authority to apply its mind and to pass an appropriate speaking order of affording personal hearing to the delinquent

Hence, court has not hesitation in holding that the impugned order suffers from non-application of mind and is violative of principles of natural justice and, therefore, cannot be sustained in law. **(Madhukar Tulsiram Tayade v. Chairman Board of Directors, Vidarbha Kshetriya Gramin Bank, Akola and ors.; 2012 (2) SLR**

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Consumer Protection Act

Ss. 2(1)(g), 2(1)(o) – Loss of crops due to non supply of electricity. Complaint dismissed by State Commission in appeal - Nothing has been produced by respondent co. to disprove or convincingly justify undue delay on their part – compensation of Rs. 20,000/- awarded by district forum affirmed

Since nobody appeared on behalf of the respondents, they were directed to be proceeded ex parte and we have considered the revision petition in the light of the documents placed by the parties on record and the submissions made by learned Amicus. Learned Amicus pointed out that the District Forum allowed the complaint of the petitioner based on the undisputed facts of this. Learned counsel for Respondents No. 1 to 3 had earlier requested for and was granted time by this Commission to file a copy of scheme and other relevant documents in support of his contentions on the limited issue of payment of compensation for causing delay in installing the electric connection on the part of the officials of the respondent Co. However, learned Amicus submitted that since neither any documents have been filed nor there has been any appearance on behalf of the respondent Co., National Commission may uphold the order of the District Forum regarding the payment of compensation of Rs. 20,000/- to the petitioner and set aside the impugned order of the State Commission which is erroneous inasmuch as it ignored the admitted position in respect of undue delay on the part of the company's officials in the matter because of which the petitioner did suffer financially for no fault of his. Court accept the contention raised by learned amicus since nothing has been produced by respondent Co. to disprove or convincingly justify the undue delay on their part in taking action in pursuance of the agreement entered in to by it with the petitioner which was well before the issuance of the letter on 17.12.1999 by the REC/Government to deny funds for the scheme. To this extent, there was deficiency on the part of the Respondents No. 1 to 3.

In the circumstances, court set aside the impugned order and partly allow the revision petition den confirm the order of the District

Forum to the extent of payment of Rs. 20,000/- as compensation in the matter to the petitioner. (**Sri Surendra Nath Patra v. Executive Engineer Electrical & ors.; 012 (2) CPR 47**)

Ss. 2(1)(g), 2(1)(o), 15 and 17 – Delay in completion of construction of apartment is deficiency in service – Complaint is to be compensated

Ex. A11 is the copy of the lawyer notice dated 8.1.2011 issued to the opposite party at the instance of the complainant. In the said lawyer notice, the deficiency in service and unfair trade practice on the part of the opposite party has been alleged. The complainant has also claimed compensation of Rs. 5,00,000 and cost of the said notice. The complainant had also claimed the arrears of monthly rent due tot with effect from 1.1.2010. It is averred by the complainant that opposite party did not responds to his lawyer notice and that the opposite party had also failed to comply with the terms and conditions. Thus the complainant had succeeded in establishing his case regarding the deficiency in service and unfair trade practice on that part of the opposite part. So, the prayer for directing the opposite party to complete construction of the one bed room residential apartment and to handover possession to the complainant as per the Agreement dated 26.6.2006 is to be allowed. Hence the opposite part is directed to complete construction of the said apartment and to handover the same to the complainant within one month from today.

There can be no doubt that the complainant suffered mental agony inconvenience and financial loss on account of deficiency in service and unfair trade practice on the part of the opposite party. The complainant is to be compensated for the mental agony, inconvenience and financial loss suffered by the complainant. So, the opposite party is made liable to pay compensation to the complainant.

The complainant has claimed tot al of Rs. 5,00,000 by way of compensation. But the complainant has not adduced any evidence to substantiate his claim for Rs. 5,00,000 as compensation. Considering the nature of the deficiency in service and unfair trade practice on the part of the opposite part a sum of Rs. 3,00,000 is awarded as compensation. (**Mukesh M. Shah v. Star Foundations and**

Structures Pvt. Ltd.; 2012 (2) CPR 11)

Ss. 11 and 17 – Territorial jurisdiction – Determination of

The present complaint in the present case was filed by the complainant at Kullu since all the transactions as per record had taken place at Mandi and opposite parties are carrying out their business at Mandi and as such as per Section 11 of the Consumer Protection Act, 1986, District Forum Kullu has no jurisdiction to try the present complaint. Moreover, the complaint on similar lines pertaining to few of the facts was filed at Mandi by the Sales Manager of Saluja. For who was complainant in the case against the complainant wherein there was a dispute relating to payment of insurance sum of Rs. 16, 000 and in the order passed in Complaint No. 44/2006 which is the impugned order against which the present appeal has been filed, the Forum below had given a finding in para No. 4 of the order that opposite party No. 1 appeared to be in collusion with opposite party No. 3 as according to opposite part No. 4, insurance premium of Rs. 16,000 had been paid by opposite part No. 3 to opposite part No. 4 and opposite part No.3 had not stated having paid the insurance premium in question of Rs. 16,000 too opposite party No. 4. In these circumstances, defence of opposite party No. 1 must fail but in complaint No. 337/2006 contradictory findings have come as the complaint was allowed and the complainant was held entitled to recover a sum of Rs. 16,000 from the opposite part No.2. Fact of pendency of complaint before the District Forum, Mandi should have been brought to the notice of the District Forum, Kullu but this fact had not been brought to the notice of the Forum at Kullu by the complainant and there appears to be material concealment of facts.

Commission are not going into the respective contentions of the parties on merits but since in the present case the District Forum at Kullu had no jurisdiction to try the present complaint since no transaction had taken place at Kullu and all the opposite parties had been carrying out their business at Mandi, as per section 11 of the Consumer Protection Act, 1986 which deals with the jurisdiction of the Forum below, District Forum, Kullu has got no jurisdiction to try the present complaint. **(Saluja Ford v. Hira lal Thakur and ors.; 2012 (2) CPR 71)**

Ss. 15 and 17- Consumer forum should not interfere where matter is pending before criminal court

In this case District Forum, after having considered the material placed before it by both parties, came to the conclusion that there was no tampering with the supply meter and there was no theft of electricity. On this finding, the electricity Supply Company was directed to refund the amount collected by it from the respondent/complainant along with interest and compensation for mental agony and cost of litigation.

Before State Commission the appellants have filed certified copies of the criminal complaint filed by appellant against respondent/complainant and order sheets recorded in the Criminal case by the Sessions Judge, Durg. These documents, prima facie show that allegation was made by the appellants against respondent regarding commission of offence of theft of electricity and such matter is pending before a competent Criminal Court. It is true that criminal complaint before competent Court has been filed after passing of the impugned order and therefore, it may be seen by the District forum, as to whether filing of such complaint after passing of such order, has some effect on the finding by which respondent/complainant, has been exonerated from charge of theft of electricity.

After having heard the arguments advanced by both parties, commission found that Electricity Supply Company, has taken this ground in the written version from the beginning that the respondent/complainant, was guilty of commission of offence of theft of electricity and if bill was issued for a higher amount, then it does not come in the category of deficiency in service. This question has been considered by the District Forum, in the impugned order, but, now as criminal case has been instituted against the respondent/complainant before a competent court for deciding as to whether the respondent/complainant has committed the offence of theft of electricity or not, therefore, it appears reasonable to set aside the impugned order and to remit the matter to back to District forum, for considering the fact that criminal complaint is pending against respondent/complainant on the same set of facts for trial of the charge of theft of electricity. **(C.G. State Power Distribution Co. Ltd.**

Dagniya, Raipur through its Managing Director & anr. v. Smt. Preetpal Kaur; 2012 (2) CPR 98)

Ss. 15 and 17 – Insurance - Repudiation of medi claim on the ground of pre-existing disease – Legality of

Considering the ground of repudiation, on the ground of pre-existing disease, the Insurance Company miserably failed to justify such repudiation. They tried to rely upon one opinion obtained from one Oncologist but same is not tendered in evidence. Besides that complainant has filed the treating doctor's opinion showing that it was not a pre-existing disease. It is pertinent to note that only after getting examined for the lump observed, it was detected that the complainant was suffering from Breast Cancer. Therefore, the forum rightly held that the Insurance Company miserably failed to justify their repudiation Hence, the repudiation being arbitrary, there is deficiency in service on the part of Insurance company and the insurance claim is rightly, therefore, awarded by the forum. **(The New India Assurance Co. Ltd v. Smt. Jayashree Subhash Swadi; 2012 (2) CPR 25)**

Ss. 15 and 17 – Insurance - Accidental death – District Forum awarded compensation of Rs. 50,000 in most arbitrary manner – validity of – Consumer forum cannot awarded amount in an arbitrary manner

Learned Counsel for the appellant submitted that the appellant had settled the insurance claim after the investigation and had committed an amount of Rs. 36,144 vide cheque No. 324220. The complainant had received the cheque on 24.10.2008. Learned Counsel further submitted that under said insurance scheme for the farmers, the head of the family was insured for a sum of Rs. 4,000 for each bag of fertilizer purchased by him. The father of the complainant had purchased 9 bags of fertilizer and, accordingly, he was insured for a sum of Rs. 36,000/ Learned Counsel admitted that the claim was repudiated initially, but after making an investigation, it was settled for Rs. 36,144. These facts were mentioned in the written statement filed by the appellant before the District Forum, but the District Forum ignored the same and awarded a sum of Rs. 50,000 without any basis.

Accordingly, the appellant had settled the claim for Rs. 36,144

and cheque dated 18.9.2008 was sent to the complainant (Paper No. 25). The appellant, while replying to the consumer complaint, had brought these facts to the notice of the District Forum in its written statement (Paper Nos. 17 and 18), but the district Forum has completely ignored it and has awarded a sum of Rs. 50,000 in a most arbitrary manner. We cannot support such an order and, therefore, the impugned order is liable to be set aside. **(IFFCO Tokio General Insurance Co. Ltd. v. Brijpal Singh and anr.; 2012 (2) CPR 59)**

Ss. 15 and 17 – Complaint cannot proceed without impleadment of necessary parties

In this case, commission found that in Ex. A1 there is clause bringing Air Travels Enterprises in the picture. Clause 5 of the agreement shows that the amount could be remitted to the Air Travels Enterprises and it is agreed by both sides that the amount could be remitted to any person authorized by the 2nd opposite part. All the same, commission found force in the arguments of the learned counsel for the respondents that the said Air Travels ought to have been arrayed as a party in the complaint. The complainant/appellant would argue that he had paid money to the Air Travels Enterprises whereas the opposite parts/respondents say they did not get any amount from the Air travels Enterprises. In the said circumstance, it is found that the Air Travel Enterprises which is alleged to have received the money ought to have been a party in the complaint. Commission found that it will be appropriate to remit back the case for a proper disposal after giving opportunity to the complainant to implead Air Travels Enterprises Indian Limited, ad contest the matter in accordance with law. The opposite parties are also given liberty to adduce further evidence if any support of their pleadings.

In the result, the appeal is allowed and the order dated 6.8.2010 of CDRF Kozhikode in CC No. 376/3008 is set aside. The matter is remitted back to the Forum below for fresh disposal after giving opportunity to both sides to adduce further evidence including the impleadment of Air Travels Enterprises in the party array. (**Prof. A.K. Basheer v. Alrifai Haj Umra Services & anr.; 2012 (2) CPR 116**)

SS. 15, 17, 19 and 21 – Insurance – Damage to bus in accident – Overloading – If overloading is not prime cause of accident, Insurance Co. cannot repudiate claim

In its complaint before the District Forum, the Respondent society had contended that it had insured its bus bearing registration No. HP-23-2879 with the Petitioner Insurance Company valid from 21.3.1994 to 20.3.1995 for a sum of Rs. 4,00,000. During the validity period of the insurance, the bus met with an accident on 16.5.1994 as a

result of which it was badly damaged and the estimated loss was Rs. 2,71,094. On being informed, the petitioner Insurance Company appointed a surveyor to assess the loss. However, the claim submitted by the Respondent society was repudiated on the grounds that at the time of accident the driver of the bus was not having a valid and effective driving licence and also because the bus was overloaded which was in violation of the terms and conditions of the policy. Being aggrieved by the repudiation of the claim which according to the Respondent society was not based on correct facts, it filed a complaint before the District Forum requesting that Petitioner Insurance Company be directed to pay Respondent society Rs. 2,71,094 being the damages suffered in the accident and Rs 1,00,000 as compensation.

The District Forum after hearing the parties noted that the issue of validity of the driving licence of the driver had been adjudicated by the District Forum as well as the State Commission in Appeal No. 94/1996 wherein the Fora below gave a finding that driver did have a valid licence. Regarding over loading of the bus and the consequences thereof, the District Forum concluded that even if the bus was carrying passengers above the permissible limit, there was no tangible and clinching evidence on record to conclude that the cause of the accident was because of overloading. The District forum cited the judgment of the Apex Court in B.V, Nagaraju v. Oriental Insurance co. Ltd., (II) 1996 CPJ 18 (SC) wherein it had inter alia been stated that if overloading is not the instant cause of an accident, the Insurance Company cannot repudiate the claim. Thus by applying the ratio of this judgment, the overloading in the instant case amounted to merely “irregular use” of the bus by the Respondent society and did not justify total repudiation of the claim. Since the Surveyor appointed by the petitioner had assessed the admissible claim due to the accident at Rs. 1,01,100, the District forum directed the Insurance Company to pay the Respondent society Rs. 75,810 (i.e. 75% of the admissible amount) with interest @ 9% p.a. from the date of institution of the claim till realization and costs of Rs. 10,000.

Aggrieved by this order, both parties filed appeals before the State Commission. Since these had arisen the State commission also disposed of both appeals by one common order. It dismissed the Appeal

of Petitioner Insurance Company by observing that there was no evidence to prove that the accident was directly attributable to the carrying of excess passengers in the bus and also cited the judgment of Hon'ble Supreme court in B.V. Nagaraju v. Oriental Insurance Co. Ltd.

Aggrieved by this order the present revision petition has been filed by the petitioner Insurance Company. The facts pertaining to the insurance policy taken by the Respondent and the accident having taken place during the validity of the insurance policy are not in dispute. We note that the Petitioner had repudiated the Respondent's insurance claim on two grounds : (i) that the driver did not have a valid and effective driving licence at the time of accident and (ii) that the bus was carrying more than the permissible number of passengers. So far as point No. 2 is concerned, we agree with the Fora below that there is no conclusive and credible evidence on record that the accident was caused because the bus was carrying more than the permissible number of passengers. The so-called expert evidence sought to be relied on and brought to our notice by Counsel for the Petitioner i.e. the affidavit of the Surveyor who is also a mechanical and automobile engineer.

This cannot be construed as an expert opinion of an independent person and is only a conjecture based on documents produced before the Surveyor. No other credible evidence has been produced by Petitioner to indicate that the accident occurred because the bus was carrying more than the permissible number of passengers as has already been observed by the Fora below. This case is squarely covered by the judgment of Hon'ble Supreme Court titled B.V. Nagaraju v. Oriental Insurance Co. Ltd. (supra), wherein it has been ruled out if overloading is not the prime cause of the accident, the Insurance Company cannot repudiate the claim. Respectfully following this judgment of the Apex Court, we uphold the order of the State Commission and direct the Petitioner Insurance Company to [pay the respondent society a sum of Rs. 1,01,100 being the damages assessed by the surveyor and Rs. 10,000 towards costs. (**New India Assurance Co. Ltd. v. Kotly Brahman Ex-servicemen's Transport and Cooperative society Ltd.; 2012 (2) SLR 84**)

S. 21 - Invocation of revisional powers – Revisional powers should not be invoked in a routine manner

Recently, Hon'ble Supreme Court in Mrs. Rubi (Chandra) Dutta v. M/s United India Insurance Co. Ltd. has observed:

“Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21(b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the matter, we are of the considered on the National Commission under Section 21(b) of the Act has been transgressed. (**Sanjay v. Gokul; 2012 (2) CPR 160 (NC)**)

Ss. 25, 27 and 27-A – Maintainability of Revision petition against order passed in execution proceedings

Respondent/Complainant filed an insurance claim for burglary policy obtained by him before the State Commission. Vide order dated 25.11.1998, State Commission partly allowed the complaint.

Aggrieved by order dated 25.11.1998 of the State Commission, both parties, i.e. petitioner/opposite party as well respondent/complaint filed separate appeals before this Commission.

Vide order dated 10.2.2003, this Commission disposed of the appeal of the petitioner, with certain modifications and upheld the order of the State Commission. On the other hand, appeal of respondent/complainant was dismissed by this Commission, vide its order dated 18.2.2003.

Petitioner did not pursue the matter further, whereas respondent/complainant filed Special Leave Petition in the Apex Court, which was disposed of vide order dated 23.7.2009, as referred to above.

Thereafter, petitioner vide letter dated 9.12.2009 sent a cheque of Rs. 5,97,706 (Rupees five lakh ninety seven thousand seven hundred

and six only) towards full and final payment in pursuance of Apex Court's order dated 23.7.2009. Being not satisfied with the action of the petitioner, respondent/claimant filed an execution application under Sections 25/27 of the Consumer Protection Act, 1986 (for short 'the Act') to which petitioner filed its reply.

Vide impugned order, state Commission directed the petitioner to make payment as mentioned in the order. Aggrieved by the impugned order petitioner filed this revisions petition.

Sections 25 to 27 of the Act have been enacted towards speedy enforcement of the orders of the District forum, the State Commission or the National Commission, as the case may be. These sections are in the nature of execution proceedings of the orders made by the three Redressal Agencies. While Section 25 of the Act visualizes the enforcement of such orders by a civil process, as if they were decree or order made by a Court of law, whereas, Section 27 of the Act confers a quasi-criminal sanction for their enforcement by way of punishment with imprisonment or imposition of monetary penalties. Since, the impugned order of the State Commission has been passed in the execution proceedings under Sections 25 and 27 of the Act, an appeal lies against the impugned order under Section 27-A of the Act.

When an equally efficacious remedy has been provided by way of an appeal against the impugned order, present revision petition under these circumstances is not maintainable. (**Oriental Insurance Co. Ltd. v. Perfect Prints through its Sole Proprietor Veena Gupta; 2012 (2) CPR 147 (NC)**)

Criminal Procedure Code

Appreciation of evidence

It is settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions/ improvements/embellishments, etc. had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not be made (sic make) the court to reject the evidence in its entirety. The court after going through the entire evidence must form an opinion

about the credibility of the witnesses and the appellate court in natural course would not be justified in reviewing the same against without justifiable reasons. (**Samsuddin Sheikh vs. State of Gujarat and Another; (2012) 1 SCC (Cri) 218**)

S. 125 – Maintenance – Proof of marriage – Need not to be strong and conclusive as in S. 494, IPC

That court held that validity of a marriage cannot be a ground for the refusal of maintenance if other requirements of Section 125 Cr.P.C. are fulfilled. Section 25 proceeds on the basis of a de facto marriage and not marriage de jure. The nature of proof of marriage required for a proceeding under Section 125 Cr.P.C. need not be so strong or conclusive as in a criminal proceeding to establish the offence under Section 494 IPC since the object of Section 125 Cr.P.C. is to afford a swift remedy, and determination by the Magistrate as to the status of the parties being subject to a final the determination of the civil court, when the husband denies that the applicant is not his wife, all that the Magistrate has to find in a proceeding under Section 125 Cr.P.C., is whether the evidence led raises a presumption that the applicant was the wife of the respondent. That would be sufficient for the Magistrate to pass an order granting maintenance. On facts held, that the appellant wife succeeded in proving that she was the legally married wife of the respondent with three children. It was also proved that the respondent husband started deserting the appellant wife after almost 25 years of marriage and in order to defeat the aim of maintenance, a story of previous marriage was set up, for which he failed to furnish any proof. Hence, it was not open for the High Court under its revisional jurisdiction to set aside finding of the trial court and absolve the respondent from paying maintenance of Rs. 500 p.m. to the appellant wife. Maintenance order is restored. (**Pyla Mutyalamma Alias Satyavathi vs. Pyla Suri Demuduu and another; (2012) 1 SCC (Cri) 371**)

S. 125

The court held that the words ‘not exceeding five hundred rupees in whole’ were omitted by Act 50 of 2001 w.e.f. 24.9.2001. Therefore, by virtue of amendment, there is no limitation now to

provide necessary maintenance under provision to such person who is entitled for maintenance thereunder.

Refusal to grant maintenance to wife on ground that interim maintenance of Rs. 500/- was granted to her in divorce petition was held to be improper. The Court held that subordinate Court should have separately gone into question of quantum of maintenance on ground of negligence and desertion alleged against husband even though interim maintenance was awarded in other proceeding. **(Kondaparthi Leelavathi & Anr. Vs. Sate of A.P. & Anr.; 2012 Cri.L.J. 870 (AP HC))**

S. 154 - FIR

The Court held that if witness took her deceased brother to hospital in an auto-rickshaw and her elder brother-Informant went to police station and gave complaint which indicates that brother reached police station prior to recording of her statement-Merely because she has stated in her evidence that her statement was recorded around 10.00 a.m., it cannot be concluded that her statement was prior to FIR which was recorded at instance of her brother at 11.00 a.m.-Use of words “around 10.00 a.m. appears to be an obvious error, it is also important to note that she is not an eye-witness, FIR recorded at instance of brother not a fabricated document. **(Jaisy @ Jayasee Ian vs. State, Rep. by Inspector of Police; 2012 Cri. L.J. 1024 (SC))**

S. 154 – Delay in FIR

In this case, the incident occurred opposite to the police station. When there was a delay of 12 hours in giving the complaint, the Court entertained a doubt about the genuineness of the version given by the prosecution at a belated stage and made the above observation. But in the present case, the offence took place at about 10.30 p.m. Immediately, they took the deceased to the hospital and the doctor on examining the deceased declared dead and they remained at the hospital till the morning and the report was presented to the police at about 7.00 a.m. on the next day morning. This is a case against the sole accused. There was consistency in the version of the prosecution from the beginning that the accused was responsible for the death of the deceased. The accused is no other than the neighbor of the deceased

and related to them. If there are number of accused and if overt acts are attributed to such accused, one can apprehend that the people who have not participated in the commission of offence were also arrayed as accused after due deliberations by taking sufficient time. But here there was only one accused who was inimical towards the deceased, therefore, the delay in preferring the complaint by itself is not a ground to throw away the prosecution case when there is sufficient material to establish that the accused is responsible for the commission of the offence, the above decision is not applicable to the facts of the case. (**Garlapati Krishna vs. State of A.P.; 2012 Cri.L.J. 691 (SC)**)

S. 164

There is no reason to disbelieve the version of Monika who witnessed the occurrence, neighbours and landlord of Manohar as well as the confessional statement of the accused before the Executive Magistrate,. Considering the opinion of the doctors, cause of death and recovery of a stone inside the house of Manohar where three different bodies were lying, we are satisfied that the prosecution has established its case beyond reasonable doubt for an offence under Section 302 IPC. The trial court considering the fact that the murders were neither premeditated nor pre-planned on the part of the appellant, and a simple case of land dispute which led to altercation and murdering of three persons, imposed life imprisonment under Section 302 IPC and rigorous imprisonment for seven years under Section 307 IPC. The said conclusion is acceptable. (**Sham Alias Kishore Bhaskarrao Matkari Vs. State of Maharashtra; (2012) 1 SCC(Cri) 298**)

S. 167(2)

Section 167(2) is one, dealing with the power of the learned Judicial Magistrate to remand an accused to custody. The 90 days' limitation is as such one relating to the power of the learned Magistrate. In other words the learned Magistrate cannot remand an accused to custody for a period of more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge sheet was filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail.

There is yet another aspect of the matter. The right under Section

167(2) Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. (**Pragyna Singh Thakur vs. State of Maharashtra; (2012) 1 SCC (Cri) 311**)

S. 190 – Cognizance of a criminal case

Section 190 of the Code lays down the condition which are requisite for the initiation of a criminal proceeding. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the Investigating Officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

The taking of cognizance means the point in time when a Court or a magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. (**Dr. Mrs. Nupur Talwar Vs. C.B.I., Delhi & Anr.; 2012 Cri.L.J. 954 (SC)**)

S. 190 – Initiation of criminal proceeding – Condition precedent – Magistrate required to exercise sound judicial discretion and apply his mind to the facts and material before him

Sec. 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding.

At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion

irrespective of the views expressed by the police in its report and may prima facie find out whether an offence has been made out or not. **(Dr. Mrs. Nupur Talwar v. C.B.I., Delhi; 2012 (77) ACC 718)**

Ss. 190 and 204

The court held that in a complaint case whether court taking cognizance and issuing process is justified in doing so, Test for. Held, if complaint contains assertions with sufficient amount of clarity on facts and events, which if taken as proved, can culminate in order of conviction against accused persons, then it is precisely the test to be applied while determining whether court taking cognizance and issuing process was justified in doing so.

The fact that the complaint previously filed had been quashed by the High Court on account of filing of a comprehensive complaint out of which these proceedings arise is, in our opinion, a complete answer to the charge of suppression. As on the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other court, the complaint before the Magistrate at Bangalore having been quashed without a trial on merits. Mere filing of a previous complaint could not in the above circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was, in our opinion, correct in holding that there was no violation of the provision of Section 202 Cr.PC. to warrant interference in exercise of revisional powers by the Sessions Judge. **(Helios and Matheson Information Technology Limited and others Vs. Rajeev Sawhney and another; (2012) 1 SCC (Cri) 767)**

S. 313 - Examination of accused under - Object of - Is to give opportunity to accused to explain circumstances appearing against him as well as to put forward his defence - Accused has freedom to maintain silence during examination - But if he makes statement supporting prosecution case it can be used against him

It is a settled principle of law that the obligation to put material evidence to the accused under Section 313, Cr.P.C. is upon the Court.

One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313, Cr.P.C., insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. (**Ramnaresh & Ors. v. State of Chhattisgarh; AIR 2012 SC 1357**)

S. 313

It is indeed true that the statements of the accused recorded under Section 313 Cr.P.C. are extremely perfunctory and do not satisfy the requirement of Section 313 Cr.P.C. We, however, find that no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. We should not however be held to mean that an argument with regard to a defective Section 313 statement cannot be raised at the SLP stage but we have gone through the grounds of SLP in this matter and find that no ground has been raised even before us in the SLP. In the absence of any complaint on this score, we must assume that the appellant had suffered no prejudice on account of a defective Section 313 statement. (**Fahim Khan Vs. State of Bihar now Jharkhand; (2012)1 SCC (Cri) 794**)

S. 313 – Statement under Sec. 313 supports the case of prosecution can be used as evidence against accused

It is settled principle of law that the statement of an accused under sec. 313, Cr.P.C. can be used as evidence against the accused, in so far as it supports the case of the prosecution. Equally true is that the statement under Sec. 313, Cr.P.C. simplicitor normally cannot be made the basis for conviction of the accused. But where the statement of the accused under sec. 313, Cr.P.C. is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced. (**Brajendra Singh v. State of M.P.; 2012**

(77) ACC 992)

S. 313 – Scope and ambit – It is a settled principle of law that the obligation to put material evidence to the accused u/s 313 Cr.P.C. is upon the court

It is settled principle of law that the obligation to put material evidence to the accused under Sec. 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Sec. 313 Cr.P.C.. in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the later, he faces the consequences in law. **(Ramnaresh & ors. v. State of Chahhattisgarh; 20120(3) Supreme 81)**

S. 320

The order cannot be passed only because one of the accused seeks permission to implead other person. Sufficient and cogent reasons are to be assigned by the Court. The power of summoning of additional accused under Section 319 of the Code is to be sparingly used. In the instant case, learned Special Judge has ordered to implead the present petitioner as accused No. 2 who has been discharged by his predecessor after careful consideration of the report under Section 169 of the Code and that too at belated stage after the evidence was closed by the prosecution. Invoking of power of addition of a person as co-accused at belated stage after the evidence was closed by the prosecution at the cost of de novo trial is not proper. This view has been endorsed by the Hon'ble the Apex Court in the case reported in AIR 2000 SC 1127. Moreover to issue summon to discharge accused is also not permissible especially when the order of discharge is not challenged by either of the parties and when the aid order has attained the finality, this Court is of the considered opinion that learned Special Judge has failed to consider very material and important aspect of the matter discussed hereinabove and has committed an error in passing the order date d19.6.2007 below

Exh. 84 in Special Case No. 1 of 2001 and, therefore, the same deserve to be quashed and set aside. (**Devendrakumar Hiralal Desai vs. State of Gujarat & Another; 2012 Cri.L.J. 233 (Gujarat HC)**)

S. 320 - Compounding of offence

What is important, however, is that in Ram Lal case [(2005) 1 SCC 347] the parties had settled that dispute among themselves after the appellants stood convicted under Section 326 IPC. The mutual settlement was then sought to be made a basis for compounding of the offence in appeal arising out of the order of conviction and sentence imposed upon the accused. This Court observed that since the offence was non-compoundable, the Court could not permit the same to be compounded, in the teeth of Section 320. Even so, the compromise was taken as an extenuating circumstances which the Court took into consideration to reduce the punishment awarded to the appellant to the period already undergone.

In our considered opinion, it would not be appropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory provisions. In our judgment, however, limited submission of the learned counsel for the appellant deserves consideration that while imposing substantive sentence, the factum of compromise between the parties is indeed a relevant circumstance which the court may keep in mind.

Having said so, we must hasten to add that the plenitude of the power under Section 482 Cr.P.C. by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be, for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in

which the inherent powers may be invoked. (**Shivji alias Pappu and others Vs. Radhika and another; (2012) 1 SCC (Cri) 101**)

S. 354(3) - Penology - Aggravating and mitigating circumstances - Balance between two has to struck between the two before deciding punishment - 'Doctrine of proportionality' has a valuable application to sentencing policy under Indian criminal jurisprudence - Aggravating and mitigating circumstances enumerated

The Supreme Court held that the law enunciated by this Court in its recent judgments, adds and elaborates the principles that were stated in the case of Bachan Singh (AIR 1980 SC 898) and thereafter, in the case of Machhi Singh (AIR 1983 SC 957). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate-for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3), Cr. P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public

place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving in-humane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43, Cr. P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these

situations in normal course,

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated,

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only

have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large. (**Ramnaresh & Ors. v. State of Chhattisgarh; AIR 2012 SC 1357**)

S. 354(3) - Death sentence - Awarding of - Principles to be applied

The principles to be applied for determining whether death sentence is to be awarded are as follows –

(1) The Court has to apply the test/to determine, if it was the rarest of rare case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (Planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

These are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. (**Ramnaresh & Ors. v. State of Chhattisgarh; AIR 2012 SC 1357**)

S. 362 – Review of a judgment

There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle

of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus office and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus office the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment.

The inherent power under Section 482, Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362, Cr.P.C. (**State of Punjab Vs. Davinder Pal Singh Bhullar & Ors. Etc. with Sumedh Singh Saini Vs. Davinder Pal Singh Bhullar & Ors.; 2012 Cri.L.J. 1001 (SC)**)

S. 378 - Appeal against acquittal - Setting aside of acquittal - Merely recording that judgment of Trial Court was perverse - Without dealing with facets of perversity relating to issue of law and or appreciation of evidence - Illegal

A very vital distinction which the Court has to keep in mind while dealing with appeals against the order of acquittal is that interference by the Court is justifiable only when a clear distinction is kept between perversity in appreciation of evidence and merely the

possibility of another view. It may not be quite appropriate for the High Court to merely record that the judgment of the trial Court was perverse without specifically dealing with the facets of perversity relating to the issues of law and/or appreciation of evidence, as otherwise such observations of the High Court may not be sustainable in law. (**Govindaraju alias Govinda v. State by Srirampuram P. S. & Anr.; AIR 2012 SC 1292**)

S. 378 – General principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal re-stated

In *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415, this court held as under:

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

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

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

(3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to

him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

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

(State of Haryana v. Shakuntala ors; 2012 (3) Supreme 113)

S. 406 – Transfer of cases – Factors to be considered before ordering transfer

Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Sec. 406 CrPC should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of traveling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.

The issue of transfer of proceedings under Section 406 of the CrPC was examined by this Court in *Vikas Kumar Roorkeval v. State of Uttarakhand*, (2011) 2 SCC 178, wherein this Court observed as under :

“23. It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is apprehension that justice will not be done cannot be the basis for transfer. However, there is no manner of doubt that the reasonable apprehension that there would be failure of justice and acquittal of the accused only because the witnesses are threatened is made out by the petitioner.”

Court has further held that inconvenience cannot be a valid basis for transfer of “criminal proceedings” from one court to another. Baseless insinuations against the presiding officer of the court may invite action and transfer petition based on vague allegations cannot be granted. (**Rajesh Talwar v. Central Bureau of Investigation and ors.; 2012 (2) Supreme 483**)

S. 437 - Provision of Bail

The Court held that the relevant considerations in this case are: (i) the accused has been in jail since 24.8.2009, (ii) trial had commenced by examining two prosecution witnesses, (iii) assurance by the State that trial will not be prolonged and concluded within a reasonable time, and (iv) the High Court while granting bail has imposed several conditions for strict adherence during the period of bail. The High Court has made it clear that in case of breach of any of the conditions, the trial court will have liberty to take steps to send the accused to jail again. The appellant is free to inform the trial court if he receives any fresh threat from the accused or from his supporters, and the trial court is free to take appropriate steps as observed by the High Court. The trial court must complete the trial within four months from receipt of the order. Hence, the grant of conditional bail is upheld. (**Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and Another; (2012) 1 SCC (Cri) 681**)

S. 439 – Anticipatory bail – Grant of – It cannot be granted as a matter of rule

There is no substantial difference between sections 438 and 439, Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the Court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.

This court in Siddaram Satlingappa Mhetre (supra) after considering the earlier judgments of the Court laid down certain factors and parameters to be considered while considering application for anticipatory bail :

“122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail :

- (i) The nature and gravity of the accusation and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice;
- (iv) The possibility of the accused's likelihood to repeat similar or the other offences.
- (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicate with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution

because over-implication in the case is a matter of common knowledge and concern;

- (viii) While considering the prayer for grant of anticipatory bail a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
- (x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

(Jai Prakash Singh v. State of Bihar; 2012 (77) ACC 245)

439 - Bail – Prayer for short term bail on ground of his sister’s marriage – Short term bail application rejected and even not allowed appellant to go to the venue of marriage in custody

In this case Learned Counsel for the appellant also made a prayer for short term bail on the ground that his sister is to be married on 24.4.2012. As the father of the appellant who was also a co-accused, has been granted bail and is out of jail, there is no reason for granting short term bail, or even allowing the appellant to go to the venue of the marriage in custody. We do not see any merit in the short term bail application also and it is accordingly rejected. (**Upendra Singh v. State of U.P.; 2012 (77) ACC 801**)

S. 482 – Exercise of power under only in appropriate cases to secure ends of justice

Prosecution instituted against accused can be quashed, in exercise of powers under section 482 Cr.P.C., only when (i) the record of the case does not disclose commission of any offence; (ii) or when there is absolute no legal evidence against the accused, (iii) or when the

evidences likely to be adduced in the case fails to establish the charge or (iv) he prosecution was initiated with mala-fide or vindictive intentions, (v) there is legal bar in continuation of the same. It is trite law that such wholesome power has to be exercised sparingly, only in appropriate cases, to secure the ends of justice. The very plenitude of the power requires it's exercise with circumspection does not fall within the purview of above categories, though they are not exhaustive, it cannot be quashed at it's very genesis is not desirable when prima-facie allegations on the face of the record discloses commission of offence requiring full-fledged trial. Such inherent power should not be mechanically exercised to stifle a legitimate trial because that will be an unwarranted intervention on Trial Court's power and will perpetuate manifest injustice. Only to prevent miscarriage of justice or to correct some grave error apparent on the face of the record that the power under section 482 Cr.P.C. should be resorted to sparingly, only in an appropriate cases.

Thus prosecution can be quashed only when commission of offence is not disclosed or when there is absolutely no legal evidence against the accused or evidence likely to be adduced fail to establish the charge or prosecution is mala fide or there is legal bar in continuation of the prosecution. (**Afjal v. State of U.P.; 2012 (77) ACC 7 (HC)**)

S. 482 – Scope and ambit – Inherent powers vested in the High Court U/s 482 of the code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice

It is true that the inherent powers vested in the high court under Sec. 482 of the code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the high court to act according to whims or caprice. This extra-ordinary power has to be exercised sparingly with circumspection and as far as possible, for extra-ordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those in charge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation. (**State of Orissa & ors. v. Ujjal Kumar Burdhan; 2012**

(3) Supreme 73)

Transfer of the cases

It is also significant to note that while the order was being dictated by the learned Special Judge, Respondent 1 moved an application for transfer of the case since allegedly an opportunity of being heard through an advocate of her choice was denied to her. This application was rightly rejected by the Special Judge for want of jurisdiction. The learned Special Judge then framed charges against Respondent 1 and the other accused. Respondent 1 then requested the High Court to transfer her case from the file of the learned Special Judge, Chamba to the Court of the Special Judge, Kangra on the ground that she had reasonable apprehension that she will not get a fair trial. The High Court, in our opinion, wrongly transferred the case as desired by respondent 1, Apprehension expressed by Respondent 1 that she would not get a fair trial was baseless.

We have already noted the number of dates on which the learned Special Judge adjourned the proceedings. It is only when he was satisfied that Respondent 1 was purposely seeking adjournment and that Mr. Malhotra, counsel appearing for Respondent 1 had argued her case that the learned Special Judge refused to grant further adjournment. We do not find any material to substantiate the fear expressed by Respondent 1 that she would not get a fair trial. The High Court, therefore, should not have transferred the case to the Special Judge, Kangra, Needless to say that such transfers ordered merely on the say-so of a party have a demoralizing effect on the trial courts. Unless a very strong case based on concrete material is made out, such transfers should not be ordered. **(Ashish Chadha Vs. Asha Kumari and another; (2012) 1 SCC (Cri) 744)**

Criminal Trial

Non examination of investigation officer – Effect of

The mere fact that the Investigating Officer has not been produced, or that there is no specific explanation on record as to how Ram Dutt suffered there injuries, would not vitiate the trial or the case of the prosecution in its entirety. These claims of the accused would have been relevant considerations, provided the accused had been

able to establish the other facts alleged by them. It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. (**Mano Dutt v. State of U.P.; 2012 (77) ACC 209 (SC)**)

Evidence – Minor discrepancies and contradictions – Consideration of

The difference between discrepancies and contradictions was explained by this Court in *State of Himachal Pradesh v. Lekh Raj and anr.*, AIR 1999 SC 3916. Reference may also be made to the decision of this court in *State of Haryana v. Gurdial Singh and Pargat Singh*, AIR 1974 SC 1871, where the prosecution witness had come out with two inconsistent versions of the occurrence. One of these versions was given in the Court while the other was contained in the statement made before the Police. This Court held that these are contradictory versions on which the conclusion of fact could not be safely based. This Court observed :

“The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version of the occurrence is contained in the evidence of the witnesses in court, while the other version is contained in their statements made before the police... In view of these contradictory versions, the High Court, in our opinion, rightly came to the conclusion that the conviction of the accused could not be sustained.” (**Sampath Kumar v. Inspector of Police, Krishnagiri; 2012 (2) Supreme 561**)

Motive – Motive however strong creates only suspicion and cannot take place of conclusive proof

One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt. (**Sampath Kumar v. Inspector of Police, Krishnagiri; 2012 (2) Supreme 561**)

Fair Trial – Scope and Ambit – A ‘fair trial’ is the bear of criminal jurisprudence, in a way, an important fact of a democratic polity that is governed by Rule of Law, Denial of far trial is crucifixion human rights

Decidedly, there has to be a fair trial and so miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of punk of perfection in procedure. An absolute apple pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism.

In *Mrs. Klayani Baskar v. Mrs. M. S. Sampooram*, (2007) 2 SCC 258, it has been laid down that ‘fair trial’ includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.

It would not be an exaggeration if it is stated that a ‘fair trial’ is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of ‘fair trial’ is crucifixion of human rights. (**Rattiram & ors. v. State of M.P. through Inspector of Police; (2012) 3 Supreme 49**)

Death sentence – Principles governing imposition of

Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other

factors and attendant circumstances. Most of the heinous crimes under the IPC are punishable by death penalty of life imprisonment that by itself does not suggest that in all such offences, penalty of death alone should be awarded. In such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. **(Ramnaresh & ors. v. State of Chhattisgarh; 2012 (3) Supreme 81)**

Electricity Act

S. 125 – CPC Sec. 100 – Sec. 125 of above Act is akin to section 100 CPC and same principle apply

An appeal under S. 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in S. 100 of the Code of Civil Procedure. S. 100 of the CPC in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the Courts below, which would in the present case, imply the Regulatory Commission as the Court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be re-opened before this Court in an appeal under section 125 of the Electricity Act, 2003. Justice as the High Court cannot interfere with the concurrent findings of fact recorded by the Courts below in a second appeal under Section 100 of the CPC, so also this Court would be loathed to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. **(M/s DSR Steel (P) Ltd. v. State of Rajasthan and ors.; 2012 (3) Supreme 177)**

Evidence Act

S. 3 – Sole eye-witness – Evidence of -Sufficiency – As a rule it cannot be stated that Police Officer can or cannot be sole eye-witness in criminal case - Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record

Therefore, the first question that arises for consideration is

whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. it cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

The obvious result of the above discussion is that the statement of a police officer can be relied upon and even from the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record. (**Govindaraju alias Govinda v. State by Srirampuram P. S. & Anr.; AIR 2012 SC 1292**)

S. 3 – Interested witness – Relative of deceased – is not necessarily interested witness. Witness to be interested must have some direct interest in having accused somehow convicted for some extraneous reason

The Court in State of Rajasthan v. Smt. Kalki and another [(1981) 2 SCC 752] : (AIR 1981 SC 1390), Myladimmal Surendran and others v. State of Kerala [(2010) 11SC 129]: (AIR 2010 sc 3281: 2010 AIR SCW 5248) and Samsuddin Sheikh v, State of Gujarat and another [(2011) 10 SCC 158] : (AIR 2012 SC 37 : 2011 AIR SCW 6486), an interested witness must have some direct interest in having the accused somehow convicted for some extraneous reason and a near relative of the victim is not necessarily an interested witness. (**Amit v. State of Uttar Pradesh; AIR 2012 SC 1433**)

S. 3 - Circumstantial evidence - Conviction on basis of - Conditions to be satisfied

The prosecution has to satisfy certain conditions before a

conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. **(Brajendra Singh v. State of Madhya Pradesh; AIR 2012 SC 1552)**

S. 3 – Evidence of sole eye-witness – Credibility of

In the case of *Joseph v. State of Kerala*, (2003) 1 SCC 465, this Court has stated the principle that where there is a sole witness to the incident, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of evidence tendered by other witnesses or the material evidences placed on record. This Court further stated that section 134 of the Indian Evidence Act does not provide for any particular number of witnesses and it would be permissible for the Court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if evidence tendered by such a witness is credible, reliable, in tune with the case of the prosecution and inspires implicit confidence. In the case of *Inder Singh* (supra), the Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence inspiring and beyond suspicion, this, leaving no doubt in the mind of the Court. **(Ramnaresh & ors. v. State of Chhattisgarh; 2012 (3) Supreme 81)**

S.3 – Hostile witness – Admissibility of

It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses

cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the Court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. **(Bhajju v. State of M.P.; 2012 (77) ACC 192 (SC))**

Ss. 3, 30 and 24 – Confession – Admissibility of – Though it to be regarded as evidence in generic sense because of provisions of Sec. 30, even then it not an evidence as defined in Sec. 3

This Court in Haricharan case clarified that though confession may be regarded as evidence in generic sense because of the provisions of section 30 of the Evidence Act, the fact remains that it is not evidence as defined in section 3 of the Evidence Act. Therefore, in dealing with a case against an accused the Court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. **(Takdir Samsuddin Sheikh v. State of Gujarat; 2012 (77) ACC 269)**

S. 11 – Plea of alibi – Concurrent finding of courts below cannot be disturbed

The learned counsel appearing for the appellant has contended that the plea of alibi of Rajender, Krishan and Kilash should have been accepted by the High Court. The accused have led their defence and produced defence witnesses to prove their plea of alibi. It is also their contention that the evidence of the defence witnesses should be

appreciated at par with the prosecution witnesses.

In this regard, reliance is also placed upon the judgment of this court in *Munshi Prasad ors. vs. State of Bihar*, (2002) 1 SCC 351. The Trial Court as well as the High Court disbelieved the plea of alibi of accused Rajender, Krishan and Kailash. (**State of Haryana v. Shakuntala ors; 2012 (3) Supreme 113**)

S. 27 – Recovery of weapon etc. – Statement of witness, Police Officer in that regard – Not reliable and not inspiring confidence – Accused would be entitled to benefit of doubt

The Court said the we are certainly not indicating that despite all this, the statement of the Police Officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not inspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the Investigating Officer recorded the statement of the accused and the article was recovered pursuant thereto, is not a sufficient ground to discard the evidence of the Police Officer relating to recovery at the instance of the accused. {See *State Government of NCT of Delhi v. Sunil & Anr.* [(2001) 1 SCC 652 : (2000 AIR SCW 4398)]}. Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the Police Officer itself is unreliable then it may be difficult for the Court to accept the recovery as lawful and legally admissible. The official acts of the Police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence. (**Govindaraju alias Govinda v. State by Srirampuram P. S. & Anr.; AIR 2012 SC 1292**)

S. 27

Court held that articles which are stated to have been discovered are easily available in the market. There is nothing special about them. Belated discovery of these articles raises a question about their intrinsic evidentiary value. Besides, if as contended by the

prosecution, the accused wanted to sell parts of the tractor, it is difficult to believe that they would preserve them till 1.8.1999. The evidence relating to discovery of these articles must, therefore, be rejected. (**Pancho Vs. State of Haryana; (2012) 1 SCC (Cri) 223**)

S. 32 - Dying Declaration

Penal Code, 1860 – S.302 – Murder trial, appreciation of evidence, Dying declaration, Acceptability, Acquittal restored, State of mind of deceased who was drugged/sedated with painkillers, at the time dying declaration was recorded, cause of death, septicemia due to 97% burns, trial court acquitted appellant finding that dying declaration does not inspire confidence, High Court reversed judgment of trial Judge and sentenced appellant to life imprisonment, various important witnesses not produced by prosecution, Dying declaration totally in conflict with prosecution version as to: (i) time of burning (ii) relation of appellant with deceased -Deceased was under influence of Fortwin and Pethidine injections (sedative painkillers) at the time of recording of dying declaration-Deceased was thus not supposed to be having normal alertness, when Magistrate recorded statement of deceased, doctor was not present and subsequently on request of police officer, doctor offered his opinion, that patient was fit to make a statement, procedure adopted by Magistrate while recording dying declaration is not acceptable, Held, dying declaration does not inspire confidence, appellant is entitled to benefit of doubt.

- Registration of birth certificate reveals prosecutrix was less than 16 years of age on date of incident, Radiologist's report revealed that age of prosecutrix was 16 to 17 years, Defence also produced certificate from Hospital, IO in order to aid appellant-accused had made a statement that certificate on record did not belong to prosecutrix, Registration of birth certificate duly proved by Medical Record Officer and CMO, NDMC and it was explained that birth certificate produced by defence was of a different female child, Documents have thoroughly been examined by courts below, No reason to examine issue further, Radiologist's report cannot predict exact date of birth, Margin of error in age ascertained by radiological examination is two years on either side, Original record produced before court,

Held., prosecutrix was less than 16 years of age on date of incident. **(Surinder Kumar vs. State of Haryana; (2012) 1 SCC (Cri) 230)**

Appreciation of Evidence S. 376 IPC

IO made an attempt to help appellant-accused, in examination in chief he deposed that birth certificate was genuine, in cross examination he deposed that “birth certificate of prosecutrix did not relate to prosecutrix”. IO was not declared hostile, Held, in view of birth certificate available on record, and accepted as genuine, this part of statement of IO cannot be believed. Criminal Justice should not be made a casualty for wrongs committed by investigating officers. Investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct.

- Court have already noted the statement of the accused himself to the Executive Magistrate at the time when he was admitted in the hospital. Since he was alive, the statement recorded by the Executive Magistrate had been treated as statement under Section 164 of the Code of Criminal Procedure, 1973 (in short “the Coe”) and proceeded further. Though the said statement is not a dying declaration, however, the accused knowing all the seriousness confessed about the killing of his brother, his wife and their child and causing injuries to the other two children. **(Mohd. Imran Khan vs. State Government (NCT of Delhi); (2012) 1 SCC (Cri) 240)**

Appreciation of Evidence in complaint case

The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, provision to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable to punishment. Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on

those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners “qua” the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced – if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal. (**Rallis India Limited Vs. Poduru Vidya Bhushan and others; (2012) 1 SCC (Cri) 778**)

Appreciation of Evidence

We have seen the whole evidence. The only explanation that this witness has given is that he did not mention the name of the accused in the FIR as he could not properly hear the name of the culprit when the matter was informed to him by his younger brother. This witness has specifically admitted that he was in the hospital from 10 p.m. to 3 a.m. and he looked after the injured person. He also asserted that he never went outside the hospital during that period. He also admitted that there was another person in the village who was related to them bearing the same name as that of the appellant. A specific suggestion was given to him that Oinam Deben Singh and L. Subhaschandra Singh had never informed him about the dying declaration made by the deceased involving the present appellant. (**Waikhom Yaima Singh Vs. State of Manipur; (2012) 1 SCC (Cri) 788**)

Motive

Motive for the commission of an offence no doubt assume greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet e experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what Wills has in his book “Circumstantial Evidence” said:

“The common inducements to crime are the desires of revenging

some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation of burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion.” (**Amitava Banerjee alias Amit alias Bappa Banerjee vs. State of West Bengal; 2012 Cri.L.J. 390 (SC)**)

S. 32 – Dying Declaration – Admissibility of – Consideration for

The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so informal that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the lapses of investigation. It must allure the satisfaction of the court that reliance ought to be placed thereon rather than distrust.

It will also be of some help to refer to the judgment of this Court in the case of *Mutthu Kutty and another v. State by Inspector of Police, T.N.*, 2005 (25) AIC 729 (SC) = (2005) 9 SCC 113 = 2005 (51) ACC 309 (SC), where the Court, in paragraph 16 and 17, held as under :

“16. 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 a 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. This court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat*, (1992) 2 SCC 474 = 1992 SCC (Cri) 403 = AIR 1992 SC 1817 – 1992 (2) ACC 527 (SC) (SCC pp. 480-481, paras 18-19)

17. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*)

(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 U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar*)

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the results 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 v. Public Prosecutor.*)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.*)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake sigh v. State of M.P.*)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.*)

(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. Krishnamurti Laxmipati Naidu*)

(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 Ojha v. State of Bihar*).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

(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*)

(xi) Where there are 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 declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra*) (**Bhajju v. State of M.P.; 2012 (77) ACC 192 (SC)**)

S. 32 – Dying Declaration – When can form basis of conviction

The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short ‘the Act’) is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Sec. 32 makes the statement of the deceased admissible, which is generally described as a ‘dying declaration’. The ‘dying declaration’ essentially means the statement made by a person as to the cause of his death or as

to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth. Once the court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid own as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. (**Bhajju @ Karan Singh v. State of M.P.; 2012 (2) Supreme 439 (MP)**)

S. 65 – Secondary evidence – When permissible

After the death of Siya Ram on 24th October, 1977, the postmortem on the body of the deceased was performed by Dr. S.N. Rai, P.W. 4, who notice four ante-mortem injuries as follows:

(1) Lacerated would 2.5 cm x $\frac{3}{4}$ cm x bone deep, on Rt. Side head, 6.5 cm above the eyebrow of right eye.

(2) Lacerated wound 2.5. cm x 1 cm x bone deep injuries 1-2 cm on the left side of the head.

(3) Contusion 6 cm x 4 cm in the right side of the face involving whole orbital area.

(4) Diffused, swelling on the Rt. Side of head parietal region.” (**Mano Dutt v. State of U.P.; 2012 (77) ACC 209 (SC)**)

Fatal Accident Act

S. 1-A – Fatal accident – Quantum – Deceased aged 27, craftsman earning Rs. 6000/- per month died to burning and bursting of transformer – Claimants were widow and 5 children – Trial Court

awarded Rs. 8,64,000/- was just

The plaintiffs-respondents filed suit against the defendants for the recovery of Rs. 10,08,000/- as compensation on account of death of Mohmad Anis, on account of the negligence of the defendants, under the Indian Fatal Accidents Act, 1855. They pleaded in their plaint that plaintiff No. 1 is the widow whereas plaintiff Nos. 2 to 6 are the sons and daughters of deceased. Defendants had installed two electric transformers of 200 KVA each in the area of Pathana Mohalla near Shiv Chowk, Sanoli Road, New Sabji Mandi, Panipat, for the supply of electricity in the area of that mohalla and other localities, which burnt down on 18.7.2003, at 8/8, 15 p.m. for want of proper maintenance. On account of the burning and bursting of those transformers, 12 persons, including the deceased, lost their lives. At the time of his death, he was a healthy person and was only 27 years old. He was doing the work of craftsman and was earning Rs. 6,000 per month. All of them were dependent upon him. Legal notice dated 24.10.2003 was served upon the defendant to pay the compensation of Rs. 10,08,000, who in spite of service of the notice and expiry of the statutory period of 60 days, failed to pay any such compensation.

It has been submitted by the learned counsel for the defendants that compensation so awarded to the plaintiff's is on the higher side. On the other hand, it has been contended by the counsel for the plaintiffs that the fact that the deceased was a craftsman having income of Rs. 6,000 per month was never denied by the defendants and as such no evidence was required to be produced in view of that admission. A correct finding was recorded and the compensation was correctly awarded.

In instant case, it was specifically pleaded by the plaintiffs in the plaint that the deceased was a craftsman and was having a monthly income of Rs. 6,000/-. In the written statement, defendants denied the contents of that para for want of knowledge. When there is no specific denial nor any such denial by implication, the defendants are deemed to have admitted that fact. Therefore, even if no such evidence was produced, the trial court and the first appellate court not commit any illegality while calculating the income of the deceased to be Rs. 6,000 per month. (**Uttar Haryana Bijli Vitran Nigam Ltd. v. Rasida; ACJ**

2012 737)

Food Adulteration Act

S. 7 r/w Sec. 16(1)(a)- Conviction for sale of adulterated cow-milk - Sentence can be reduced where accused has no criminal history

The petitioner was convicted for an offence under Section 7 read with Section 16(1)(a)(i) of the Prevention of Food Adulteration Act 1954 vide judgment dated 16-4-2001 passed by the Chief Judicial Magistrate, Hisar. Vide order dated 17-4-2001 he was sentenced to undergo rigorous imprisonment for a period of six months and pay fine of Rs. 1,000. Aggrieved by the same, the petitioner filed an appeal, which was dismissed by the Additional Sessions Judge, Hisar vide judgment dated 29-4-2005. Hence, the present revision petition.

Learned counsel of the petitioner, during the course of arguments, has not challenged the conviction part of the judgment prayed that the sentence qua imprisonment be reduced to already undergone by the petitioner. In support of his arguments learned Counsel for the petitioner has placed reliance on *Risala v. State of Haryana*, wherein it was held that since the petitioner had suffered protracted trial of 24 years, it would be appropriate to reduce the sentence of fine was enhanced to Rs. 10,000.

There is nothing on record to suggest that the petitioner was a previous convict. The sample of milk was drawn on 26-7-1993. Since then the petitioner is facing the criminal proceedings.

Accordingly, the conviction of the petitioner is maintained. However, the sentence qua imprisonment is reduced to already undergone by him and sentence of fine is enhanced to Rs. 10,000 to be deposited by the petitioner within a period of two months. (**Chandgi Ram v. State of Haryana through Food Inspector, Hisar; 2012 FAJ239 (P&H)**)

Ss. 7 and 16 r/w Sec. 13 (2) –Cr.PC , Sec 482 – Sale of adulterated Ghee–Cognizance – Though prosecution has been launched after two years, sample of packed Ghee manufactured by petitioner has been taken for analysis - Although there is delay, but delay is required to be explained by prosecution - Effect of - Only ground of delay

proceeding cannot be quashed

In the present case, though the prosecution has been launched after more than two years, sample of packed Anik Ghee manufactured by the petitioner has been taken for analysis. Although there is delay, but delay is required to be explained by the prosecution as held by the Madhya Pradesh High Court in Suresh Narayanan's case (supra). In absence of any contrary material it would be difficult to hold that life of packed Anik Ghee was ten months or it was not fit for use after, some period. Even otherwise, the petitioner has not exercised its valuable right available under Section 13(2) of the Act for analyzing the sample from the Central Food Laboratory. In absence of contrary report of the Central Food Laboratory, it would be difficult to hold that the food was not fit for analysis or that its nature has changed after lapse of some period. In these circumstances, only on the ground of delay proceeding cannot be quashed.

Consequently I do not find any ground for quashment of criminal proceeding. Therefore, the petition is dismissed. **(Hindustan Lever Ltd. (Now known as Hindustan Unilever Ltd. v. State of Chhattisgarh and Ors.; 2012 FAJ 278 (Chhatt))**

Ss. 7 and 16 – Cr.PC Sec. 378 – Sale of Adulterated Laboratory is contrary to report of Public Analyst –Held, “Report of central food Laboratory supersedes report of public Analyst”, while report of central food Laboratory do not suggest about any colour used in preparation of biscuit Hence Acquittal was valid

The trial Court has, after appreciating the oral as well as documentary evidence, found that though it is the case of the complainant that all the procedure of sampling has been done in the presence of his assistant, prosecution has not examined the assistant of the complainant. Therefore, only evidence of complainant cannot be considered. It is also observed by the learned Magistrate that the sample was taken on 26th February 1992, analysis was done on 11th March 1992 and complaint was

filed on 19th May 1992. Thus, there is a delay of more than three months in filing the delay after the sample was taken. The complainant had not explained the delay of more than three months in filing the complaint. It is also observed by the learned Magistrate that report of the Central Food Laboratory is contrary to the report of the Public Analyst and the report of the Central Food Laboratory supersedes the report of the public analyst and therefore, report of the public analyst have no importance. The report of the Central Food Laboratory do not suggest that any prohibited colour was used in preparation of biscuit. It is also observed by the learned Magistrate that the prosecution has not proved the case against the respondent-accused beyond reasonable doubt. The Trial Court has also observed that there are serious lacuna in the oral as well documentary evidence of prosecution. Nothing is produced on record of this appeal to rebut the concrete findings of the Trial Court.

Thus, the appellant could not bring home the charges against respondent-accused in the present appeal. The prosecution has miserably failed to prove the case against the respondent accused. Thus, from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt.

Mr. H.H Parikh, learned Additional Public Prosecutor, is not in a position to show any evidence to take a contrary view in the matter or that the approach of the trial Court is vitiated by some manifest illegality or that the decision is perverse or that the trial Court has ignored the material evidence on record.

In above view of the matter, I am of the considered opinion that the trial Court was completely justified in acquitting the respondent-accused of the charges levelled against him. **(State of Gujarat v. Bashir Ahmad Miya Ahmad; 2012 FAJ 241 (Guj))**

S. 7 r/w Section 16 and 13(2) - Nothing has been mentioned in

packet relating to its best use before same matters of its packing – Effect of

As per the complaint, the petitioner is manufacturer of Bru Instant Coffee Chicory Mixture, a food article. The Food Inspector has purchased aforesaid food i.e. packed coffee packet on 30.7.2008 from its agent. After complying with the procedure, same was sent for analysis to the Public Analyst. As per report of the Public Analyst, same was found adulterated vide report dated 8.9.2008. Complaint has been launched against the petitioner and other accused on 27.4.2010 i.e. after lapse of more than one year seven months.

Learned Senior Advocate appearing on behalf of the petitioner vehemently argued that sample has been taken on 30.7.2008, Public Analyst has analyzed the sample on 8.9.2008 which has been received by the Food Inspector on 13.10.2008, but complaint has been filed on 27.4.2010 after lapse of one year nine months of purchase of the food article. After lapse of one year nine months, the food would not be fit for analysis by the Central Food Laboratory. Therefore, the petitioner has been deprived to analyze the sample from the Central Food Laboratory and due to inordinate delay the proceeding required to be quashed under Section 482 of the Cr.PC. Learned Senior Advocate placed reliance in the matter of M/s Hindustan Lever Limited- and another v: The State of Chhattisgarh in which this Court has held that after the period of best use i.e. best use of food, prosecution would be abuse of process of the Court.

On the other hand, learned State counsel opposed the petition and submitted that packed food i.e. Coffee manufactured by the petitioner has been found adulterated. Although prosecution has been launched after one year nine months, but no period has been prescribed on the packet of the coffee relating to its best use.

As per copy of the complaint and other documents,

nothing has been mentioned in the packet relating to its best use before some months of its packing. The petitioner has not exercised the right available under Section 13 (2) of the Act to analyze the sample from the Central Food Laboratory.

In the matter of M/s Hindustan Lever Limited (supra), prosecution has been quashed on the ground that after stipulated period mentioned in the packet, launching of prosecution after more than one year has caused prejudice to the accused and the accused is deprived of its valuable right to analyze the sample from the Central Food Laboratory. The case of M/s Hindustan Lever Limited (supra) is distinguishable on acts to that of the present case.

In the present case, I do not find any ground for quashment of criminal proceeding in absence of such condition. **(Hindustan Unilever Ltd. V. State of Chhattisgarh and Ors.; 2012 FAJ 270 (Chhatt))**

Ss.13(2) and 20 - Prevention of food Adulteration Rules, R. 9B - Cr.PC Sec. 482 – Adulteration – Criminal Prosecution - Violation of mandatory provision of Sec. 13(2) – Effect of –Prosecution cannot continue where there is flagrant violation of mandate of law

The Prevention of Food Adulteration Act, 1954 time to time faced radical changes and during said course through amendment, the valuable right of accused has been recognized and an attempt has been made to preserve the same so that they should not feel prejudiced. In the aforesaid background Subsection-2 of Section-13, has visualized. According to Subsection-2 of Section-13 an obligation has been put upon the complainant, the local health authority, to serve a copy of public analyst report upon the accused just after launching of prosecution whereupon, if so required. the accused may file a petition before the court concerned within ten days of receipt of that report showing his intention to challenge the report of public analyst so that sample be examined by the Central analyst. Subsection-2 of Section-13 does not prescribe any time limit

where under the local health authority (Complainant) is bound to serve a copy of public analyst upon the accused.

According Sub Rule 9 (B) only ten days time was prescribed and was made available to the prosecution from the date of launching of prosecution to serve copy of public analyst report. If no report is served within the aforesaid stipulated period, certainly in that event, it will be presumed that there has been flagrant violation of mandate of the law and ultimately the aforesaid event is going to lean in favour of accused.

Now, coming to the present case, the State through counter affidavit has not controverted the aforesaid event. The order impugned also did not speak whether the aforesaid mandatory provision was ever complied with. During course of rejection of the prayer of accused/petitioners for discharge the learned lower court had not explained the aforesaid event; Petitioners though failed to file order-sheets to show that at initial stage such pleas were taken however Annexure-S happens to be there whereunder such ground has been taken at the time of charge. Hence these happen to be uncontroverted plea existing on the record which ought to have been considered by the court.

In the aforesaid facts and circumstances of the case, because of the fact that the petitioners have been deprived of to file mandatory provisions of law by the prosecution negligently or intentionally whichever may be subsequent prosecution cannot be permitted to continue. **(Shanti Kumar Jain v. State of Bihar & Anr.; 2012 FAJ 253 (Pat.))**

S. 16(1)(a) (i) – Sale of adulterated cow Milk – Conviction - Rigorous imprisonment for six months and fine of 1000 awarded – Evidence led by prosecution appreciated in right perspective – Findings of courts below do not call for any interference at revisional stage on the ground that evidence cannot be re-appreciated at revisional stage

The allegations against the petitioner are that he was

found having in his possession adulterated cow's milk, contained in a drum, for public sale. On receipt of the report of public analyst to the effect that the milk so purchased was not to the prescribed standards as laid down under the rules, complaint was filed against him. After recording the preliminary evidence, notice of accusation was issued to the accused to which he denied as incorrect. The complainant led further evidence. The accused was also examined under Section 313 Cr.P.C. Opportunity to lead defence was also-given.

Ultimately, the trial ended in conviction. His appeal also failed. Without assailing the judgment of conviction, learned counsel for the petitioner has urged far extending some leniency on the quantum of sentence.

Even otherwise, on scrutiny of the impugned judgment, it transpires that the evidence led by the prosecution appears to have been appreciated in the right perspective. No such illegality much less irregularity or perversity was found or detected which may result into miscarriage of justice. As such, the findings of both the Court's below do not call for any interference at this revisional stage. (**Bhagwan Singh v. State of Haryana; 2012 FAJ 234 (P&H)**)

Ss. 16 (1)(1A) - Sale of adulterated salt - In case of branded article without impleading co. as accused, food Inspector has launched prosecution against applicant conviction - Legality of

As per case of the prosecution, the applicant has old Trishul brand iodized salt manufactured by Durga Salt Company and same was found adulterated. Prosecution was launched and the applicant has been convicted and sentenced as aforesaid.

At the outset, learned counsel for the applicant submits that the Food Inspector has purchased branded food article from shop, but has not enquired that who was the owner of shop, whether the applicant was owner of shop, inter alia, the

applicant has suggested the Food Inspector that owner of the shop was Manohar Lal Lal Chand and not the applicant. Even the Food Inspector has purchased salt manufactured by Durga Salt Company and the applicant has not sold the open food i.e. he has sold packed food manufactured by the Company, but the Company has not been made as accused. In these circumstances, jail sentence awarded to the applicant is causing hardship to the applicant for the casual act of the applicant and he is facing prosecution since 1995. Learned counsel by placing reliance in the matter of Satya Narayan Agarwal v. State of Assam, contends that the benefit extended to the accused in Satya Narayan's case (supra) be extended to the applicant.

On the other hand, learned State counsel opposes the application and submits that the Food Inspector has purchased branded salt, but has not made the Company as accuse.

Considering the peculiar facts of the case that in case of branded article without impleading the Company as accused the Food Inspector has launched prosecution against the applicant, I am of the view that the benefit extended by the Supreme Court in the matter of Satya Narayan (supra) should be extended to the applicant

In the light of dictum of the Supreme Court in Satya Narayan's case (supra), the revision is partly allowed. Conviction of the applicant is hereby maintained. **(Pawan Kumar Navlani (in jail) v. State of M.P. (now the State of C.G.))**

Houses and Rent

Sub-Letting - The term - Explanation of

It is very difficult for a landlord to prove sub-letting where a brother of the tenant is sitting in the shop. Sub-letting is a private affair between the tenant and the sub-tenant. The landlord is not privy to such an understanding. The circumstances of such a sub-letting can be gathered from the surrounding events and facts. In this case the tenant admittedly lives with his family in Delhi and is doing his own business

there. His brother was found in the shop in dispute. The tenant-revisionist accepts that when he is absent his brother sits in the shop. This circumstance indicates that the tenant revisionist is doing business in Delhi and his family lives with him in Delhi. When he is earning his livelihood in Delhi with his family then he is definitely settled in Delhi and is not doing business in the shop in dispute. He has not filed any evidence to show as to when he sits in the shop in dispute. In the absence of such evidence the circumstance is that his brother Adil is doing business in the shop. Whether he is getting any monetary consideration from his brother for using the shop is privy to him. The landlord cannot lead any evidence on a fact privy to the tenant and his sub-tenant. Therefore the circumstances indicate of a sub-letting by the tenant to his brother. The brother is not a member of the family of a tenant. Hence it cannot be held that a family member of the tenant was found sitting in the shop in dispute. The tenant revisionist took the shop on rent for doing business of cloth and shoes where as his brother Adil is doing the business of re-filling of gas cylinders. Clearly sub-letting is proved on the circumstances of this case. The submission of learned counsel for the tenant revisionist is against the record hence it cannot be accepted. **(Rashid vs. Kailas Chand; 2012(2) ARC 880)**

Indian Penal Code

S.149 – Applicability of

Wherever five or more persons commit a crime with a common object and intent, then each of them would be liable for commission of such offence, in terms of Sections 1412 and 149 IPC. The ingredients which need to be satisfied have already been spelt out unambiguously by us. Reverting back to the present case, it is clear that, as per the case of the prosecution, there were more than five nine persons were also convicted by the Trial Court and the conviction and sentence of six of them has been affirmed by the High court The members of this assembly had acted in furtherance to the common object and the same object was made absolutely clear by the words of accused Matadin, when he exhorted all the others to ‘finish’ the deceased persons.

In other words, the intention and object on the part of this group was clear. They had come with the express object of killing Manohar

Lal and his family members. It might have been possible for one to say that they had come there not with the intention to commit murder, but only with the object of beating and abusing Manohar Lal and others, but in view of the manner in which Matadin exhorted all the others and the manner in which they acted thereafter, clearly established that their intention was not to inflict injuries simplicitor. Manohar Lal, admittedly, had fallen on the ground. However, the accused still continued inflicting heavy blows on him and kept on doing so till he breathed his last. They did not even spare his wife Sushila and inflicted as many as 33 injuries on her body. Where a person has the intention to cause injuries simplicitor to another, he/she would certainly not inflict 30/33 injuries on the different parts of the body of the victim, including the spine. The spine is a very delicate and vital part of the human body. It, along with the ribs protects all the vital organs of the body, the heart and lungs, etc. Powerful blows on these parts of the body can, in normal course, result in the death of a person, as has happened in the case before us. The way in which the crime has been committed reflects nothing but sheer brutality. The members of the assembly, therefore, were aware that their acts were going to result in the death of the deceased. Therefore, court finds no merit in this contention of the accused also. (**State of Haryana v. Shakuntala ors.; 2012 (3) Supreme 113**)

S. 302 - Criminal P. C. (2 of 1974), S. 354 (3) - Death sentence - Awarding of - Considerations - Requirement of recording special reasons - Puts restriction on exercise of discretion

The Court has to record special reasons for awarding death sentence. The Court, therefore, has to consider matter like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances. These factors cannot be similar or identical in any two given cases. Thus, it is imperative for the Court to examine each case on its own facts, in light

of the enunciated principles. It is only upon application of these principles to the facts of a given case that Court can arrive at a final conclusion whether the case in hand is one of the 'rarest of rare' cases and imposition of death penalty alone shall serve the ends of justice. Further, the Court would also keep in mind that if such a punishment alone would serve the purpose of the judgment, in its being sufficiently punitive and purposefully preventive.

The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contradistinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

Every punishment imposed is bound-to have its effect not only on the accused' alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death. (**Ramnaresh & Ors. v. State of Chhattisgarh; AIR 2012 SC 1357**)

Ss. 376, 300 – Gang Rape and murder – FIR – Delay in lodging – Offence committed at night in village- Husband informant out of village – Accused remaining in house of deceased for some time- Death of deceased taking place after considerable time after offence – Husband who came after being informed lodging FIR next day morning- Delay stands explained – Not fatal to prosecution

The Court not in agreement with the learned counsel appearing for the appellants that the delay does not stand explained in the present case. The occurrence took place at about 11 p.m. at night in a village area where normally by this time, people go to their respective houses and stay inside thereafter. After committing the rape on the deceased and her subsequent death which itself took a considerable time, the accused persons remained in the house for some time. Thereafter, they made it sure that PW6 goes to the house of PW12 and tells her incorrectly and without disclosing the true facts that the deceased was not waking up despite efforts, which he did and this fact is fully

established by the statement of PW 12. In the meanwhile, the news had spread and one Ashok had rung up PW 1 who came to the spot of occurrence. After seeing his wife in that horrible condition and doubting that Bhupendra might have committed the crime since by that time PW6 had not told him the correct story, he went to the Police Station and lodged the FIR at about 10.50 a.m. on 10th August, 2006. Police registered the FIR under Sections 376 and 302, IPC vide Exhibit P16.

Thus, there is plausible explanation available on record of the case file which explains the delay in lodging the FIR. We also cannot lose sight of the statement of PW4, father of PW6, who stated that when he went to the Police Station, he found his son there who informed him that he was in the Police Station since the past two days. His son had challenged all the four accused persons in his presence and later he was informed by the Police that his son was a witness in the case. This witness knew the accused persons as well as the deceased Rajkumari. He was a party to the seizure memo, Exhibits P/7 to P/10 though in the Court he stated that nothing was seized in his presence and, at this stage, he was declared hostile. The statement of PW6 does not suffer from any legal or factual infirmity and appears to be the true and correct version of what actually happened at the scene of occurrence. The delay, if any, in lodging the FIR, thus, stands explained and is, in no way, fatal to the case of the prosecution. **(Ramnaresh & Ors. v. State of Chhattisgarh; AIR 2012 SC 1357)**

Ss. 376, 300 – Rape and murder

Hindu Minority and Guardianship Act (32 of 1956), S. 6 - Guardians and Wards Act (8 of 1890), Ss. 7, 17 - Appointment of Guardian - Application by mother of girl, to appoint her brother as guardian of girl- No material available to hold that father of girl cannot continue as natural guardian. The biological parents, the father and mother, who are the natural guardians, are to be preferred, while making a declaration as to guardianship or in making an appointment of a guardian, for whatever be its purpose. This can be excluded only in case where both the parents are found either unfit to be the

guardian, or to discharge the duties and responsibilities attendant to guardianship, or upon their failure, refusal or abandonment of such duty and responsibility. Therefore where there was no material to hold that the father of the girl cannot continue as the natural guardian, he would not be liable to be removed from that capacity, may be the mother, for reason best known to her, would not be interested to act as the guardian of the girl in-lieu of the father and thus dismissal of application of mother of girl to appoint her brother as guardian of girl would be proper. (**Deepa Sasikumar & Anr. v. Sasikumar; AIR 2012 Kerala 69**)

Indian Stamp Act

Ss. 33, 47A, 56, Art. 5, Sub-clause (b-1) and Art. 23, with Explanation to schedule 1B – stamp duty chargeability – Agreement for sale – clear recital therein that possession not delivered – If possession not given as per agreement for sale, instrument not to be charged to stamp duty as instrument of conveyance

The Explanation to Article 23 of Schedule 1B of the Indian Stamp Act, as incorporated in the State of Uttar Pradesh, reads as under:- “For the purposes of this Article, in the case of an agreement to sell an immovable property, where possession is delivered before the execution or at the time of execution, or is agreed to be delivered without executing the conveyance, the agreement shall be deemed to be conveyance and stamp duty thereon shall be payable accordingly: Provided that the provisions of Section 47A shall mutatis mutandis apply to such agreement: Provided further that when conveyance in pursuance of such agreement is executed, the stamp duty paid on the agreement shall be adjusted towards the total duty payable on the conveyance.”

A bare perusal of the Explanation to Article 23 of Schedule 1B of the Indian Stamp Act, as incorporated in the State of Uttar Pradesh, goes to show that an agreement to sell an immovable property shall be deemed to be a conveyance for the purpose of stamp duty. If any, of the following conditions are fulfilled: (i) where the possession is delivered before the execution of the agreement: or (ii) where the possession is delivered at the time of execution of the agreement: or (iii) where the

possession is agreed to be delivered without executing the conveyance.

In view of the aforesaid discussion I'm of the considered opinion that the respondents committed manifest error of law by invoking the Explanation to Article 23 of the Schedule 1B of the Indian Stamp Act so as to treat the agreement for sale dated 21.8.2001 as a deed of conveyance. The agreement in question was liable to stamp duty as payable under sub-clause (b-1) of Article 5 to Schedule 1B that is, on the consideration set forth in the instrument. Accordingly, the proceedings under Sections 33 and 47A of the Indian Stamp Act for determining the market value of the subject matter of the instrument are not justified in law. (**Raj Kumar v. Commissioner, Jhansi Division, Jhansi and others; 2012(3) AWC 2817**)

Provisions of stamp Act will prevail over Administrative order

The provisions of the Stamps Act will prevail over the administrative order passed by the Special Secretary and it is evident that both the Courts below have exceeded the jurisdiction vested in them by imposing deficient stamp duty on the basis of circle rate along with penalty as well as on the amount of loan and interest thereon. In view of the provisions of Article 18(c) aforesaid, the stamp duty has to be paid as conveyance. (**M/s. Steel Engineers v. State of Uttarakhand; 2012 (116) RD 239**)

Indian Succession Act

S. 63 – Proving of Will – Factor to be considered

In *Jaswant Kaur v. Amrit Kaur*, (1977) 1 SCC 369 the Court culled out the following propositions:-

“1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Sec. 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicions about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing

state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with will, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

In *Uma Devi BNambiar v. T.C. Sidhan* (supra), the Court held that active participation of the propounder/beneficiary in the execution of the Will or exclusion of the natural heirs cannot lead to an inference that the Will was not genuine. (**Mahesh Jynar (Dead) by L.Rs. v. Vinod Kumar and others; 2012 (2) Supreme 467**)

Industrial Disputes Act, 1947

S. 2-A - Appropriate Government - Garden Reach Shipbuilders & Engineering Ltd. (GRSE) - Not carried on directly by Central Government - Not under the authority of Central Government - Nor Central Government has conferred any authority by a statute on

appellant - Company to carry on the industry - Tribunal has rightly held State Government is appropriate Government in relation to industry run by the appellant-company

From the Memorandum of Understanding, it is clear that with the assistance of the Central Government the appellant company runs the industry and fulfils its objectives including customers' satisfaction. Accordingly, it is clear that the appellant company is running the industry upon receiving assistance from the Central Government and not under the authority of the Central Government as has been erroneously claimed on behalf of the appellants.

The industry of the appellant company herein namely, GRSE is not carried on directly by the Central Government or by anyone of its departments like Post & Telegraph or the Railways. Therefore, the conferment of authority on the appellant company has to be established in order to hold that the Central Government is the "Appropriate Government" in relation to the appellant company in terms of section 2 (a) (i) of the Industrial Disputes Act. In the present case, the Central Government has not conferred any authority by a statute on the appellant company to carry on the industry.

The learned Tribunal has decided the aforesaid question of fact upon scrutinizing the relevant documents and evidence on record and arrived at the conclusion that the State Government is the "Appropriate Government" in relation to the industry run by the appellant company. The aforesaid question of fact cannot be adjudicated by this Court in its Constitutional Writ Jurisdiction. Furthermore, the appellant company has not also produced any document in order to establish the conferment of authority on the appellant company by the Central Government. (**Garden Reach Shipbuilders & Engineers Ltd. Vs. Second Industrial Tribunal another; (2012 (133) FLR 1060) Calcutta HC**)

Ss. 2-A, 11-A and 10(4-A) - Dismissal from service - Domestic enquiry was fair and proper-Charges stood proved against petitioner - Cause of strike not spontaneous - Workman has admitted that scrap was removed by operators themselves - It was not cause of strike - Petitioner has put 11 years of service - Hence Labour Court was justified in substituting punishment of dismissal to that of compulsory

retirement - In exercise of discretion under section 11-A of Act-No interference required with

The Labour Court in the instant case has taken into consideration the number of years of service workman has put in while modifying the order of punishment from dismissal to compulsory retirement and it cannot be held as arbitrary, unjustified or not based on no evidence. In fact, the Hon'ble Supreme Court has laid down the contours under which the order of compulsory retirement can be challenged namely it would be only' on the ground of no evidence or having not been formed on the basis of records or being on collateral grounds or being arbitrary but cannot be challenged on merits, in the matter of K. Kandaswamy v. Union of India and another 1995 (71) FLR 989 (SC). In that view of the matter, I do not find any good ground to interfere with the order of the Labour Court. **(B.M. Channappa vs. Management of Warner Lambert India Pvt. Ltd.; (2012 (133) FLR 321) (Karnataka High Court))**

S. 2(j) - M.P. Police Housing Corporation - Activities of Corporation come within the purview of industry - As defined under section 2(j) of Act

The activities of the Madhya Pradesh Police Housing Corporation pertains to construction of houses and various other activities connected with Civil Engineering aspect of the matter and in view of the principles laid down by the Supreme Court in the case of Bangalore Water Supply & Sewerage Board. V. A Rajappa and others (1978 (36) FLR 266(SC), the activities of the Corporation comes within the purview of industry as defined under section 2(j) of the Industrial Dispute Act.

Daily Wager - Petitioner is a daily wager - He cannot be transferred from original place of posting - Directed to post him at his original place of posting

Once it is found that he is daily wages employee, he cannot be transferred from the original place of posting in view of the law laid down in the case of Ashok Tiwari v. M.P. Text Bokk Corporation, decided on 20th April, 2010. **(M.P. Police Housing Corporation vs. Sher Singh and another; (2012 (133) FLR 66) (M.P. H.C.))**

S. 2 (j) - Water Technology Centre for Eastern Region (WTCER) Bhubaneswar - A unit under Indian Council of Agricultural Research - Is an “Industry” - Activities of it are analogous to trade and commerce - It is admitted that ICAR was an industry

It was admitted that ICAR was an ‘industry’. Furthermore, it is found from instruction No. 4/85 dated 17.5.1985 of the Chief Labour Commissioner (C), New Delhi addressed to all concerned officers to treat that the Central Government is the appropriate Government in respect of Indian Council of Agricultural Research and its allied institutions in Central Sphere and enforce the provisions of Minimum Wages Act, 1948, Contract Labour (R&A) and entertain Disputes under the Industrial Disputes Act.

All these go to show that WTCER which is a unit of ICAR is an industry.

The case of Physical Research Laboratory 2000(85) FLR 185 (SC), would not be applicable to the present case, because Physical Research Laboratory is an institution under the Government of India's Department of Space which is engaged in pure research in Space and Science. The purpose of the research is to acquire knowledge about the formation and evolution of the universe, but the knowledge thus acquire is not intended for sale.

So, it is held that. WTCER is an ‘industry’ as defined under section 2(j) of the I.D. Act. (**Indian Council of Agricultural Research vs. P.O, CGIT-CUM-LABOUR COURT, BBSR and others; (2012 (133) FLR 270) (Orissa H.C.)**)

S. 4-K - U.P. Co-operative Societies Act, 1965 – Jurisdiction - Even a dispute relating to service conditions of an employee of Industrial Disputes Act, 1947 - Co-operative society would be governed by Co-operative Societies Act, 1965 - Central Act, 1947 and U.P. Act, 1947 would have no application despite that section 135 has not been enforced

It is clear from above judgment that even a dispute relating to service conditions of an employee of Co-operative Society would be governed by application despite that section 135 has not been enforced.

(M/s. Pradhan Prabandhak, Kishan Sahakari Chini Mill., Saharanpur vs. State of U.P. and others; (2012 (133) FLR 1015) (All. H.C.))

S. 6-A and 6-H – Reinstatement - There is no forum provided for getting actual reinstatement enforced - And very limited executionary forum provided for in shape of section 6-H of Act - Dy. Labour Commissioner does not possess any authority to set aside the order of dismissal and to pass order of reinstatement- Section 6-H is in shape of execution proceedings - Wherein directive can be issued for recovery of money due from employer

U.P. Industrial Disputes Act, 1947 - Section 6-H - Order of dismissal - Once authority under section 6-H is explicit - It cannot go into validity of dismissal order

Under section 6-A of U.P. Industrial Disputes Act, 1947, an award becomes enforceable on the expiry of thirty days, from the date of its publication. Under the aforementioned Act and the Rules, framed there under, no machinery has been provided for to compel the employer to accept the work of reinstated employee except to ensure monetary benefit.

Under U.P. Industrial Disputes Act, 1947 and the Rules framed there under there is no forum provided for getting actual reinstatement enforced, and very limited executionary forum has been provided for in the shape of section 6-H of the Act.

Proceeding under section 6-H of U.P. Industrial Disputes Act, 1947 is in the shape of execution proceeding and in the proceeding under section 6-H(1) of U.P. Industrial Disputes Act, 1947 it has limited jurisdiction inasmuch as in proceeding under section 6-H(1) of the U.P. Industrial Disputes Act, computation for payment of money can be made but therein in said proceeding, Deputy Labour Commission does not possess any authority to set aside the order of dismissal and to pass order of for reinstatement.

Section 6-H of U.P. Industrial Disputes Act, 1947, is pari material to the provision of section 33-C of Industrial Disputes Act, 1947, and the said provision has come up for consideration before Apex Court on numerous occasions, and consistent view has been that same

is in the shape of execution proceedings wherein directives can be issued for recovery of the money due from employer.

Once authority under section 6-H of Labour Court under U.P. Industrial Dispute Act, 1947 is explicit and it cannot go into validity of the dismissal order dated 10.10.1998 and Labour Court cannot direct for reinstatement of the workmen in question, then in such a situation and in this background order which has been passed by the Deputy Labour Commissioner refusing reinstatement cannot be faulted.

There being no concept of actual reinstatement, and admittedly on the strength of the award, contract of service had been subsisting, and monetary benefit has been extended, though under the umbrella of section 6-H, then as to whether subsequent disciplinary proceedings are good or bad has to be answered by Industrial Court, and in proceedings under section 6-H, Labour Court, cannot afford to ignore the same. (**Irshad Mohd. Khan and others Vs. Additional Labour Commissioner, U.P., Ghaziabad and other; (2012 (133) FLR 770 All. H.C.)**)

S. 6-H (1) and 6-H (2) - Application under section 6-H(1) - Money due-Claim by workman – Is post award wages - Post award wage does not come under category of money due- Consequently application under section 6-H(1) cannot be file

The settled law is that proceedings under section 6-H(1) of the Act are execution proceedings.

The authority vested with the power there under cannot determine any complicated question of law and fact. It cannot determine a dispute with regard to existence of legal right.

It will be seen that what the workman claim is post award wages. As already stated herein above, post award wages does not come under category of money due and consequently and application under section 6-H(1) cannot be filed.

The Labour Court exercising the power under section 6-H(1) lacks power to adjudicate in this behalf. The entitlement of the workman should not be under dispute. Admittedly, the entitlement of the claim has been disputed. (**Jai Prakash Ahirwar Vs. State of U.P.**)

and others; 2012 (133) FLR 711 (All. H.C.)

S. 6-I- Industrial Disputes Rules, 1957- Rule 40 - Representation by an Advocate - When these advocates represented, no objection raised by workman- Consequently there is a tacit consent given by the workman - Once a deemed consent is given, the workman in the same proceeding, cannot turn around and say that the deemed consent has now been withdrawn - Also there would be a deemed leave granted by the Court.

A combined reading of the aforesaid provisions makes it apparently clear that a legal practitioner can only represent a party if consent is given by the other party and leave of the Presiding Officer of the Labour Court/Tribunal is obtained. Rule 40 indicates that an advocate cannot appear as representative of an employer.

The Court is of the opinion that there was a deemed tacit consent given by the workman in allowing a legal practitioner to represent the employer. Once such deemed consent is given, the workman, in the same proceeding cannot turn around and say that the deemed consent has now been withdrawn or that he now no longer wants to give consent to continue and allow the legal practitioner to represent the employer any further. Once consent has been given, it cannot be taken back.

The Court is of the opinion that once a legal practitioner was allowed to participate and represent the employer for a considerable period of time, there would be a deemed leave granted by the Court. **(Kishan Sahakari Chini Mills Ltd. Vs. Basant Kumar Joshi; (2012 (133) FLR 74) (Uttara Khand H.C.))**

S. 9-A and 12 (3) – Payment of Gratuity Act, 1972 - Section 7(7) - Settlement - Change proposed in pay structure - Award of Gratuity in favour of workman - Challenged by management - Notice under section 9-A issued by management - Petition of management, challenging award of gratuity instead of going in appeal under section 7(7) of Gratuity Act- Not to be entertained

It must be noted that the question of Payment of Gratuity Act is a special law and not only creates right in favour of the workman to receive gratuity under certain contingencies but also provides for

hierarchy of forums such as a controlling authority and an appellate authority. Therefore, it is incumbent upon the management to move an appellate authority. Under such circumstances, this Court is not inclined to entertain the writ petition. (**Management, A. 2295, Madurai Co-op. Printing Works Ltd and another vs. Controlling Authority under Payment of Gratuity Act; 2012 (133) FLR 44 (Madras H.C. Madurai Bench)**)

Ss. 10 and 2 (s) – Reference - Government refused to refer the dispute and held that workman had failed to establish existence of a valid dispute - Though the Government is not empowered to adjudicate upon the matter for purpose of referring the dispute-Validity of dispute cannot be determined by him - Moreover the question of delay also Labour Court will decide - Authorities are directed to refer the dispute within one month

It is settled law that the Central Government is not empowered to adjudicate upon the matter for the purpose of referring the dispute. It is for the workman to establish that he was employed by the bank during the period w.e.f. 18.4.1993 to 19.11.1994 and that a valid dispute existed or was apprehended. It is also apparent that the Central Government did not refer the dispute considering as to whether any dispute was apprehended or existed. The validity of dispute cannot be determined by him as it is matter of adjudication.

As regards question of limitation is concerned, it is for the Labour Court to grant relief or not to grant relief taking into consideration the question of delay. (**Manoj Kumar Sahu Vs. Union of India and others; (2012 (133) FLR 23) (All. H.C.)**)

Ss, 10, 10(1) and 12(5) - Constitution of India, 1950 - Article 226 – Reference - Application for making reference rejected - Government was clearly in error in rejecting the application reference of dispute-While considering the question as to whether reference should be made or not - If the dispute in question raises a question of law - Appropriate Government should not purport to reach a final decision on it-Similarly on disputed questions of fact, it cannot purport to reach final conclusion - However, it must record reasons for denial to make reference - It cannot decide the dispute itself

From the legal position stated by Apex Court from time to time,

it is clear that when the appropriate Government considers the question as to whether a reference should be made for industrial adjudication or not, it has to exercise its discretion conferred by section 10 of the Act and while doing so it may consider prima facie merit of the dispute and take into account other relevant factors which would help it to decide whether making a reference would be expedient or not. If the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of Industrial Tribunal. Similarly on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal.

It must, therefore be held that an examination of a prima facie merits cannot be said to be foreign to the inquiry which the appropriate Government is entitled to make in dealing with dispute under section 10(1). However, when the Government decided not to make reference for industrial adjudication, it is under an obligation to record its reason for not making such reference.

While exercising the power conferred by section 10 of the Act to refer an industrial dispute to a Tribunal for adjudication, the appropriate Government is discharging an administrative function wherein it has to form an opinion as to factual existence of an industrial dispute as a preliminary step to the discharge of its function. If the Government performs an administrative function while either making or refusing to make a reference under section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis.

The Government/respondent No. 1 was clearly in error in rejecting the application of petitioner for reference of dispute to the industrial adjudication. As noted earlier the State Government instead of referring the dispute for adjudication to the appropriate Industrial Tribunal or Labour Court under relevant provisions of Industrial Disputes Act, it itself decided the dispute holding that there appeared to be no employer-employee relationship between the management of respondents' institution and the petitioner-workman and while so, in my opinion, the State Government itself decided the dispute finally which is not permissible under law. (**Ram Shiromani Yadav Vs.**

Conciliation Officer/ Dy. Labourt Commissioner, Allahabad and other; (2012 (133) FLR 390) (All. H.C.))

S. 10 - Contract Labour (Regulation and Abolition) Act, 1970 - Section 10(1) - Constitution of India, 1950 - Article 226 – Reference - Workman paid wages by contractor but he was performing work of petitioner-company-And his services were terminated by the Contractor-Dispute raised - Reference challenged-Contract if found sham and bogus, the workman would be employee of management -Reference does not suffer from any ambiguity - And petition filed in abuse of process of Court - Petition dismissed with cost of Rs. 30,000/-

In my opinion, the reference as worded is to the same effect, If the Industrial Adjudicator finds the contract to be sham and bogus, the necessary corollary thereof would be of the respondent No. 2 being an employee of the petitioner and then the question of the validity of termination of services and the relief if any to which the respondent No. 2 is entitled would be gone into. However if the petitioner succeeds in establishing corollary would be of there being in existence no relationship of employer and employee between the petitioner and respondent No. 2 workman, the question of the petitioner being required to justify the termination of services of the respondent No. 2 would not arise. In my view, the reference does not suffer from any ambiguity and the present petition has been filed in the abuse of the process of this Court and to delay the adjudication of the reference. **(ICICI Prudentiaial Asset Management Co. Ltd. Vs. Union of India; (2012 (133) FLR 505) Delhi H.C.))**

S. 11-A and 2(s) - Termination of services - Of petitioner-workman -On accepting his letter of resignation - No material to establish that resignation was not voluntary and was on misrepresentation - Award rejected reference passed by Labour Court - Petitioner, Security Co-ordinator as ex-serviceman on wages of Rs. 8500/- p.m. is held a workman-No interference made with award-Petition rejected

The labour Court did not find favour with the oral testimony of the petitioner. In my option, in the absence of relevant material

constituting substantial legal evidence of the fact in issue that the resignation was not voluntary, but by the employer practicing an act of misrepresentation on the workman, no exception can be taken to the reasons, findings and conclusions arrived at by Labour Court in the award impugned.

I find the whole edifice of the case to be built up fallacious assumptions. Although learned Counsel for the petitioner submits that the petitioner had no other material to place before the Court and therefore an inference ought to be drawn from the circumstances, I am afraid that submission is unacceptable. Petitioner's statement being self-interested was uncorroborated, when coupled with his conduct and material on record disentitled the drawing of an inference in his favour i.e., resignation was not voluntary and was on misrepresentation. (**R. Ramanujam Vs. Senoir Manager, M/s. by Design (Private) Limited, Bangalore; 2012 (133) FLR 252 (Karnataka H.C.)**)

S. 14-A and 2(1) (iv) r/w section 2(z) - Notice under section 14-A - In absence of any such material existing before the Addl. Commissioner or even before this Court - Notice under, to prosecute the petitioner - Company was absolutely unjustified - Notice was not founded on any material basis-Hence notice impugned is quashed

In the opinion of the Court, in the absence of any such material existing even before the Addl. Commissioner or even before Court, the notice to prosecute the petitioner- Company was absolutely unjustified. If there was no work available at all and if no casual labourers had been actually employed by the company, then it could not have been said that petitioner –company was violating the terms of the award insofar as the engagement of the casual labourer is concerned. In the absence of any such material worth the name either before the Addl. Commissioner or even before this Court, the only conclusion that can be drawn is that the notice was not founded on any material basis and, therefore, to prosecute the petitioner on the said stand is unwarranted. The writ petition is allowed and the notice impugned herein dated 9.12.2005 is, therefore unsustainable and is hereby quashed. (**Duncans Industries Limited vs. State of U.P. and others; 2012 (133) FLR 767**)

All. H.C.))

S. 17-B - Compliance of - Gainful employment - Impugned order requires the appellant to comply with section 17-B of Act - Small time petty business run by family members, in which the respondents participate on account of being jobless - Would not affect their right to enforcement of section 17-B of Act - It cannot be said respondent Nos. 2 and 3 are gainfully employed

It is apparent that small time petty business run by family members of the respondents No. 2 and 3, in which business the said respondents participated on account of being jobless, would not affect their right to the enforcement of section 17-B of the ID Act, 1947.

It cannot be said that respondent's No. 2 and 3 are gainfully employed. (**Lumax Automotive Systems Ltd. Vs. Its Workmen, Hindustan Engineering & General Mazdoor Union and other; 2012 (133) FLR 241 (Delhi H.C.)**)

S. 17-B - Employees Provident Funds Scheme, 1952 - Para 29 and 26-B — Payments-Made under section 17-B by employer - At present, the status of workman is that of a dismissed employee - He cannot be said to have earned the wage, which is paid to him under section 17-B of Act - Any payment made under section 17-B is not actually wages earned - It is in nature of subsistence allowance

It is clear that basic wages on which contribution is to be calculated, is all emoluments, which is earned by an employee while on duty, leave or on holidays. The emphasis is on the expression that all emoluments which are earned by a employee. Any payment made under section 17-B of the Act is not actually wages earned. Payment made under section 17-B of the I.D. Act is in nature of subsistence allowance given to the workman, who has been ordered to be reinstated in service by the Labour Court and the award passed by the Labour Court is assailed in any higher Court.

It is not disputed that the employee was dismissed. The Labour Court by its award directed his reinstatement but the operation of the award has been stayed. So, at present, the status of the workman is that of a dismissed employee, and therefore, he cannot be said to have earned the wages, which is being paid to him under section 17-B of the

I.D. Act. (M/s Orissa AIR Products Pvt. Ltd. vs. Regional Provident Fund Commissioner (C&R), Khurda and another; (2012 (133) FLR 336) (Orissa High Court))

S. 25-B - Continuous service - For 240 days in preceding 12 calendar months from date of his disengagement-He has worked for more than 240 days in year 1991, 1990 and 1989 – As such he is deemed to be in continuous service for one year in terms of clause (1) of section 25-B - He was a daily wager - He is about 45 years of age now - As the management no more requires labourers - Hence, petitioner workman is awarded a sum of Rs. 2,00,000/- as compensation

As per the case of the opposite party-management, in the meantime they have set up an automatic plant for cleaning foreign materials from the stack and ship deck by investing huge amount of money and they no more require labourers for cleaning of the same. Under such circumstances, it would meet the ends of justice if a lump sum amount of Rs. 2,00,000/- is awarded in favour of the petitioner-workman as compensation.

Daily Wager - Petitioner was engaged as a daily wager - So he is not entitled to get enhanced wage, bonus and overtime allowances

As borne out from the evidence on record, the petitioner was engaged as a daily wager, so he is not entitled to get enhanced wage, bonus and overtime allowances. The learned Tribunal has rightly not awarded these benefits to the petitioner-workman. (**Gopinath Panda Vs. M/s Mineral & Metal Trading Corporation of India Ltd., BBSR; (2012 (133) FLR 132) (Orissa HC)**)

Ss. 25-B - and 10(1)(d) – Termination - Oral termination of services - Without complying with provisions of section 25-F - Petitioner a casual labour, has completed more than 240 days prior to such termination order-Termination is illegal retrenchment - Labour Court has awarded compensation in lieu of reinstatement - Tribunal rightly held that it had no obligation to award full back wages - Has in its discretion awarded compensation of Rs. 35,000/- with interest - Which does not call for interference-However, as no

cogent reasons given - There could be no justification in not directing reinstatement - Hence, respondents directed to reinstate the petitioner

The respondent Tribunal tightly held that it had no obligation to award full back wages. The aforesaid finding is reasoned and supported by judgments of the Supreme Court. The respondent Tribunal has, in its discretion, awarded compensation of Rs. 35,000/- with interest. The award of compensation does not call for interference.

There is, however, no cogent reason assigned for refusing the relief of reinstatement. In view of the definite finding of the respondent Tribunal that the refusal of employment of the petitioner was void an initio, there could be no justification in not directing reinstatement. The petitioner should have been reinstated in the position in which the petitioner has been engaged.

The impugned award is set aside to the extent that the petitioner has been denied the relief of reinstatement. The respondents are directed to reinstate the petitioner. **(Debnath Chakraborty Vs. Union of India and other; (2012 (133) FLR 187) (Calcutta H.C.))**

S. 25-B, 25-F and 10(1) - Termination of services - Workman has worked for more than 240 days in preceding 12 months from date of termination-even as a daily wager - Termination without following section 25-F of Act - He was entitled to protection of section 25-F of Act - Hence Labour Court passed the award giving relief of reinstatement cannot be said to be illegal or bad in law- But gainful employment of workman not considered - Award of full back wages is therefore modified to the extent of 25% and 50% back wages

From perusal of aforesaid provision of the Act, it does not make any distinction in between permanent employee and daily wages employee and protection of section, 25-F of the Act is equally conferred in both class of workman.

The petitioner has worked for more than 240 days preceding 12 months from the date of his termination is entitled for protection under section 25-F of the Act and, as such, the award passed by the Labour Court giving the relief of reinstatement cannot be said to be illegal or

bad in law.

The Labour Court while giving the relief of reinstatement also gave the relief of full back wages but by the span of time, the law on relief of reinstatement with full back wages has changed. Now the view of the Hon'ble Apex Court is that when the order of termination is bad ipso facto, the person will not be entitled for the relief of reinstatement with full back wages as during that period the workman might have been engaged at some other place as no one can live in this world without money. The Court has held the onus is upon the workman to prove that he was not gainfully employed.

It is not desirable to remand the matter back for the decision on the issue of wages afresh, instead the award of full back wages is modified to the extent that the workman/petitioner will be entitled to 25 per cent of the back wages from the date of order of termination upto the date of reference and from the date of reference to the date of award he will be entitled to 50 per cent of back wages. (**Engineer-In-Chief, Path Nirman Vibhag, Bihar and another vs. Surya Narayan Paswan and another; (2012 (133) FLR 384) (Patna High Court)**)

Ss. 25-F and 25-G – Termination - Of services - Muster roll and other documents available on record establish that respondent - workman has worked for 240 days in preceding 12 months - He was not paid any compensation before termination of his services - There was breach of section 25-F of Act - Though there was inordinate delay of 14-15 years in raising the dispute and statement of claim filed after almost 9 years - In or around February, 2010 - Hence he is to be reinstated and entitled to back wages @ 10% for period after February, 2010

The petitioner also could not establish that the respondent's service was terminated by way of disciplinary proceedings. Under the circumstances, it is not possible to find fault with the conclusion reached by the Labour Court as regards the breach of section 25-F of the Act.

So far as the direction requiring the petitioner to reinstate the respondent is concerned, having regard to the fact that the petitioner has not established any circumstances which would persuade the Court to

not uphold the direction requiring the petitioner to reinstate the respondent-workman e.g. it is not even urged, much to an end the requirement of engaging the respondent has come to an end or that the respondent has crossed age of superannuation or that there were complaints against the respondent etc. have not been established by the petitioner, any ground justifying the objection against the direction to reinstate the workman (except the ground of delay) is not pleaded, much less established, by appropriate evidence. Under the circumstances, when the Trial Court has, after considering the proved breach of section 25-F, exercised the discretion to grant the said relief, I do not consider it appropriate to interfere with and disturb the said direction.

Therefore, it is directed that the respondent will not be entitled to any benefit of backwages until February, 2010 and for the period after February, 2010 the respondent would be entitled for backwages @ 10% and not 20% as directed by the Labour Court. (**State of Gujarat and another vs. Kalidas Bhikhabhai Dudhrejiya and another; (2012 (133) FLR 297) (Gujarat H.C.)**)

Ss. 25-F and 2(oo)(bb) - Oral termination - Petitioner a daily wage employee, engaged as Driver on 26.9.1988 and continued to work continuously upto 24.1.1991, when his services terminated - He had completed 240 days of service in current year - Condition precedent under section 25-F not complied with - Labour Court held it a retrenchment and directed reinstatement without back wages -Labour Court has not committed any error in holding the order of termination as illegal and directing reinstatement - As he was daily wager, back wages rightly denied-Hence warrants no interference

The Labour Court has not committed any error. Once, the petitioner has been in continuous employment for one continuous year as per the provisions of section 25-B of the Industrial Dispute Act. And if the termination does not fall in any of the exempted clause as contemplated in section 2 (oo) (bb), the termination would amount to retrenchment and in the present case as the termination is not covered by any of the exempted clause, the termination was retrenchment and as the same was brought about without complying with the provisions of

section 25-F it is illegal. Accordingly, in holding the termination to be retrenchment and the same to be illegal, the Labour Court has not committed any error.

As far as denial of back wages to the employee is concerned, the employee is only a daily wages employee and, therefore, the employee cannot be granted back wages even if his retrenchment is found to be illegal.

Accordingly, it is a case where the award passed by the Labour Court seems to be in accordance with law and does not warrant any interference. (**M.P. Police Housing Corporation v. Sher Singh & ors.; 2012 (133), FLR 66 (MP)**)

S. 33 (c) (1) – Reinstatement – Recovery of back wages – Whether Tribunal can order for recovery of back wages due to wrong fixation of pay – Held, “No”. It does not fall within the purview of tribunal

In this case two issues raised by petitioner, one pertained to fixation of pay on reinstatement and other issue related to recovery of back wages by respondent. Hon’ble Court has observed that insofar as pay fixation of petitioner is concerned no fault is found therein. However due to wrong fixation excess salary was paid to petitioner. Since excess payment was made to petitioner by respondent DTC by own mistake with no fault of petitioner. This amount cannot be recovered from petitioners, this is concerned which pertains to recovery of amount which was given to petitioner, it would not be within the purview of Tribunal to decide as to whether respondent DTC can recover amount or not. Axiomatically same does not fall for adjudication in this petition. Petitioner directed to agitate this issue before appropriate forum. (**Chander Pal v. CMD; 2012 (2) SLR 744 (Delhi)**)

S. 33-C(2) – Overtime wages - Claim for - Labour Court directed petitioner to pay overtime wages to respondent- Validity of - Held, in view of judgment passed by Supreme Court in case of D. Krishnan v. Special Officer, reported in AIR 2009 SC 395, unless claim/entitlement to overtime wages is determined by some competent authority, it cannot be directed to be paid under

Industrial Disputes Act - Impugned order quashed-Petition allowed

This writ petition is directed against order 30.8.1991 passed by Presiding Officer, Labour Court (II), U.P., Meerut in Misc. Case No. 53 of 1990 under section 33-C (2) of Industrial Disputes Act ? Raj Kumar Singh v. Nagar Palika Mawana. Through the said case respondent No. 2 workman Raj Kumar Singh had claimed over-time wages against the petitioner from 24.6.1982 to 2.12.1987. The Labour Court accepted the case of respondent No. 2 and directed payment of Rs. 5,917.50 as overtime wages to him by the petitioner-employer.

In this writ petition an interim order was passed on 6.12.1991 staying the operation of the impugned order till further orders.

The matter is squarely covered by the authority of the Supreme Court reported in D. Krishnan v, Special Officer, (2008 (118) FLR 1196 (SC) relied upon by the learned Counsel for the petitioner. In the said authority it has been held that unless claim/entitlement to overtime wages is determined by some competent authority (prior adjudication), it cannot be directed to be paid under section 33-C(2) of Industrial Disputes Act.

Accordingly, writ petition is allowed. Impugned order is set aside. (**Nagar Palika, Mawana V. Labour Court; (2012 (133) FLR 825) All. H.C.**)

Judicial Discipline

Judicial discipline – What constitutes

The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken recourse to. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in M. Nagraj (Supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated albeit incorrectly, the same could not have been a ground to treat the decision as per incuriam or not a binding precedent. Judicial discipline commands in such a situation when there

is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

In *Snundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others*, AIR 1991 SC 1893 while dealing with judicial discipline, the two-Judge Bench had expressed thus :-

“One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.”

The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by tow division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the found responsibility that is expected from the Judges. (**U.P. Power Corporation Ltd, v. Rajesh Kumar & ors.; 2012 (3) Supreme 386**)

Binding precedent – Effect of

Judgment of a co-ordinate Bench is bind. In case of disagreement with judgment of co-ordinate Bench the proper course is to refer the matter to a larger Bench. (**U.P. Power Corporation**

Ltd, v. Rajesh Kumar & ors.; 2012 (3) Supreme 386)

Juvenile Justice (Care & Protection of Children) Act

Ss. 2, 29, 63(2) – Welfare of children – Guidelines stated – At least one Police Officer in every police station must be designated as juvenile or child welfare officer

The Home Departments and the Director Generals of Police of the States/Union Territories will ensure that at least one police officer in every police station with aptitude is given appropriate training and orientation and designated as Juvenile or Child Welfare Officer, who will handle the juvenile or child in co-ordination with the police as provided under sub-section (2) of section 63 of the Act. The required training will be provided by the District Legal Services Authorities under the guidance of the State Legal Services Authorities and Secretary, National Legal Services Authority will issue appropriate guidelines to the State Legal Services Authorities for training and orientation of police officers, who are designated as the Juvenile or Child Welfare officers. The training and orientation may be done in phases over a period of six months to one year in every state and union territory.

The Home Departments and the Director Generals of Police of the States/Union Territories will also ensure that Special Juvenile Police Unit comprising of all police officers designated as Juvenile or Child Welfare Officer be create in every district and city to co-ordinate and to upgrade the police treatment to juveniles and the children as provided in sub-section (3) of section 63 of the Act. (**Sampurna Behura v. Union of India; 2012 (77) ACC 237 (SC)**)

S. 12 – Ground for refusal of bail to juvenile – Bail to juvenile can be refused only under provisions of S. 12 of above Act

Sec. 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides the provisions as to when bail to a juvenile can be refused.

“12 Bail of Juvenile.- (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for

the time being in force, be released on bail with or without surety or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person but he shall not be so released if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer in-charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of inquiry regarding him as may be specified in the order.”

In view of the aforesaid provision, the bail application of the juvenile can be rejected only on the existence of the aforementioned grounds enumerated in section 12 of the Juvenile Justice Act.

Keeping in view the aforementioned legal position and the fact that in this case no such conditions exist, on the basis of which the bail application of a juvenile can be dismissed. (**Arvind Kumar Mishra v. State of U.P.; 2012 (77) ACC 64**)

R. 33 (3)(f) – Custody of unclaimed child – Consideration of – Child welfare committee shall decide as to where the un-claimed child be kept

In this case, an unclaimed child was picked up by G.R.P., Amroha. As no one came forward to claim the custody of the 2 and a half years old child, the G.R.P. Chauki Incharge published an advertisement in the newspaper that the child may be taken by anyone, who could show that he was the child's natural guardian. When no natural guardian of the child appeared, then the petitioner approached the G.R.P. Railway Station, Amroha that he has no male issue and he

has sufficient property to look after the child and the child may be given in his custody. On the petitioner's application, the child was handed over to him. It appears that in the meantime, one Laxman and his wife Saroj who had filed an FIR on 4.9.2007 regarding disappearance and kidnapping of their child under section 364 IPC came forward before the police and claimed that the said child was actually theirs, the S.H.O. of P.S. Majhola, District Moradabad reached the house of the petitioner and took away the child from him and handed him over to respondent No. 8 Laxman. As the police had taken away the child from the petitioner without approaching the Child Welfare Committee or following any legal formalities, the petitioner has filed the present Habeas Corpus petition before this Court.

Court has direct the SSP Moradabad to take the child Sachin from the custody of respondent Nos. 7 and 8 and to produce him before the Child Welfare Committee within a week from the date the petitioner files a certified copy of this order alongwith the petition before him. The CWC shall take a decision as to whether the child should be kept in the children's home or any other suitable place as mentioned under rule 33(3) (f) of the rules or he should be given for foster care to the petitioner or other suitable person in accordance with the provisions of Juvenile Justice (Care and Protection of Children) Rule, 2007. Court may mention that the matter needs to be handled sensitively as the child must be in some trauma inasmuch as he has changed 3 sets of parents first when he must have lived at his home with his natural parents and thereafter he remained with the petitioner for two years till the police illegally seized him and handed him over to respondent Nos. 7 and 8 where after he is with them. Court has hope that this matter will be decided by the CWC with utmost expedition. (**Sachin v. State of U.P.; 2012 (77) ACC 302**)

Land Acquisition Act

S. 5A - Land Acquisition Act, 1894 - Sections 5-A and 6 - Section 5 - A(I) gives right to any person interested in any land notified under section 4(1) as being needed or likely to be needed for a public purpose to raise objections to acquisition of the land

Section 5-A(I) of the L.A. Act gives a right to any person

interested in any land which has been notified under section 4(1) as being needed or likely to be needed for a public purpose to raise objections to the acquisition of the said land. Sub-section (2) of section 5-A requires the Collector to give the objector an opportunity of being heard in person or by any person authorized by him in this behalf. After hearing the objections, the Collector can, if he thinks it necessary, make further inquiry. Thereafter, he has to make a report to the appropriate Government containing his recommendations on the objections together with the record of the proceedings held by him for the decision of the appropriate Government and the decision of the appropriate Government on the objections shall be final. It must be borne in mind that the proceedings under the L.A. Act are based on the principle of eminent domain and section 5-A is the only protection available to a person whose lands are sought to be acquired. It is a minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the concerned authority, inter alia, that the important ingredient namely 'public purpose' is absent in the proposed acquisition or the Acquisition is mala fide. The L.A. Act being an ex-proprietary legislation, its provisions will have to be strictly construed. **(M/s. Kamal Trading Private Ltd. (Now known as Manav Investment & Trading Co. Ltd.) v. State of West Bengal and others; 2012(115) RD 821 (SC)**

Legal Services Authorities Act

S. 22-C – Permanent Lok Adalat – Jurisdiction – whether permanent Lok Adalat is a remedy for disputes between applicant and public utility service where nature of dispute is pitty – Held, “Yes” but it is not a remedy for all disputes

If the parties do not arrive at any compromise or settlement, the case is either returned to the court of law or the parties are advised to seek remedy in a court of law. This was causing unnecessary delay in the dispensation of justice. The Lok Adalat was an alternative mode of resolution of disputes to the cases, which had already reached the court and pending adjudication before them. Even before the introduction of section 89 of the Code of Civil Procedure, because of the provisions of

the Legal Services Authorities Act, 1987, constituting Lok Adalats, pending cases were referred to Lok Adalat. The system of Lok Adalat is mainly based on compromise or settlement between the parties. Therefore, when the compromise or settlement was not reached, such cases which were referred to Lok Adalats were returned to the court of law, as they were returned to the court. Therefore, the purpose of referring the matters to Lok Adalats was for settlement, on failure of which the matters were sent back to courts. Insofar as the cases which were entertained by the Lok Adalats were not referred by the courts, the parties were advised to seek remedy in a court of law. It resulted in causing delay in dispensation of justice. It is in that context, it was felt that if the Lok Adalats are given the powers to decide the case on merits, in case the parties failed to arrive at any compromise or settlement, this problem could be tackled to a great extent. Further, the cases which arise in relation to public utility services, such as Mahanagar Telephone Nigam Ltd., Delhi Vidyut Board, etc., need to be settled urgently so that people get justice without delay even at pre-litigation stage and thus most of the petty cases which ought not to go to the regular courts would be settled at the pre-litigation stage itself, which would result in reducing the workload on the regular courts to a great extent. Therefore, the main object of introducing this Chapter and constituting the Permanent Lok Adalat is to provide for a forum for pre-litigation stage, more importantly, it was meant only to petty cases which ought not to go to regular courts so that workload of regular courts to a great extent is reduced by resolution of such petty cases. This Permanent Lok Adalat is not a remedy for all disputes. It is a remedy only to disputes between the applicant and public utility services, the nature of dispute being petty cases, which ought not to go to regular courts. As even to decide such petty cases there was no forum or pre-litigative mechanism, these Permanent Lok Adalats are constituted to fill the said vacuum. Therefore, the Permanent Lok Adalats are established for providing pre-litigation mechanism for conciliation and settlement of cases relating to public utility services. (**Bajaj Allianz General Ins. Co. Ltd. v. Madhavan Nair; 2012 ACJ 745**)

Limitation Act

S. 5 - Law of limitation binds everybody including the Government

It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with Court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/ years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has

miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay. (**Office of Chief Post Master General v. Living Media India Ltd.; 2012 (116) RD 167**)

S.5, C.P.C. - O-IX, R.13 - Delay condonation application - Dismissal of legality

Two suits were filed for eviction in the year 2007 and, since then, the proceedings have been going on and the matter was being adjourned for one reason or the other. It has been stated that since January, 2010, the trial court became vacant on account of the non-availability of a Presiding Officer. On 23rd July, 2010, the case was transferred to the court of 2nd ADJ, Dehardun and 30th July, 2010 was fixed as the date for the evidence of the plaintiff. Notice to the counsel was issued which was duly received on 30th July, 2010. An application was filed by the plaintiff's counsel for adjournment which was rejected by an order dated 30th July, 2010 and the evidence of the plaintiff's witnesses was closed. The trial court, thereafter, fixed 6th August, 2010 as the next date fixed for the evidence of the defendant's witnesses.

On 6th August, 2010, the defendant appeared in person alongwith an application for adjournment on the ground that his counsel was out of station. The trial court rejected this application but adjourned the matter in the interest of justice and fixed 9th August, 2010 for the examination of the defendant's witnesses. On 9th August, 2010 when the case was called out, no one appeared on behalf of the defendant. The court accordingly closed the evidence of the defendant and fixed 10th August, 2010 for hearing. On 10th August, 2010, the matter was heard ex-parte since the defendant did not appear nor his counsel appeared and the judgment was reserved and was pronounced on 12th August, 2010 and the suit of decreed.

From the record, it transpires that the counsel for the defendant applied for judgment on 7th September, 2010 and, thereafter, filed an application under Order 9 Rule 13 of the CPC on 12th October, 2010 alongwith an application u/s 5, of the Limitation Act to condone the delay in filing the revision. The application u/s 5 of the Limitation Act was rejected by an order dated 2nd November, 2010. Against the

rejection of the Section 5 application, two revisions have been filed. The revisionist has also challenged the ex-parte decree dated 12th August, 2010 filing two separate revisions. All the four revisions have been clubbed and are being heard together.

In the light of the aforesaid this Court found that neither the applicant nor his Advocate was fare to the court and the applicant and his advocate deliberately chose not to appear before the court for the reasons best known to them. No doubt, the court is always of the opinion that the matter should be decided on merits and that full opportunity should be given to all the parties concerned, but in the present case, the conduct of the applicant makes it clear that he is not entitled for any relief. The order sheet indicates that in the past the applicant had tried to delay the proceedings by adopting all kinds of dilatory methods. The present one is another kind of a dilatory tactic which he adopted but not successful. The Court found that the applicant had knowledge of the proceedings and did not choose to appear and consequently was not entitled to recall the order. The application under section 5 of the Limitation Act and consequently the application under Order 9 Rule 13 of the CPC was rightly rejected. **(Sunil Agarwal vs. Smt. Madhvi Thakur; 2010 (2) ARC 173 (Uttarakhand HC))**

S. 5 - Exercise of power – Consideration for

What needs to be emphasized is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Sec. 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression sufficient cause would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Courts find that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court

can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest. (**Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai; 2012 (2) Supreme 674**)

S. 5 - Scope and ambit – Law of Limitation is founded on public policy

The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Court is empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation. The expression sufficient cause used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay. (**Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai; 2012 (2) Supreme 674**)

Lok Adalat

Lok Adalats are being constituted at various places in the country for the disposal in a summary way and through the process of arbitration and settlement between the parties, of a large number of cases expeditiously and with lesser costs. The institution of Lok Adalats is at present functioning as a voluntary and conciliatory agency without

any statutory backing for its decisions. It has proved to be very popular in providing for a speedier system of administration of justice. In view of its growing popularity, there has been a demand for providing a statutory backing to his institution and the awards given by Lok Adalats. It is felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also take justice to the doorsteps of the poor and the needy and make justice quicker and less expensive.

The parties were fully aware that under the Act, the District Legal Services Authority may explore the possibility of holding pre-litigation Lok Adalats in respect of the cheque bouncing cases. The compromise in such cases would be treated as in award having force of a decree. All objections as raised with regard to the execution in view of above statutory provisions itself is rightly rejected. Having settled the matter in Lok Adalat and now after more than 3 years raising such plea is untenable. Having obtained the award from Lok Aalat, the party is not permitted to resile from the same. It attains finality to the dispute between the parties finally and binds all. Therefore, the order in this regard needs no interference.

From the above discussion, the following propositions emerge:

- (1) In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that court.
- (2) The Act does not make out any such distinction between the reference made by a civil court and a criminal court.
- (3) There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various courts (both civil and criminal), tribunals, Family Court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other forums of similar nature.
- (4) Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable

of execution by a civil court.

(K.N. Govindan Kutty Menon Vs. C.D. Shaji; (2012) 1 SCC (Cri) 732)

Minimum Wages Act

S. 3(2)(i), 4(1) and 20(3)(i) Complaint - For unpaid minimum wages as per notification dated 1.8.2003 - For workmen of petitioner - transport company - Authority found that the management had not paid the actual minimum wages - Worked out unpaid wages and also levied penalty - However no reason given for levying penalty at 10 times as such - Penalty of 10 times stands modified - Petitioner is directed that apart from minimum wages already deposited, the petitioner should pay Rs. 3,25,872/- to the concerned workman

In normal circumstances, when the Act gives power to the authority to levy penalty and also gives the discretion to levy penalty depending upon the fact situation and the authority exercise statutory power, it may not be proper for this Court to interfere with the quantum of penalty. Non-payment of wages notified under the Minimum Wages Act will result in forced labour prohibited under Article 23 of the Constitution of India.

In any event, in the order impugned in the writ petition, the authority had not given any reason for levying the maximum penalty because the penalty ranges from amount equivalent to the non-payment of minimum wages and go up to the maximum of 10 times and therefore, when there is a discretion vested with the authority, he should normally exercise the discretion in a particular manner.

The order impugned in this writ petition levying penalty 10 times stand modified. It is suffice to direct the petitioner that apart from the minimum wages already deposited and withdrawn by the workmen, the petitioner should pay Rs. 3,25,872/- to the concerned workmen. **(Mohan Das Vs. Authority, Minimum Wages Act/Dy. Commissioner Labour and other; (2012(133) FLR 262) (Madras H.C.)**

S. 20(3) - Minimum Wages - Order directing petitioner to pay amount to workers as difference of salary and penalty of 10 times

of said amount - There was clear report of Labour Inspector - Hence, competent authority committed no error in directing to pay such amount to workers - However, in absence of notice and hearing to petitioner, imposition of penalty is not justified - Penalty to the extent of Rs. 25,000/- is enough in the ends of justice

We do not find any reason to interfere with the proceedings drawn ex-party and, therefore, in adjudicating the claim and directing payment of Rs. 17,848/- as the difference of salary, the competent authority has not committed any error and to that extent interference into the order is not called for.

The penalty should have been imposed in a reasonable manner and this having not been done, it is a fit case where interference into the quantification on the penalty should be made by this Court. On evaluating the totality of the facts and circumstances, we are of the considered view that for the default committed by the petitioner, imposition of a penalty to the extent of Rs. 25,000/- (Rupees Twenty Five Thousand) would be enough and would meet the ends of justice. **(Vinod Kumar Chourasia Vs. Labour Inspector and another; (2012(133) FLR 695) (M.P. H.C.)**

S. 22-A - Contract Labour (Regulation and Abolition) Central Rules, 1971 - Rule 81 (1) (i) – Contract Labour (Regulation and Abolition) Act, 1970 - Cognizance under-Complaint - Alleged that petitioner's company had failed to display the date of payment of unpaid wages in English hand Hindi - Which is violative of Rule 81 (1)(i) of Rules, 1971-However ACJM instead of taking cognizance under Contract Labour Act, took cognizance under Minimum Wages Act - Without application of mind-Which is an abuse of process of Court - Hence that order cannot be sustained - Quashed

The Labour Enforcement Officer (C) filed aforesaid complaint petition alleging therein that petitioner's company had failed to display the date of payment of unpaid wages in English and Hindi, which is violative of Rule 81 (1) (i) of Contract Labour (Regulation and Abolition) Central Rules, 1971. But from perusal of impugned order, I find that learned Addl. Chief Judicial Magistrate instead of taking cognizance under Labour Contract (Regulation and Abolition) Act,

1970 took cognizance under Minimum Wages Act which clearly shows that he passed the impugned order without application of mind, which is in my view, is an abuse of the process of Court. Accordingly, the said order cannot be sustained. **(Sridhar Nath Sinha @ S.N. Sinha and another vs. State of Bihar and another; (2012 (133) FLR 561) (Jharkhand H.C.)**

Minimum Wages – Claim of - Filed by petitioners - Minimum Wages Act, 1948 - Dispute revolves around short point namely, applicability of notification issued on 14.1.2004 under the Act - Revolves on payment of wages to workmen of 1st respondent-factory on basis of notification - What is manufactured by first respondent is “electrical ballast” and not “electronic ballast” - however no inference can be drawn merely on basis of a clause in Memo and Articles of Association - As such the activity carried on by first respondent is rightly held as electrical and not electronic- No infirmity found with order passed by the authority

The only conclusion that can be drawn is that what is manufactured by the first respondent is a “electrical ballast” and not “electronic ballast”.

However, no such inferences can be drawn merely on the basis of a clause found in the Memorandum and Articles of Association inasmuch as the said clause covers not only what activity is carried on by them but also covers what activities are not carried on by them also.

There is no electronic circuit available so as to bring item within the scope of electronic Ballast. As such the appropriate Authority was of the view that activity carried on by the first respondent-company is electrical and not electronic and it has rightly held so. In that view of the matter notification issued at Annexure-A is inapplicable to the employees of the first respondent-company. I do not find any infirmity in the order passed by the said authority for the reasons aforesaid.

Taking into consideration the first respondent-company itself has recognized these workmen to be on par with the workmen working in the electronic ballast w.e.f. 2005, ends of justice would be met if the first respondent-company is given liberty to consider the prayer of workmen for grant of some solacium to the petitioners who had filed

claim petition before the Minimum Wages Authority and who have been pursuing their claim and who are on the rolls of the first respondent-company as on date as one time measure. (**Apex Luminaries Employees Union (CITU) Vs. Management, Apex Luminaries (p) LTD. and another; (2012 (133) FLR 730 (Karnataka High Court)**)

Motor Vehicle Act

S. 147 – Motor insurance police – suppression of material fact – liability of insurance come - Whether co. absolved from liability

Even before me the same contention relating to the commencement of risk is advanced and the learned counsel appearing for the respondents would rely on the judgment of the Hon'ble Supreme Court in J. Kalaivani v. K. Sivashankar, 2002 ACJ 613 (SC). The Hon'ble Supreme Court had held that the liability of the insurance company would commence from the time when a specific mention of time is made and in the absence of such time the policy would become operative from previous midnight when bought. The principle of law is well taken and I have no difficulty in accepting the plea that normally the risk would commence from 00:00 hours if there had been no time stipulated in the policy. Another important aspect of the insurance law is that the contract of insurance is a contract of uberrima fidei (utmost good faith) and if there had been a suppression of material fact the policy would become vitiated. The Hon'ble Supreme Court in the above case had occasion to consider only one issue relating to commencement of risk and it had no occasion in that case to deal with the situation of suppression of material fact. That is precisely the issue in this case.

When evidence was given through two witnesses of the insurer that the owner had suppressed the fact of involvement of the vehicle in an accident even before the risk was undertaken by the insurance company, the owner avoided the witness-box to explain whether he had given such information or the policy and the proposal had been given and accepted by the insurer even before the accident. I have already pointed out that the owner did not even have the courage to

put the suggestion that the cover note had been issued prior to the time of the accident itself or that it was issued to cover the risk from an anterior time, after having been apprised of the accident. The finding of the Tribunal has again merely taken into consideration as to when the risk would normally be undertaken when time is not stipulated in the cover note or the policy. The non-examination of the owner in this case assumes enormous significance and an adverse inference has to be drawn and if he had examined himself he would have had to admit that the cover note had been made only subsequent to the accident and the fact that accident itself was not disclosed to the insurer.

The liability for the claims arising out of the accident shall under the circumstances fall on the shoulders of the owner of the vehicle only. The insurance company was justified in cancelling the policy and the insurance company shall stand exonerated in all the cases. **(National Insurance co. Ltd. v. Rajwinder Kaur; 2012 ACJ 1061)**

Ss. 147(5) and 149(1) – Cheque dishonoured – Policy remains in force till cancelled and it cancelled after the accident

The question raised in this case is whether the insurer is absolved of its obligations to the third party under the policy of insurance because the cheque given by the owner of the vehicle towards the premium got dishonoured and subsequent to the accident the insurer cancelled the policy of insurance?

The legal position is this regard, where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets

dishonoured and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof. (**United India Insurance Co. Ltd. v. Laxmamma & ors.; 2012 (3) Supreme 105**)

S. 149(2)(a)(ii) – Motor Insurance – Liability of insurance co. on ground of driving licence is fake and fabricated – consideration of – merely on these grounds that the driving licence was found fake and fabricated, invalid co. cannot be absolved from its liability to make payment of compensation to claimant

In the case of National Insurance Co. Ltd. v. Swaran Singh, 2004 ACJ 1 (SC), it has been categorically held by the Hon'ble Apex Court that mere absence, fake or invalid driving licence or disqualification of the driver for driving, are not in themselves defences available to the insurance company. The Hon'ble Supreme Court in plethora of cases has repeatedly held that merely on this ground that the driving licence was found to be fake, the insurance company cannot be absolved from its liability to make the payment of compensation to the claimants of the deceased.

In the ultimate analysis, I am of the view that the defence of mere absence fake or invalid driving licence or disqualification of the driver for driving, is not available to the insurance company in the light of the decision in the case of National Insurance Co. Ltd. v. Swaran Singh, 2004 ACJ 1 (SC). Thus, the insurance company is held liable to make the payment of compensation to the claimants-respondents. (**Manohar Das v. Mishri; 2012 ACJ 740**)

S. 163-A – Applicability of provision – It not only applies only third party but it applies to all victims of motor accidents whether they are outside or inside the vehicles

Section 163-A which declares the right and liability, does not in any way limit the applicability of the section to third parties. Plain language of the section appears to take in all the victims of motor accidents whether they are inside or outside the vehicle. The section, by

the wide sweep of the semantics, appears to take within its width all victims of accidents. The mere fact that section 163-A was included in the Chapter XI of the Act and that Chapter XI has the heading 'Insurance of Motor Vehicles against Third Party Risks' appears to be irrelevant considering the opening non obstante clause of section 163-A. The fact that the words 'third party' appear on the heading of the Second Schedule does also appear to be irrelevant to us considering the language of section 163-A. The argument appears to be possible that section 163-A can apply only to third parties-that is, all persons other than the owner and authorised insurer, who are made liable under section 163-A. If suffering and not fault is the foundation of liability, it appears to us to be necessary to bring all who have suffered death/personal disablement within the sweep of the section-without exclusion of even the owner, if possible. We feel one has to view the liability under section 163-A more as a welfare measure by the State which outsources its obligation to ameliorate the suffering of victims of accidents and gets the same done by authorised insurers (basically government companies) who are given monopoly rights to carry on the lucrative business activity of motor vehicles insurance. The State's liability/responsibility can be viewed as that of patron-patriarch to ameliorate the suffering of victim citizens. It can also be viewed from the angle of its proven inability to prevent actionable negligence on its roads. Want of adequate infrastructure may also contribute/cause the accident in which event also the responsibility of the State is prominent. It appears to us that the liability under section 163-A is advisedly placed on the broad shoulders of the authorised insurer of the vehicle who is favoured by the State to exclusively undertake such lucrative business activity. It is true that the owner is also made liable. We feel that it applies to a defaulter owner who despite the mandate of the Act has defaulted in getting his vehicle insured. That the defaulter owner has been made liable in a case where there is no authorised insurer in respect of a vehicle is according to us too unsatisfactory an indication to deny benefits of section 163-A to the victim/owners, their employees, or those who allegedly step into their shoes. All victims appear to fall within the target group to whom benefits are intended under the beneficial statutory provision going by the simple and plain language of section 163-A. (**National Insurance Co. Ltd. v. P.C.**

Chacko; 2012 ACJ 1065)

S. 166 – Maintainability of claim application – Non joinder of driver as necessary party - effect of – Claim application against owner of offending motor vehicle cannot be dismissed on ground that driver has not been impleaded

A bare look on sub-section (1) of section 140 of the Act shows that the liability to pay compensation on account of death or permanent disablement of any person resulting from an accident arising out of the use of a motor vehicle is of the owner of the motor vehicle. The liability under section 140 of the Act, commonly known as ‘no fault liability’, arises merely on account of death or permanent disability suffered by any person resulting from an accident arising out of use of a motor vehicle. No fault liability is of the owner and that is a primary liability and is not a vicarious liability arising out of the negligence on the part of any person including the driver.

Section 166 of the Act enables the victim of a motor accident to make an application for compensation. Section 158(6) of the Act imposes a duty on the officer-in-charge of the police station to forward a copy of any information regarding any accident involving death or bodily injury to any person recorded by him to the Claims Tribunal having jurisdiction in the area. Sub-section (4) thereof says that Claims Tribunal shall treat any report of accident forwarded to it under sub-section (6) of Section 158 of the Act as an application for compensation under the Act. If the report of a police officer is to be treated as an application for compensation, obviously such application cannot be dismissed even if it (the police report) does not name the driver who may in some cases be absconding and whose name and address may not be known. If there would be no requirement of naming the driver in the report of the police officer under section 158(6) of the Act, different rules and standards cannot be applied for a claim application made by the victim against the owner of the motor vehicle. Thus, in my view, the law relating the requirement of joining the driver of a motor vehicle as a party to the claim application which arises under the common law of torts and the principle of the owner’s liability being only vicarious the owner cannot be liable unless the driver is a party to the petition stands modified so far as the claim application under the Motor Vehicle

Act is concerned. The claim application against the owner of the motor vehicle cannot be dismissed merely on the ground that the driver of the motor vehicle involved in the accident was not joined as a party to the application. (**Sikhandar Khan Rashid Khan v. Ansar Baig Sabdar Baig; 2012 ACJ 985**)

S. 166 – Award of compensation – Consideration of

Appellant's husband herein in the instant case died in a road accident when the Maruti car in which he was traveling with husband of respondent No. 2 and the father of respondent Nos. 3 and 4 went out of control. The appellant and other legal representatives of deceased filed a petition under Section 166 of the M.V. Act, 1988 for award of compensation to the tune of Rs. 4 lacs. They pleaded that the accident was caused due to rash and negligent driving of the Maruti car by driver of case, that at the time of his death, the age of the deceased was about 45 years and that he was earning Rs. 5,000/- per month by running a milk dairy and doing agriculture.

Tribunal held that claimants were entitled to compensation of Rs. 1,32,000/- with interest at the rate of 12 per cent annum, from the date of application. The High court relying upon the judgment of Apex Court in Sarla Verma v. Delhi Transport Corporation, applied the multiplier of 14 and held that the claimants were entitled to total compensation of Rs. 1,77,500/- with interest at the rate of 7 per cent per annum on the enhanced amount from the date of appeal till realization.

Hence, present appeal has been filed against said order of High Court.

The Court held that there was no absolute rule that there would be no addition in the income of a person who is self employed or who is paid fixed wages. On the contrary court held that a person who is self employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he/she becomes victim of accident then the same formula would be applied for calculating the amount of compensation. Again, the Court held that it was not possible to approved the view taken by Tribunal that deceased would have spent $\frac{1}{3}^{\text{rd}}$ of his total earning, i.e., Rs. 500/-, towards personal expenses.

Apart from that, there was no reason for Tribunal to assume that sons who had become major could no longer be regarded dependant on deceased. Hence total amount payable to claimants held to be Rs. 3,19,840/-. Impugned judgment as also award of Tribunal were set aside. Appeal was allowed. (**Santosh Devi v. National Insurance Company Ltd. and ors.; 2012 (3) Supreme 197**)

Ss. 166 and 163-A – Claim tribunal procedure and powers – Determination of

These are the only questions to be ascertained in a claim under section 163-A. We repeat that negligence is irrelevant. Consequently contributory negligence must also be held to be absolutely irrelevant. To ascertain the liability under section 163-A, one need not go beyond the four walls of section 163-A as it is a distinct and different absolute statutory liability imposed under section 163-A. Extent of dependency is also irrelevant to ascertain the quantum of compensation. Of course, later while directing apportionment among the legal heirs where there is plurality of legal heirs dependency may assume some relevance. But dependency or extent of dependency is absolutely irrelevant while ascertaining liability or quantum of liability of the owner/insurer in a claim under section 163-A. The legislature was conscious that it may be difficult for the legal community to accept the altered norms. That explains the employment of the non obstante clause in the opening words of the section. We may note that while any legal representative can sustain a claim under section 166, only the legal heirs or the victim can sustain the claim under section 163-A. (**National Insurance Co. Ltd. vs. P.C. Chacko; 2012 ACJ 1065**)

Injury – Permanent disability and loss of income – Whether any compensation for permanent disability is admissible when injured has already awarded compensation for loss of income under clause 5(b) of second schedule of M.V. Act, 1988 – Held, “No”

As per clause 5(b) of the second schedule to the Motor Vehicles Act, the claimant is entitled to compensation for 35 per cent of permanent partial disability. Claimant was paid Rs, 15,252 as monthly

salary at the time of accident as per Exhs. A4 and A5 and the same is not disputed. The multiplier for the age of 53 years is '11' as per the decision of the Hon'ble Apex Court in Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC). Hence, the compensation for loss of income payable to the claimant as per clause 5 (b) of the Second Schedule to the Motor Vehicles Act is Rs. 15,252 x 12 x 11 x 35/100 = Rs. 7,04,642.40.

As rightly contended by the learned counsel for the appellant, if the claimant is awarded Rs. 7,04,642.40 as per clause 5(b) of the Second Schedule to the Motor Vehicles Act, the claimant is not entitled to Rs. 70,000 towards disability compensation awarded by the Tribunal, as held by the Full Bench decision of this court in Cholan Roadways Corporation Ltd. v. Ahmed Thambi, 2006 ACJ 2703 (Madras). Therefore, the amount of Rs. 70,000 for disability compensation and Rs. 50,000 towards loss of income are deleted from the award. (**Tamil Nadu State Trans. Corpn. Ltd. v. Antony Xavier Rayer, K.; 2012 ACJ 885**)

Injury – Principles of assessment – Compensation in injury cases is always higher than in case of death since it is given to living victim of the accident both for his personal loss and for economic loss

It is well settled that in a personal injury case, the injured has to be compensated under the heads: (1) pain and suffering; (2) loss of amenities; (3) shortened expectation of life if any; (4) loss of earnings or loss of earning capacity or in some cases for both and (5) medical treatment and other special damages like transportation or travelling expenses, nutrition and good, etc. While determining compensation under the above heads, the two main elements to be borne in mind are: personal loss and the pecuniary loss. Chief Justice Cook burn in Fair v. London and North Western Railway Co., (1869) 21 LT 326, distinguished the above two aspects thus :

“In assessing (the compensation) the jury should take into account two things, first the pecuniary loss (the plaintiff) sustains by accident, and secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present

loss, but his incapacity to earn a future improved income.”
(Rameshwari Devi v. Himachal Road Trans. Corpn.; 2012 ACJ 1017)

Quantum – Fatal accident – Principles of assessment – Whether compensation for loss of love, affections, guidance and supervision is admissible to minor child – Held, “No”, such loss is covered under loss of dependency

The compensation awarded by the Tribunal as ‘general damages’, however, is either on higher side or not permissible under law. The loss of income to the dependants of the deceased because of death includes within its fold, the damages almost on all counts except the loss of consortium to the widow, loss to estate and actual expenses like medical expenses, and funeral expenses. The Tribunal has awarded an expenses. The Tribunal has awarded an amount of Rs 20,000/- to the widow of the deceased on account of loss of consortium. The amount awarded is on higher side. The compensation suggested by Second Schedule to Motor Vehicles Act on account of loss of consortium is Rs. 5,000. The Tribunal without assigning reasons has awarded compensation four times the suggested compensation. The Tribunal as against suggested compensation on account of loss to estate awarded twenty times the suggested amount and compensation on account of funeral expenses two and a half times of the suggested compensation. The just compensation on account of loss of consortium, loss to estate and funeral expenses, having regard to all the aspects of the case, would be Rs. 10,000, Rs. 5,000 and Rs. 5,000. There was no reason for the Tribunal to award compensation on account of loss of love, supervision, etc. in favour of respondent Nos. 3 to 6 as such loss is covered in loss of income or dependence. Rs. 40,000 awarded by the Tribunal on said count, thus, must be disallowed. **(National Insurance Co. Ltd. v. Fatima; 2012 ACJ 954)**

Municipalities Act

S.128 – U.P. Krishi Utpadan Mandi Adhiniyam, Sec. 17(3)(b) r/w Rule 75 – Weighment tax chargeable Nagar Palika Parishad, is not permissible within campus of Mandi Samiti

So far as the question of ultra vires is concerned, in association

with the earlier judgments we hold and say that the claim of the weighment tax/charge by the Nagar Palike Parishad cannot be said to be ultra vires but it cannot impose the same within the campus of the Mandi Samiti, where the traders and/ or purchasers are under obligation to pay the similar wighment charges to the Mandi Samiti itself.

Thus, in totality, the writ petition can be allowed and is allowed. The claim, if any, of the weighment fee or charge or tax by the Nagar Palika Parishad within the campus of the Mandi Samiti cannot be held to be sustainable. (**Chhotey Lal Rajendra Kumar Jain and others v. Nagar Palika Parishad, Barua Sagar, District Jhansi and others; 2012 (2) AWC 2902**)

S.12-D – Scope of – Revised/Recall-order attained by misrepresentation and/ or fraud can always be review/ Recalled - Even if statute does not give power of review to authority concerned

In *Oriental Insurance C.o. Ltd. v. Motor Accident Claims Tribunal and others*, 2009(1) AWC 358, in which it has been held while relying upon the judgment of the Hon'ble Apex Court (supra) that even if there is no power to review or recall the Court/Tribunal is still not powerless to review/recall its order obtained by misrepresentation or fraud. It is trite in law that this Court while exercising its plenary power has inherent right to review any order. There is no constraint in exercising of such power. This may not be true while the Court is considering an issue under the Statute which excludes the power of review. Any tribunal or any statutory authority cannot exercise such power unless and until statute so provides. However, exception to such principle is that if any order has been passed/obtained by fraud the Authority/Tribunal shall always have such power to review/recall its mistake in this behalf. The principle on the basis of which such power has to be exercised is to ensure that a dishonest litigant is not allowed to use the Courts for obtaining an oblique purpose. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly

administration of the Court's business. (**Ashok Kumar Singh and another v. State of U.P. and others; 2012(2) AWC 2930**)

National Security Act

S. 3(2) – Communication of right to make representation – Ambit and scope

In this case question after determination was when the District Magistrate/Detaining Authority acting under section 3(2) of the National Security Act is required to communicate to the person detained, regarding right of making representation to him in view of Apex Court's decision in Kamlesh Kumar's case (supra). If so, non-communication would infringe fundamental right guaranteed under Article 22 (5) of the Constitution?

Court has observed that it difficult to agree with the argument that it is obligatory for the District Magistrate/Detaining Authority under National Security Act, 1980, to communicate the detenu his right for making representation to him, and that non-communication of the period of 12 days within which he can make representation to him will render the detention order invalid. Court also do not agree with his submission that the District Magistrate/Detaining Authority has power to revoke or modify the detention order passed by him after it is approved by the State Government.

Court, therefore, answer the questions posed before us in the reference, as follows:-

“(1) The District Magistrate /Detaining Authority acting under section 3(2) of the National Security Act, 1980 is required to communicate to the person detained, his right of making representation to him, and that non-communication of such right will infringe fundamental right of the detenu under Article 22(5) of the Constitution of India.

(2) The obligation of the District Magistrate/Detaining Authority is to communicate to the detenu, his right for

making representation to him, is upto the date of approval of the detention order by the State Government, or before 12 days. The non communication of the period will not render the detention order invalid.

(3) The District Magistrate/Detaining Authority does not have power to revoke or modify the detention order passed by him, after it is approved by the State Government.

(4) The district Magistrate/Detaining Authority is not obliged to consider and decide the representation, after approval of the detention order by the State Government.”

(Km. Indu Mishra v. Union of India; 2012 (77) ACC 17)

S. 3(2) - Constitution of India – Articles 22(4), (5)(6) and (7) – Preventive detention – Meaning and object

The preventive detention means detention of a person without trial, in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention. The object of preventive detention is not to punish a person, but to prevent him from doing something, which comes within Entry 9 (Preventive detention of reasons connected with Defence, Foreign Affairs, or the Security of India; persons subjected to such detention) of List 1, and Entry 3 (Preventive Detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention) of List 3 of the Seventh Schedule of the Constitution of India. The purpose is to prevent the individual not merely for acting in a particular way, but from achieving a particular object,. No offence is proved, nor is any charge formulated. The justification is suspicious or reasonable probability and not criminal conviction, which may be warranted only by legal evidence. The order of preventive detention is made as precautionary measure. It is based on reasonable prognosis of the future behavior of a person based on his past conduct in the light of surrounding circumstances. (**Km. Indu**

Mishra v. Union of India; 2012 (77) ACC 17)

Negotiable Instrument Act

Ss. 141 and 138 – Word used deemed – Significances of – Word “deemed” used in Sec. 141 applies to the company and persons responsible for acts of company

The word ‘deemed’ used in sec. 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in S.M.S. Pharmaceuticals Ltd. (supra). In the said case, it has been opined that the criminal liability on account of dishonor of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extended the liability to the officers, the conditions incorporated in sec. 141 are to be satisfied. (**Aneeta Hada v. M/s Godfather Travels & Tours Pvt. Ltd.; 2012 (77) ACC 924**)

Payment of Gratuity Act

Ss. 2(e) and 13-A (As amendment in 2009) – Gratuity - ‘Teacher’ - Is an employee within the definition under section 2(e) of Act - Amendment in view of Amendment Act, 2009, is given retrospective, effect from 3.4.1997

The Legislature has amended the definition of ‘employee’ under section 2(e) of the said Act with effect from 3.4.1997, which is in tune with the observations made in para 25 of the judgment of the Apex Court. The Objects and Reasons of such amendment make the intention of the Legislature very clear to apply the provisions of the Payment of Gratuity Act to the Teachers also. The amended definition is wide enough to cover the category of the Teachers for the purpose of applicability of the said Act. There is no escape but to hold that a Teacher is an ‘employee’ within the meaning of section 2(e) of the said Act and hence the provisions of the said Act are applicable. **(President Secretary, Vidarabha Youth Welfare Institution (Society), Amravati Vs. Pradip Kumar and others; (2012 (133) FLR 278) Bombay H.C.-Nagpur Bench)**

Gratuity - Pensionary benefits - Communication dated 24.11.2001 issued by respondent - Bank directing petitioner to inter alia refund the entire gratuity amount received by him as a pre-condition for release of pension to him - The pension is sought to be denied to petitioner only for reason of gratuity under the Gratuity Act - As per Apex Court, benefit of gratuity under Gratuity Act cannot be deprived without obtaining exemption from Government - There was no such exemption with the Bank - Therefore the communication of the Bank is quashed/set aside - The petitioner is held entitled to pension in addition to the gratuity amount received by him

We fail to see as to how the matter would not be covered by the judgment aforesaid of the Supreme Court the ratio whereof is that benefit of gratuity under the Gratuity Act cannot be deprived without obtaining exemption from the Government and which has not been granted to the respondent Bank. It was precisely for this reason that the

Supreme Court upheld the claim of the retired employees in that case for gratuity in addition to the pension being received by them.

The communication dated 24th November, 2001 of the respondent Bank asking the petitioner to refund the gratuity amount received by him as a pre-condition or to furnish an undertaking in that regard as a pre-condition for release of pensionary benefits is quashed/set aside. The petitioner is held entitled to pension in addition to the gratuity amount received by him. The respondent Bank is accordingly directed to release the arrears of pension due to the petitioner within six weeks of today together with interest @ 6% per annum from the date when the pension for each month would have fallen due and till the date of payment. (**A.C. Aggarwal Vs. Allahabad Bank; (2012 (133) FLR 803) (Delhi H.C.)**)

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

S. 47(2) - No promotion should be denied to a person merely on the ground of his disability. It would mean that where a person otherwise found eligible and suitable for promotion, the State should not deny him promotion on the ground of his disability-Hence, in view of protection given in Section 47(2), could not be claimed as matter of right for reservation for persons suffering with disabilities for promotion

Sub-section (2) of Section 47 of the Act No. 1 of 1996 is couched in negative terms, namely, that no promotion shall be denied to a person merely on the ground of his disability. This would mean that where a person is otherwise found eligible and suitable for promotion, the State shall not deny him promotion on the ground of his disability. In our view the protection given in sub-section (2) of Section 47, cannot be claimed as a right in a positive manner, for reservation for persons suffering with disabilities for promotion.

We further find that the consideration for affirmative action, providing reservation for physically handicapped persons under U.P. Act No. 1 of 1996 in direct recruitment cannot be extended, interpreting these Acts, to claim a right for reservation, in promotions.

The provisions for reservation in promotions, may be provided by the State as a matter of policy. The Courts do not either make policy, or ordinarily interfere with the policy decisions of the State. The Courts would not by interpreting the provisions providing for reservations, provide or cull out a policy favouring reservation for physically handicapped persons for promotion in public services. **(Bhanu Pratap Singh v. State of U.P.; 2012(2) ESC 1103 (All) (DB))**

Practice and Procedure

Subsequent writ petition for relief which was earlier available - Maintainability of- Held, “No”

In this case, it has been held that the petitioner by means of this second petition now seeks quashing of the order which was passed on 30.12.2010, whereby his licence in Form-11 was cancelled.

In the opinion of the Court this second writ petition is barred by principle enshrined under Order 2 Rule 2 C.P.C. which provides that if a relief was available to the petitioner at the time of filing of his earlier proceedings and if such relief is not prayed for, it is to be deemed that the relief has been waived.

From the records of the present writ petition it is clear that the petitioner had not prayed for quashing of the order dated 30.12.2010 in his earlier Writ Petition No. 34463 of 2011, when such relief was very much available to the petitioner.

Therefore, in view of Order 2 Rule 2 C.P.C., this subsequent writ petition, for the relief which was earlier available to the petitioner but had not been prayed for, would not be maintainable. **(Bhagwan Das and Sons (M/s) vs. State of UP; 2012(2) ARC 119 (All.))**

Probation of Offenders Act

The Court held that death caused by rash and negligent driving. Criminal courts cannot treat nature of offence under S. 304A IPC as attracting benevolent provisions of Probation of Offenders Act, 1958 One of the prime considerations in determining quantum of sentence

for offence of causing death or injury by rash and negligent driving of automobiles should be deterrence. For lessening high rate of motor accidents due to careless and callous driving of vehicles, courts are expected to consider all relevant facts and circumstances bearing on question of sentence and proceed to impose a sentence commensurate with gravity of offence. Sentence of six months' RI and fine of Rs. 5000 each imposed by Supreme Court. **(State of Punjab Vs. Balwinder Singh and Others; 2012) 1 SCC (Cri) 706)**

Provincial Small Causes Court Act

S. 23 - Application for – Rejection of – Legality

In this case Govind Krishna Das and others filed SCC Suit No.39 of 1998 against the petitioner Gulabi Devi for ejection and payment of arrears of rent claiming themselves to be the owners/landlords of House, Varanasi with the petitioner as a tenant. During the pendency of the said suit, the suit property was purchased by Kamlesh Kumar Pal by a registered sale deed dated 9th February, 2001 and he was impleaded as a plaintiff. The petitioner moved an application under Section 23 of the Act for return of the plaint as it involves serious question of title. This application was rejected by the Judge, Court of Small Causes by the judgment dated 1st February, 2010 and the Revision filed by the petitioner for setting aside the aforesaid judgment was also dismissed.

It is stated in paragraph 17 of the writ petition that respondent Kamlesh Kumar Pal also filed a release application under Section 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The Prescribed Authority allowed the application filed by respondent Kamlesh Kumar Pal by the order dated 24th February, 2010 and the appeal filed by the petitioner against the aforesaid order was also dismissed by the order dated 17th July, 2010. The petitioner filed Writ Petition No.50742 of 2010 to assail these orders which petition has also been dismissed by a detailed judgment of date.

Thus, for the reasons stated in the aforesaid judgment rendered in Writ Petition No.50742 of 2010, it is not possible to accept the contention of learned counsel for the petitioner that the Courts below

committed an illegality in rejecting the application filed by the petitioner under Section 23 of the Act. (**Gulabi Devi (Smt.) vs. Kamlesh Kumar Pal; 2012 (2) ARC 148 (All.)**)

S. 25 - Exercise of power – Scope - Jurisdiction u/s 25 are limited and are not as if it is an appeal

The jurisdiction under Section 25 of the Provincial Small Cause Court Act are limited and are not as if it is an appeal. Therefore it has to be seen whether the judgment impugned is in accordance with law. When the findings of the Trial Court are not perverse then no interference is required therein. (**Rashid vs. Kailsh vs. Kailas Chand; 2012(1) ARC 880**)

Registration Act

S. 17(1)(b) - Validity of registration of memorandum of family settlement - Registration of same being not required u/s 17(1) (b) of Act - Relied on

So far as the validity of memorandum of family settlement is concerned, that is a settlement between the persons, who are vested with the right, title and interest in the property by virtue of being sons of Radhey Shyam Soni, who purchased the same through the registered deed and since it does not create or assign any new right, title or interest in that, the registration of the same is not required under Section 17(1)(b) of the Registration Act, 1908. (**Sushil Kumar vs. District Judge, Sultanpur; 2012(2) ARC 38**)

Right of Children to Free & Compulsory Education Act

S. 23(1) - After enforcement of Act, 2009 no appointment can be made on post of Assistant Teacher in a Primary institution if person does not possess qualification prescribed by NCTE in Regulations notified under Section 23 of Act, 2009

Since the provision does not contemplate appointment of a Teacher who is not qualified as per Regulations of N.C.T.C., any provisions made earlier even if permit unqualified persons to be appointed in certain cases, cannot be followed after framing of Regulations by Authorised Authority. In absence of a statutory provision prior to Act, 2009, the provisions permitting appointment of untrained persons could have been complied with since the same had no occasion to infringe any other statute having overriding effect but after

Act, 2009 and Regulations framed thereunder, the situation has undergone a wide change. It is not disputed that National Council of Teachers Education has been notified as Authorised Academic Authority under Section 23(1) and the said body has framed Regulations laying down minimum qualification and eligibility conditions for appointment of Teachers in Primary Schools. In the light of said provisions, which have been made under Act, 2009; the same have overriding effect and, therefore, the otherwise provisions under provincial legislation would sub-serve. (**Committee of Management, Mahavir Singh Solanki Memorial Krishi Junior High School, Aliganj, District Budaun v. State of U.P.; 2012(2) ESC 1082 (All)**)

Right to Information Act

Control or State information commission has no jurisdiction to pass an order providing for access to the information, can only pass an order of penalty

It has been contended before us by the respondent that under section 18 of the Act the Central Information Commission or the State Information Commission has no power to provide access to the information which has been requested for by any person but which has been denied to him. The only order which can be passed by the Central Information Commission or the State Information Commission as the case may be, under section 18 is an order of penalty provided under section 20. However, before such order is passed the Commissioner must be satisfied that the conduct of the Information Officer was not bonafide. (**Chief Information Commissioner v. State of Manipur; 2012 (116) RD 505 (Supreme Court)**)

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act

S. 3 - Criminal P.C. (2 of 1974), Ss. 193, 209 - Trial for offence under Act - Held by special Judge without committal of case to it - Trial does not stand vitiated - Conviction not liable to be set aside or retrial ordered AIR 2004 SC 1890: 2004 AIR SCW 1708 and AIR 2004 SC 536: 2003 AIR SCW 6511, held per incuriam

Because of the restricted role assigned to the Magistrate at

stage of commitment under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate Court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deducted from procedural lapse or an interdict like commitment as enshrined under S. 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has- roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It is therefore impossible to say that such, non-compliance vitiates the trial. The objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under Act does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial. **(Rattiram & Ors. v. State of M.P. through Inspector of Police; AIR 2012 SC 1485)**

S. 3 - Criminal P.C. (2 of 1974), Ss. 193, 209 – Trial for offence under Act – Held by special Judge without committal of case to it –Trial does not stand vitiated – Conviction not liable to be set aside or retrial ordered

Because of the restricted role assigned to the Magistrate at stage of commitment under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate Court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of

abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deducted from procedural lapse or an interdict like commitment as enshrined under S. 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It is therefore impossible to say that such non-compliance vitiates the trial. The objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under Act does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial. **(Rattiram & Ors. v. Stat of M.P. through Inspection of Police; AIR 2012 SCC 1485)**

Service Law

Appointing more persons than the number of posts advertised – Effect of – This will violatives Arts. 14 and 16

The legal position regarding the power of the Government to fill up vacancies that are not notified is settled by several decisions of this Court. Mr. Rao relied upon some of those decisions to which we shall briefly refer. In *Rakhi Ray v. High Court of Delhi*, (2010) 2 SCC 637, this Court declared that the vacancies could not be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates violative of Article 14 and 16(1) of the Constitution of India. This Court observed :

“It is settled law that vacancies cannot be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies is a denial being violative of Articles 14 and 16(1) of the Constitution of India.” **(Kapil Muni Karwariya v. Chandra Narain Tripathi; 2012 (2) Supreme 453)**

Reservation – Principles for providing and implementing

reservation rules re-stated

The following principles can be carved out:-

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet ‘exercise of power’ by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

(v) The state has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4A). Therefore, Clause (4A) will be governed by the two compelling reasons – “backwardness” and “inadequacy of representation” and “inadequacy of representation”, as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling - limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest

of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

(vii) If the appropriate, Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated,. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous facts. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

(U.P. Power Corporation Ltd. v. Rajesh Kumar & ors.; 2012 (3) Supreme 386)

Appointment – Relaxation of age – When irrelevant

The respondent no. 1 issued a public notice published in

“Hindustan Times” dated 7.6.2009 inviting applications for recruitment against various posts on regular basis. A Sr. No. 2 eight posts of Special Educator (DMR/DVTE) were notified. Four posts out of eight belong to general category.

The petitioner applied for the post through proper channel being a Govt. employee. Since the petitioner did not fulfill the eligibility regarding age, she applied for relaxation of age. She was allowed to appear provisionally in the written test held on 28.11.2009. Respondents declined the request of the petitioner for relaxation of age. Aggrieved of the action of the respondents in declining the relaxation of age, petitioner filed O.A. No. 291/CH.2010. An interim direction was issued vide order dated 19.4.2010 reserving one post till further orders. The petitioner was declared successful in the written test and was called for interview to be held on 20.12.2010, subject to the outcome of the court case. On conclusion of the process of selection respondents no. 4 to 6 were appointed and the petitioner remained unsuccessful. Petitioner filed above mentioned O.A before the Tribunal challenging the selection of respondent's no. 3 to 6 on the post of Special Educator (DMR/DVTE) and sought a further direction for her appointment. During the course of hearing before the Tribunal the petitioner prayed for relaxation in age. The Tribunal dismissed the petition primarily on the ground that since the petitioner has failed to qualify the test, the plea of age relaxation has become redundant.

It is admitted case of the parties that the petitioner failed to qualify in the test/section process and thus the question of relaxation of age definitely becomes irrelevant and redundant. The petitioner, though, argued that she was awarded less marks in the interview, however, this was not a ground of challenge in the O.A filed by her and thus no cognizance can be taken of such a plea. The only relief claimed in O.A filed by the petitioner was for age relaxation and a direction for her selection/appointment. Since the petitioner relaxation and a direction for her selection/appointment. Since the petitioner failed to qualify, the question of age relaxation could not have been decided by the Tribunal. (**Kiran Sharma v. Union of India & ors.; 2012 (2) SLR 652 (Pat.)**)

Specific Relief Act

S.6 – S.C. suit for restoration of possession of property in dispute more possession will not lead to presumption of tenancies

The Supreme Court of India in the case of Mahabir Prasad Jain (Supra) has specifically held that mere exclusive possession itself will not give any presumption of tenancy and further that a suit by an agent or by the servant under Section 6 against the master would not be maintainable.

What logically follows is that a categorical finding had to be arrived at by the courts below as to whether in the facts of the case the plaintiff had been able to establish that he was the tenant of the premises in question. Mere possession will not lead to a presumption of tenancy. (**Smt. Akila and another v. Nisar Ahmad and others; 2012(2) AWC 2006**)

S. 20(2)(b) – Suit for specific performance – What type of defence should be taken and who can take it, evidence of such defence should be brought on record

Suit in question was filed by appellant herein in the instant case against respondent for specific performance of agreement for sale in respect of agricultural land. On appreciation of the material on record, the trial court held that the appellant had proved that the respondent agreed to sell the suit land for consideration of Rs. 51,000/- by executing an agreement for sale. An appeal, first appellate court on hearing the parties and on appreciation of the material on record answered all the issues in favour of appellant but reversed the judgment and decree thereby allowing discretion in favour of the respondent by directing him to pay the earnest money with second appeal, Single Judge vide impugned judgment dismissed the second appeal on the ground that the first appellate court had factually found that respondent would be landless as against that appellant who was having various business as well.

Hence present appeal has been filed against said order of High Court.

The question as to whether the grant of relief for specific

performance will cause hardship to the defendant within the meaning of Clause (b) of sub-section (2) of S. 20 of the Specific Relief Act, 1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract. The High Court in the second appeal failed to notice that the respondent had not taken any defence of hardship and no such issue was framed and in absence of any such evidence on record, the first appellate court held that he would be landless should the decree for specific performance be granted.

For the reasons stated above, court is of the view that the appellant is entitled to the specific performance of agreement for sale, as ordered and decreed by the trial court. The appeal is accordingly allowed. The order passed by the High Court in the second appeal and the judgment and decree passed by the first appellate court are set aside. **(Prakash Chandra v. Narayan; 2012 (3) Supreme 204)**

S. 37- Permanent injunction suit - Revision against suo moto order passed by Trial Court restraining plaintiff from interfering in the possession of defendant/petitioner - Allowed - Challenged u/s 37, on the ground revision no maintainable - Held, "Plea unsustainable"

The claim of the petitioners is that they were defendants in a suit filed for permanent injunction being Suit No. 406 of 2010 against the petitioners. In the said suit interim injunction application was also filed and vide order dated 12.5.2010 the defendants-petitioners were restrained from interfering in the possession of the plaintiffs.

It is submitted that the plaintiffs were digging up the earth from the land in possession of the petitioners and, therefore, the court below exercising jurisdiction under Section 151 CPC suo moto passed an order restraining the plaintiffs from interfering in the possession of the petitioners-defendants vide order dated 27.5.2011 against which revision was filed by the plaintiffs and the revisional court set aside the order dated 27.5.2011. In the said revision objection was raised by the petitioners-defendants that as the order challenged is an interlocutory order and does not decide the case, therefore, the revision is not

maintainable.

It was further submitted that against the order passed under Section 151 CPC, appeal would lie under Order XXXIII Rule 1(R) CPC.

In my view, there is no error in the order of the revisional court. Apparently, there was no material before the appellate court to alter the earlier order passed by it by a subsequent order. The affect is that the order of restrain against the defendants will now operate against the plaintiffs itself which is unwarranted and, therefore, there is no error in the order. (**Mohd. Asad Abbas vs. Devi Lal; 2012(2) ARC 116**)

Tort

Negligence – Tortfeasor – Determination of – Whether a minor or a person without a valid driving licence can be presumed to be a tortfeasor – Held, “No”

In this case, accident has occurred on a highway and the vehicle, according to the owner, had been recently repaired and the vehicle had been seriously damaged only by the negligent conduct of the driver of the truck. Driver of the truck himself was examined, but the Tribunal reasoned that the evidence given on behalf of yet another claimant whose appeal is a subject in F.A.O.No. 400 of 1988 was a minor and he ought to have been driving the vehicle himself. The tribunal was literally adopting a reasoning which was nobody's case. Even if Mange Ram was to be taken as a driver, even then there is no presumption of liability that a minor is responsible for the accident and negligence must always be attributed to him. There could be no presumption that a minor or a person who did not have a valid driving licence could be presumed to be a tortfeasor. (**Haryana Glue Works v. Kapoor Singh; 2012 ACJ 982**)

Transfer of Property Act

S.116 of Lease of immovable property - Effect of handover - Conditions required u/s needed to be satisfied

Section 116 of the Transfer of Property Act provides effect of holding over. It provides for the situation under which, despite determination of lease, if the lessee continues in possession a new lease

may come into existence. For application of this section two things are necessary:

(1) The lessee should be in possession after the termination of the lease.

(2) Lessor or his representative should accept the rent or otherwise assents to his continuing in possession.

It has been held that after expiry of original lease, a new lease by operation of law comes into existence as per Section 116 of the Transfer of Property Act. The rights of the parties are governed under Section 116 of the Transfer of Property Act. It has been held that after expiry of the lease where the landlord, after the expiry of the lease, accepted rent at the old rate for a number of years, he cannot be allowed to charge rent at the enhanced rent provided in the penal clause of the earlier lease vide **Usto Ahmedoo v. Abdul Rehman Darzi; AIR 1977 J&K 79**. The tenant paying the rent after expiry of the lease period and remaining in operation is called tenant by holding over. A new tenancy by way of holding over is created by implication under law. In other words, the old terms of tenancy seizes after expiry of the lease.

On a careful consideration of the matter, I find that the view taken by the court below is legally not justified. It is not in dispute that the lease/rent agreement was only for a fixed period of five years and the same was not renewed or extended any further. The lease has come to end by the efflux of time. It follows that after expiry of the aforesaid period, the defendant-tenant became month to month tenant. Tenancy would be governed by the provisions of Transfer of Property Act. The provisions of U.P. Act No. 13 of 1972 are not applicable to the building in question. It was not disputed that the tenancy of the defendant-tenant has been determined by giving a valid notice. The terms of old lease deed including the default clause will not be operative for post expiry period of lease. The lease agreement has lost its efficacy as also its clauses. (**Santosh Kumari Anand (Smt.) vs. U.P. Power Corporation Vidyut Transmission; 2012(2) ARC 420 (All.)**)

U.P. Co-operative Societies Act

S. 69 - Powers - Conferred upon the Registrar for remedying of

defects - Discussed and explained.

The administrative powers under section 69 of the Act have been conferred upon the Registrar for remedying of defects. The powers of the Registrar had been delegated under a notification dated 24.7.1969 but these powers can be exercised only in cases where as a result of audit held under section 64 of the Act or an inquiry under section 65 of the Act or on an inspection under section 66 of the Act the Registrar is of the opinion that the society is not working on sound lines or its management is defective, then he may without prejudice to any other action under this Act, order directing the society or its officers to take such action not inconsistent with this Act, the rules and bye-laws to remedy the defects within the time specified therein. The definition of Joint Registrar under Rule 2(f) of the U.P. Cooperative Societies Rules, 1968 defines Joint Registrar as an officer appointed as a Joint Registrar of Cooperative Societies under sub-section (2) of section 3. Sub-section (2) of section 3 provides that the State Government may, for the purposes of this Act, also appoint other persons to assist the Registrar and by general or special order confer on any such person all or any of the powers of the Registrar. Therefore, even if it is presumed that respondent No. 3 was exercising delegated powers of Registrar in passing the impugned order under section 69 of the Act, then also he had no jurisdiction to pass the impugned order because under section 69 of the Act the order can be passed for remedying the defects directing the society or its officers to take such action not inconsistent with the act, rules and bye-laws. In the instant case, no such directions have been issued by respondent No. 3 for remedying the defects either to society or to its officers. Further respondent No. 3 cannot issue such directions when respondent No. 4 exercising delegated powers of Registrar has already ordered for holding fresh inquiry under section 65 of the Act. **(Committee of management, Bhartiya State Bank Karmachari vetan Bhogisahkari Rin Samiti Ltd., through its Chairman Peitioner v. State of IT.P. through Principal Secretary, Co-operative, IT.P. Shasan, Lucknow and others, 2012(115) RD 849 (All HC)**

U.P. Government Servant (Dispute & Appeal) Rules, 1999

Non issuance of any charge-sheet to petitioner so far fortify and justify an inference to be drawn by High Court that order of suspension passed in instant case is stigmatic, Arbitrary and even otherwise illegal, gross abuse of power conferred upon appointing authority regarding suspension. And, such a prolonged suspension cannot be held valid and justified and respondents cannot be allowed to keep an employee under suspension for an indefinite period

Moreover, such a prolonged suspension cannot be held valid and justified and the respondents cannot be allowed to keep an employee under suspension for an indefinite period as held by this Court in Smt. Anshu Bharti v. State of U.P. and others, 2009(1) AWC 691 where in paras 9, 10, 12 and 13 this Court has observed as under:

“ The prolonged suspension of the petitioner is clearly unjust and unwarranted. The question deals with the prolonged agony and mental torture of a suspended employee where inquiry either has not commenced or proceed with small pace. Though suspension in a contemplated or pending inquiry is not a punishment but this is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment if resorted to by the competent authority to enquiry into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not with due diligence and within a reasonable time. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry or in a prolonged enquiry is unreasonable. It is neither just nor in large public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under

suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in society. A person under suspension is looked with suspicion in the society by the persons with whom he meets in his normal discharge of function.

A Division Bench of this Court in *Gajendra Singh v. High Court of Judicature at Allahabad*, 2004(3) UPLBEC 2934, observed as under:

“We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his colleagues and friends but by public at large too.”

Disapproving unreasonable prolonged suspension, the Apex Court in *Public Service Tribunal Bar Association v. State of U.P. and others*, 2003(1) UPLBEC 780 (SC), observed as under:

“If a suspension continues for indefinite period or the order of suspension passed is mala fide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution
(Para 26)

The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplated or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided an absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

The view I have taken is supported from another Judgment of this Court in *Ayodhya Rai and others v. State of U.P. and others*, 2006(3) ESC 1755. (**Rakesh Bhusan Mishra v. State of U.P.; 2012(2) ESC 1057 (All)**)

U.P. Imposition of Ceiling on Land Holdings Act

Ss. 26 and 27(4) – Allotment of surplus land – sub-Divisional Magistrate has no power to make allotment this power vests with collector but power of conciliation of allotment vests with commission or U/s. 27(4)

The power to make allotment of land declared surplus under the 1960 Act vests with the Collector of the district in view of the provisions of Section 26 of the 1960 Act quoted herein below:

“Section 26. Settlement or letting out of surplus land by Collector. – All settlement of surplus land vested in the State shall be made on behalf of the State Government by the Collector in accordance with the provisions of Section 26A and 27.”

This has to be read in accordance with the Rule 59 of the Ceiling Rules.

The power to cancel an allotment vests in the Commissioner of the Division, under sub-section (4) of Section 27 of the 1960 Act.

It appears that the learned Commissioner was labouring under some misconception, inasmuch as, there is a distinction between the definition of the word “Prescribed Authority” and the word “Collector”, used under the Act, inasmuch as, these are two different authorities, defined at two different places. The Legislature, therefore, clearly intended that the Prescribed Authority can be a person not below the rank of Assistant Collector. First Class to decide objections, but when it came to matters of allotment of surplus land, the Legislature clearly intended that this power has to be exercised by the Collector of the district under Section 26 of the Act. In view of this, the Collector is empowered to proceed to make allotment. The claim of allotment by the petitioners through the Sub-Divisional Officer, therefore, cannot be sustained. There is no delegation of the power under Section 26 of the Act on a sub-Divisional Officer or Assistant Collector 1st Class.

Accordingly, the allotment made in favour of the petitioners was not in accordance with the 1960 Act, as such the Commissioner has committed an error by remitting the matter back to the Sub Divisional

Officer who even otherwise did not have any jurisdiction in the matter. Apart from this, it is the Commissioner himself who has to exercise powers under Section 27(4) and for this reason also there was no occasion for relegating the dispute by a remand order to the Sub Divisional Officer. The Commissioner, therefore, in my opinion, has adopted a totally wrong procedure. (**Mahbullan and others v. State of U.P. and others; 2012(2) AWC 2895**)

UP Urban Buildings (Regulation of Letting, Rent & Eviction) Act

Ss. 21 and 22- Release of accommodation

The Supreme Court in Ragavendra Kumar Vs. Firm Prem Machinery and Co., AIR 2000 SC 534 also observed :-

“..... It is settled position of law that the landlord is best judge of his requirement for residential or business purpose and he has got complete freedom in the matter.”

This finding of fact recorded by the Appellate Authority is based on the evidence on record and cannot be said to be perverse. The Supreme Court in Munni Lal & Ors. Vs. Prescribed Authority & Ors., AIR 1978 SC 29 observed that while examining the findings of bonafide need and comparative hardship of landlord and tenant, it is not for the High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, to reappraise the evidence and come to its own conclusion which may be different from that of the Appellate Authority or the Prescribed Authority.

In the present case, the finding of the Prescribed Authority and the Appellate Authority regarding comparative hardship cannot also be said to be perverse. There is also nothing on the record to indicate that the petitioner made any effort during the pendency of the release application to find out any alternative accommodation. This would also tilt the balance in favour of the landlady. (**K. Gopal (Dr.) vs. Smt. Sudarshan Devi Bhatia; 2012(2) ARC 11**)

Ss. 20 (1) and (2) – Provisions under - Eviction of tenant and determination of tenancy

In present case, learned counsel for the petitioner has submitted that under section 20(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, a suit for eviction of a tenant alone from a building after determination of his tenancy can be instituted and as the petitioners (defendant nos. 2 and 3) are sub-tenants and not tenants, the suit abated since the legal heirs and representatives of the widow of the deceased tenant-defendant no.1 were not brought

on record after the death of the widow, who had earlier been substituted in place of the tenant. It is also his submission that the Judge, Court of Small Causes has the jurisdiction to pass a decree only against a tenant and not against a person who is not a tenant and since in the instant case no decree against the tenant could have been passed as the suit against him abated, the petitioners who are sub-tenants cannot be evicted. It is also his submission that defendant no.1 had colluded with the plaintiff and had made a false statement that he had sub-let the accommodation to defendant nos. 2 and 3 though defendant nos. 2 and 3 were the owners of the premises by adverse possession.

The first submission of learned counsel for the petitioners is that the suit filed by the plaintiff for ejection and for payment of arrears of rent stood abated when Kamla Devi, widow of the deceased defendant no.1, died for the reason that her heirs and legal representatives were not brought on record. It is, therefore, his submission that the decree passed by the Judge, Court of Small Causes on 8th February, 2008 is null and void and legally unenforceable. In support of this contention, learned counsel for the petitioners has placed reliance upon the provisions of section 20(2) of the 1972 Act and has contended that the suit for eviction of a tenant from a building after the determination of his tenancy can be instituted and so if the legal heirs and representatives of the tenant are not brought on record, the suit will abate even though the sub-tenants may have been arrayed as defendant nos. 2 and 3.

Court has observed that this contention of the learned counsel for the petitioners cannot be accepted. Sub section (1) of section 20 of the 1972 Act provides that save as provided in sub section (2), no suit shall be instituted for eviction of the tenant from a building, notwithstanding the determination of his tenancy by efflux of time or expiration of the notice to quit or in any other manner. Sub-section (2) of section 20 of the 1972 Act provides that a suit for eviction of the tenant from a building after determination of his tenancy may be instituted on one or more of the grounds stipulated in sub-clauses (a) to (g). Under sub clause (e), a suit against a tenant can be instituted if the tenant has sub-let the premises, in contravention of the provisions of section 25 of the 1887 Act, the whole or any part of the building. In the instant case, the plaintiff had instituted the suit on the ground that the

tenant was in arrears of rent for not less than four months and the tenant had also sub-let the premises to defendant nos. 2 and 3. The Courts below have found as a fact that the tenant-defendant no.1 had sub-let the premises to defendant nos. 2 and 3 who were in actual possession and, accordingly, the suit for ejectment was decreed. (**Raj Bali Singh vs. Radhika Prasad; 2012(1) ARC 869 (All.)**)

U.P. Zamindari Abolition and Land Reforms Act

Ss. 122B(4F) & 132 – Whether declaration of right of any person can be made in respect of public utilities land U/s. 132 of above Act – Held (ii)

Court has observed that the order dated 30-9-1983 refers to the land in question having been converted under an order dated 14th October, 1977 for the purpose of extending the benefit of a declaration in favour of the petitioner. Nonetheless there is no authority with the Sub Divisional Magistrate under the law for the time being in force to declare a land of public utility in the shape of a road/rasta as defined under Section 132 of the 1950 Act as an old parti. The record of settlement therefore, could not have been altered by the Sub Divisional Magistrate under his executive order or even otherwise which has been made the basis of declaration in favour of the petitioner in the order dated 30-9-1983. Apart from this, the order dated 30-9-1983 also appears to have rested the entire finding on the basis of such an entry in the khataunt to give a declaration in favour of the petitioner.

In the opinion of the Court the consequential action which is based on the order of 1977 also was equally erroneous and, therefore, in the opinion of the Court the Sub Divisional Magistrate did not commit any error in law to have set aside the order dated 30-9-2009. (**Ram Adhar (Chamar) v. Board of Revenue, U.P. at Allahabad and others; 2012(2) AWC 1885**)

Ss.195, 198(4) and 198(6) – Allotment of Gram Sabha land – Cancellation of – Allotment of Gram Sabha land cannot be cancelled U/s. 198(4) of U.P.Z.A. and L.R. Act when limitation therefore U/s. 198(6) thereof had expired for initiating proceedings

The scheme of the Act clearly provides that in case any proceeding has been initiated by the Assistant Collector either on a

complaint or suo motu the period of limitation in both the case is circumscribed by Section 198(6). It does not make any distinction in respect of where the proceedings have been initiated on a complaint or by Collector suo motu. All the grounds available for cancellation of the lease or allotment are to be circumscribed by period of limitation provided therein. Power to cancel the lease under Section 198(4) of the Act does not carve out any special category which can be excluded from the purview of the limitation. The ground on which the lease of the petitioner is cancelled relates to non-approval granted by the Collector at the time of allotment. This can be an issue for the purpose of cancellation of allotment provided same can be raised within period of limitation provided under the Act. Once the period of limitation has expired the Collector cannot cancel the lease on the ground that there was no prior approval granted as contemplated by Section 195 of the Act.

It is required to mention that in the earlier proceedings on 13.3.1985 report was called from the Tehsil authorities by the Collector in which it is stated that the lease granted in favour of the petitioners on 1.2.1976 was approved by the S.D.M. in the same very year even on this ground also the findings of both the courts below cannot be sustained.

In the result, the writ petition is allowed. The orders impugned dated 5.8.2006 and 9.12.2004 are hereby quashed. (**Jiya Ram and others v. State of U.P. and others; 2012(3) AWC 2708**)

Words and Phrases

Tamper and correction – Distinction between

There is good deal of difference between the word tamper and correction. If any portion of the document is corrected by the author of the document, it is perfectly justifiable and the same amounts to correction. However, if the said correction is done by somebody, an unauthorized person, including the insured in the instant case, it amounts to tampering in the instant case, it amounts to tampering of the document. (**Oriental Insurance Co. Ltd. v. Shivanna; 2012 ACJ 795**)

Misconduct and disgraceful – Meaning of

In Government of A.P. v. P. Posetty, (2000) 2 SCC 220, this Court held that since acting in derogation to the prestige of the institution/body and placing his present position in any kind of embarrassment may amount to misconduct, for the reasons, that such conduct may ultimately lead that the delinquent had behaved in a manner which is unbecoming of an incumbent of the post.

It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest (Vide : General Manager, Appellate Authority, Bank of India & anr. v. Mohd. Nizamuddin, AIR 2006 SC 3290).

The expression ‘disgraceful conduct’ is not defined in the statute. Therefore, the same has to be understood in given dictionary meaning. The term ‘disgrace; signifies loss of honor, respect, or reputation, shame or bring dis-favour or discredit. Disgraceful means giving offence to moral sensibilities and injurious to reputation of conduct or character deserving or bringing disgrace or shame. Disgraceful conduct is also to be examined from the context in which the term has been employed under the statute. Disgraceful conduct need not necessarily be connected with the official of the office bearer. Therefore, it may be outside the ambit of discharge of his official duty. (**Ravi Yashwant Bhoir v. District Collector, Raigad & ors.; 2012 (2) Supreme 506**)

Workmen’s Compensation Act, 1923

S. 2(n) – claim - Filed by appellant for compensation on account of injuries sustained in a motor accident - Accident took place on 10.5.2001 - Section 2(n) amended vide notification w.e.f. 8.12.2000 - And casual labour is included in the definition- Therefore, the claim petition could not have been dismissed in view of amended definition of workman on ground that the appellant was casual labour

The Workman’s Compensation Act, 1923 was amended vide notification dated 18th of December, 2000 whereby, the word “other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer; trade or business” was omitted by the Workmen’s Compensation Amendment

Act, 2000 (Act No 46 of 2000) w.e.f. 8th of December, 2000.

Accident took place on 10.5.2001 in which appellant sustained injuries, therefore, the claim petition could not have been dismissed in view of the amended definition of workman by the learned Court below on the ground that the appellant was casual labour. Even if the appellant was casual workman then too the appellant is entitled for the compensation, as the accident took place on 10.5.2001, i.e. after the amendment of the definition. **(Badri Vs. State of M.P. and others; (2012 (133) FLR 693) (M.P. H.C.)**

S. 3 - Liability of insurer - Death of workman not due to accident arising in course of employment but violently attacked in quarrel- No nexus between his death and accident - Compensation could not be awarded - No liability of insurance company - Impugned order fastening liability on insurance company set aside - Appeal allowed

This C.M.A. is preferred against the order of the Commissioner for Workmen's Compensation and Asst. Commissioner of Labour-IV in W.C. No. 11 of 2006 dated 24.1.2008.

The Counsel for the appellant mainly urged that the accident was not due to the rash and negligent driving of the driver of the auto and that the death was not during the employment of the deceased. He further urged that the deceased was not having valid driving license at the time of the accident. In support of his arguments he placed reliance on a decision in Rashida Haroon Kupurade v. Div Manager, Oriental Ins. Co. Ltd and others, (2010 (124) FLR 1007 (SC), wherein the Supreme Court held that the employer is not liable to pay compensation when there is no nexus between death and accidents. He also relied on decision in Malikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd., and another. (2009 (121) FLR 216 (SC).

The Counsel appearing for the respondent while submitting his arguments drawn the attention of the Court to the observation of the lower Court wherein it has clearly held that the death was during the employment of the deceased and therefore the Insurance Company should pay the compensation.

Now the point for consideration is, whether the order of the

lower Court is sustainable?

In recent decision *Ravindra Singh Negi v. Workmen's Compensation Commissioner, Chamoli and other (supra)* case, the Bench of the Apex Court held that in case, cases fall under Workmen's Compensation Act for granting compensation, the employer liability was extensively discussed. It has also held that the accident arising within and in the course of employment and the claimant should prove the nexus between the death and the accident, and if they failed to prove the same, employer is not liable to pay any compensation. In the present case on hand, it has to be seen whether there is any nexus between the accident and the death. Admittedly the deceased died due to head injury when he was fallen on the ground due to violent attack by the opposite driver. The facts noted in the aforesaid decision are squarely applicable to the present case on hand. Further in another decision *Malikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd.* and another (*supra*) case, the Apex Court also held that if there is no sufficient material to connect the death with the rash and negligent driving, the Insurance Company cannot be fastened with liability. These two decisions of the Apex Court amply focussed the doctrine in proving the nexus between the death and the accident. Therefore the Court below ought not to have awarded any compensation as the deceased auto driver died due to the quarrel between him and the driver of the seven-seater auto and not died during the course of employment in view of the clear admission of P.W.1 coupled with documentary evidence-Exs.A.1 to A.3 which cuts the root of the defence that deceased died in the course of employment. So when there is no nexus between the death and the accident, the Insurance Company cannot be fastened with liability. Therefore, in the totality of the circumstances, the finding of the Labour Court that the deceased died while he was on duty as auto driver at the time of accident cannot be sustained.

Accordingly, the Civil Miscellaneous Appeal is allowed. During course of arguments, the Counsel for the appellant submitted that 50% of the award amount deposited by the Insurance Company was withdrawn. Pursuant to finding while allowing the appeal, the Insurance Company is at liberty to take recourse for recovery of the said amount

which was withdrawn by the claimants/respondents. There shall be no order as to costs. (**New India Assurance Company Ltd. Vs. Smt. Noorjahan Begum and others; (2012 (133) FLR 1023) (A.P. H.C.)**)

Section 3, 3(2) and 3(2)(a) - Award of compensation - By Commissioner - Finding that workman died due to heart attack in course of employment - Which was directly attributable to injury by accident arising in course of employment - Namely death due to stress and strain caused by strenuous nature of work - Findings do not warrant any interference - Award of compensation was upheld as proper - However the interest becomes payable after 30 days from the date of accident

This Court has no difficulty and hesitation in agreeing with the finding rendered by the Deputy Commissioner of Labour that here is the case wherein the employee died of in the course of and out of the employment and the respondent is liable to pay compensation and the finding warrants no interference from this Court.

As heart attack leading to death of the employee is held to be caused due to strenuous nature of work and is hence construed to be employment injury occurred in the accident arising out of and in the course of employment. The provisions of sections 3(2) and 3(2)(a) of the Act relating to occupational disease are not applicable to the instant case.

As there is no serious dispute with regard to the quantum of compensation fixed by the Commissioner, the award under challenge is to be necessarily confirmed, except with regard to the date from which the interest becomes payable. As per the judgment of the Division Bench of Madras High Court *Oriental Insurance Company Limited, Pondicherry v. Kaliya Pillai and another*, 3002 (96) FLR 399 (Mad.), the interest becomes payable after 30 days from the date of accident. **(Managing Director, Highland Parade Resort, Highland Holiday Homes Pvt. Ltd., Kodaikanal Taluk Vs. Smt. SubbuLakshmi and others; (2012 (133) FLR 54) (Madras High Court)**

Ss. 3 and 30 – Compensation - Compensation with interest at 12% awarded by Commissioner against the insurance company - Insurance Co. has not challenged the award while employer has not challenged it and has accepted the award - Employer has not chosen to appear before Court - Therefore, Insurer is required to be absolved from the

liability - Deceased died due to heart failure because of consumption of unidentified substance - Therefore insurance company cannot be held liable - Moreover the claimant will not be entitled to amount of compensation as awarded Rs. 2,70,142/-

The insurance company has challenged the judgment and award while the employer has not challenged the same and accepted the judgment and award. Though served, the respondent No. 3 - employer has not to appear before this Court. Therefore, the Insurance Company is required to be absolved from the liability. The deceased died due to heart failure because of consumption of unidentified substance and therefore the Insurance Company cannot be held liable. Since, the employer has not preferred appeal challenging the order and has accepted the award, the liability is on the employer.

In view of the above, the claimant will not be entitled to amount of Rs. 2,70,142/-. The judgment and order of the Workmen Compensation Commissioner directing the insurance company to pay Rs. 2,70,142/- is quashed and set aside, It will be open for the claimant to recover the amount from the employer. **(New India Assurance Co. Ltd. Vs. Dahyabhai Lallubhai Padhiar and other; (2012 (133) FLR 42) (Guj. H.C.)**

Ss. 3 and 30 – Compensation - Calculation of - Compensation under provisions of Act as they existed on 1.6.1999 - If wages are taken at Rs. 2000/- p.m. - Then compensation shall work out to Rs. 27,668/- Interest payable @ 12% from 1.7.1999

In view of the above settled position of law, it is clear that the compensation was payable to the claimant under the provisions of the Workmen's compensation Act as they existed on 1.6.1999. At the relevant time, the maximum wages which would be taken were Rs. 2,000/- per month. If the wages are taken at Rs. 2,000/- per month, then the compensation shall work out to Rs. 27,668/-. As far as interest is concerned, the claimant is entitled to interest @ 12% per month from 1.7.1999, i.e. after giving a period of one month, as provided under section 4-A of the Act. The claimant shall be interested from this date to the date when the amount was to be deposited. **(Executive Engineer, H.P.P.W.D.,D. and R. Division, Nalagarh and another Vs. Premu;**

(2012 (133) FLR 319) (Himachal Pradesh High Court)

Ss. 3 and 30 – Compensation - Liability of payment of - Appeal by Insurance Company - Pleaded that applicant is a rickshaw drive and submitted that rickshaw was sold to other person, so the insurance company is not liable to pay compensation - However, if any breach of conditions of policy is committed the insurance company is required to specify in WS and also to lead evidence to that effect

Ss. 4 and 30 – Compensation - Applicant was working as a driver on Auto Rickshaw - It requires manual effort - Therefore, disability assessed by Doctor is rightly accepted by Tribunal

The said rickshaw was insured with the Appellant-Insurance Company. If at all any breach of conditions of the policy is committed, the Insurance Company is required to specify in written statement and also lead evidence to that effect. Mere presentation of the policy is not sufficient to appreciate the defence of the Insurance Company. No doubt, the Applicant to prove the fact of the accident and the accident has taken course of his/her employment. Once that burden is discharged it is on the Insurance Company to prove that there is a breach of terms of the policy. It cannot be expected that certain facts or policy conditions or other terms or breaches are within the knowledge of the applicant.

The applicant was working as a driver on the Auto rickshaw. Though work was of a sanitary nature, it requires manual effort therefore the disability assessed by Doctor is rightly accepted by the Tribunal. Moreover, assessment of the disability is not controverted before the Tribunal. **(New India Assurance Co. Ltd. Vs. Prakash Dhondiram Nade and another; (2012 (133) FLR 597) (Bom HC)**

Ss. 30, 30 (1) and (2) - Limitation Act, 1963 - Section 5 - Memo of appeal - Under the Act, 1923 - If filed without certificate of deposit -Would not be maintainable - Appeal was barred by limitation in terms of section 30(2) of act, 1923 - Appellants have to show sufficient cause for condonation of delay - Such condonation cannot be had under the guise of an application seeking condonation of delay in representing the appeal

Kerala High Court Rule, 1971 - Rules 15 and 16 - Memo of appeal - Under Workmen's Compensation Act - If presented without certificate of deposit - Appeal should have been returned, for filing it along with certificate of deposit

The presentation of the memorandum of appeal in hand on 14.12.2010 without producing therewith, the Commissioner's certificate as to deposit, does not amount to institution of the appeal under section 30 of the Act, having regard to the third proviso to sub-section 1 thereof. It was no appeal in the eye of law because of the infraction of the aforesaid pre-condition as to deposit. Such incompetence continued till the production of the Commissioner's certificate, in the light of what is stated above. By that time, the appeal was barred by limitation in terms of section 30(2) of the Act, as interpreted above.

Pre-conditions as to institution of such an appeal have to be satisfied to sustain the appeal. "Re-presentation" of a returned appeal memorandum and "condonation of delay in re-presentation" do not make an appeal maintainable, if it is not otherwise. Such an exercise also does not amount to condonation of delay in exercise of the judicial power in terms of the Act, to condone delay.

The condonation of delay in representation of the memorandum of appeal along with such certificate does not amount to condonation of delay in institute the appeal. The appellants have to show sufficient cause for condonation of the delay in institution of the appeal. Such an application could be filed invoking 5 of the Limitation Act, 1963 read with section 30(3) of the Act.

The Registrar shall have the duty and power, subject to any special or general order made by the Chief Justice, inter alia, to return any memorandum of appeal, the presentation of which is defective by reason of failure to comply with the prescribed procedure or which requires any amendment to conform to the procedure or practice of the Court for being represented within a period not exceeding 15 days, after supplying the deficiency, curing the defect or making the amendment, or to require that the deficiency be applied, the defect cured of the

amendment made within a period not exceeding 15 days of the presentation Rule 16 of the Rules authorises the Registrar to hear and determine an application for excusing, inter alia, the delay in remedying any defect or in representation.

The presentation of a memorandum of appeal under section 30(1) of the Act, without it being accompanied by the Commissioner's certificate as to deposit, does not amount to institution of the appeal in terms of the Act. (**Thattuparam Nath Govindan Asari & others Vs. Tharammal Suresshan & another; (2012 (133) FLR 635) (Ker HC)**)

Legal Quiz

Query 1- In a case of Motor Accident claim the Tribunal read the date of validity of a document wrongly and fixed liability on owner whether in review petition, the Tribunal has jurisdiction to reconsider the said issue and change the liability form owner to the insurer.

Ans. In **United India Insurance Co. Ltd. Vs. Rajendra Singh; AIR 200 SC 1165**, the claimants obtained an award for injuries which were later found to have been sustained not in a accident. It was held that no court or Tribunal can be regarded as powerless to review its own order that was wrangled through fraud or misrepresentation.

2. S. 169 – Claim Tribunal - Powers of review

The question of maintainability of the review application cannot be doubted on account of the fact that the Tribunal was not lacking in its power of reviewing its order which resulting into material injustice to the claimants, who happen to be widows, daughter and sons in these cases. The legislature has not specifically prohibited to Claims Tribunal to follow the general procedure prescribed in the Code and when there is no specific prohibition for following the general procedure in an inquiry under Section 168 of the Act and more so, when the wide discretion is vested in the Claims Tribunals under Sub-section (1) of S. 169 of the Act.

Court has no hesitation in holding that the Claims Tribunal failed to exercise the jurisdiction vested in it while rejecting the applications for review filed by the revisionists. The Tribunal ought to have considered the settled law in regard to the award of the interest and further it was not deprived of the power to entertain the review as the legislature has empowered the Claims Tribunal with wide power of discretion to follow such procedure as it thinks fit for holding the enquiry under Section 168 of the Act. The view expressed in **Sunita Devi Singhania Hospital Trust; AIR 2009 SC (Supp) 215** compels the Court to take a view that if any application was moved for

rectification of mistake, then the same was within the province of the Tribunal to correct the same in order to discharge the function effectively for the purpose of doing justice between the parties.

The review applications, therefore, were very well maintainable before the Tribunal and the Tribunal failed to exercise the jurisdiction vested in it in accordance with law for correcting the said omission. **(Sandhya Vaish v. New India Insurance Company Ltd.; 2011 (1) ALJ 408 (All HC, LB)**

Query 2- Whether a second ordinance incorporating therein the same subject-matter, as of first ordinance, can be promulgated, during the pendency of the Bill in the legislature, and House is adjourned?

Ans. - In response to the said as above, the following answer is proposed.

In relation to Art. 213 of Constitution of India, the judgment of Hon'ble Supreme Court in the case of **AIR 1987 SUPREME COURT 579 "D. C. Wadhwa, Dr. v. State of Bihar"** is relevant, and important extract of judgment is reproduced herein below, which replies the query:

“... The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the Legislature is not in Session. The primary law making authority under the Constitution is the Legislature and not the Executive but it is possible that when the Legislature is not in Session circumstances may arise which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances. But every Ordinance promulgated by the Governor must be placed before the Legislature and it would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before

the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue Ordinances is an emergent power exercisable when the Legislature is not in Session, an Ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the legislature reassembles must necessarily have a limited life. Since Article 174 enjoins that the Legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next Session and an Ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the Legislature, it is obvious that the maximum life of an Ordinance cannot exceed seven and a half months unless it is replaced by an Act of the Legislature or disapproved by the resolution of the Legislature before the expiry of that period. The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the Ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the Legislature. The Constitution makers expected that if the provisions of the Ordinance are to be continued in force, this time should be sufficient for the Legislature to pass the necessary Act. But if within this time the Legislature does not pass such an Act, the Ordinance must come to an end. The Executive cannot continue the provisions of the Ordinance in force without going to the Legislature. The law-making function is entrusted by the Constitution to the Legislature consisting of the representatives of the people and if the Executive were permitted to continue the provisions of an Ordinance in force by

adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature. The Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in Session, take over the law-making function of the Legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the Legislature as provided in the Constitution but by laws made by the Executive. The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, re-promulgate the Ordinance as soon as the Legislature is prorogued. **“Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the Legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision.”**

Query 3 - (i) Suit valuation ds fu/kkZj.k ds laca/k esa igys cksyus dk vf/kdkj U;k;ky; @oknh dk gksxk ;k izfroknh dk gksxk ?

(ii) ;fn Presiding Officer us vius {ks=kf/kdkj ds ckgj tkdj Bail ns nh gS vkSj og vfHk;qDr mlds {ks=kkf/kdkj ds ckgj fLFkr tsy esa can gS ijUrq Bail nsus ds igys custody warrant served gks x;s gSaA bl ifjLFkfr esa Presiding Officer dks D;k djuk pkfg;s?

Ans. In regard to your first question, Hon'ble High Court of Allahabad has in the case of **Wajid Ali v. Isar Bano; AIR 1951 ALLAHABAD 64 [C. N. 8.](F.B)** "has held that Section 149, Civil P. C., has to be read as a proviso to S. 4, Court-fees Act, in order to avoid contradiction between the two sections. As a result of reading the two sections together in this light, the law may be stated thus : (1) Ordinarily a document insufficiently stamped is not to be received, filed, exhibited or recorded in a Court. (2) When, however, an insufficiently stamped document is presented to the Court, the Court has to decide whether it will exercise its discretion in allowing time to the party presenting the document to make good the deficiency. (3) If it decides that time should not be granted, it will return the document as insufficiently stamped. (4) If it decides that time should be granted, it will give time to the party to make good the deficiency, and in order to enable the party to make good the deficiency within the time allowed, the Court will tentatively for that limited purpose receive the document. (5) If the deficiency is made good within the time fixed, the document is to be deemed to have been presented and received on the date on which it was originally filed. (6) If the deficiency is not so made good, the document is to be returned as insufficiently stamped by virtue of S. 4 of the Act.

Again it has been held by the Hon'ble High Court of Allahabad in the case of "**Jagarmath v. Ram Dularey**"; **AIR 1956 ALLAHABAD 63 (Vol. 43, C. 23 Jan.)** that, under S. 6, Court Fee Act the Court is directed not to accept a document which is not properly

stamped, but this section has to be read, as pointed out in the 'Full Bench Case' referred to above, along with S. 149, C.P.C. When as, insufficiently stamped memorandum of appeal is presented before a Court the Court has jurisdiction under S. 149 to grant time for making good the deficiency in the court-fee.

At that stage there is no occasion for the Court to issue notice to the respondent as there is no appeal and no respondent till then, and discretion vested in the Court under S. 149 has, in the very nature of things, to be exercised *ex parte*. It is at that very point of time that the Court has to make up its mind whether to allow time or not. No doubt, the Court must exercise its discretion in a reasonable manner, but if it errs, it appears to us that its discretion cannot be questioned at a subsequent stage of the case after the deficiency has been made good in compliance with the order of the Court unless at the time of making the order the Court expressly reserved to the opposite party the right to object the order.

In regard to your second query, the case of "**Pramod Kumar v. State of U. P.; 1991 Cr. L. J. 1063**" is important wherein it was observed by Hon'ble High Court of Allahabad, that where the accused was charged with commission of an offence at place "A". He was already in Jail custody at another place 'B' for committing an offence there when charges were framed against him at place "A". A requisition by Court at place "A" was sent to Superintendent of Jail at place B for transferring the accused to place 'A' which was not complied with by him because of the pending case against the accused at place "B". Subsequently the accused was remanded to Court at place 'A' at the behest of a sub-inspector from place 'A'. Thereafter the accused filed an application for bail in Court at place 'A'. In such circumstances it cannot be said that the accused was in custody of Court at place "A" Rejection by the Court at place 'A' of such bail application of accused would be proper. The transfer of the accused in compliance of the requisition of Court at place 'A' was possible only if the accused was released on bail or the case itself was disposed of at place "B". Further, the requisition by itself does not authorise the detention of the accused in 'A' case. Merely because a requisition has been received which was not complied with by the Superintendent, District Jail at place 'B' under

S.269, it could not be said that by receipt of this requisition, the accused could be deemed to be in the custody of the Court at place "A". (Paras 3, 4, 5, 10)

Again in the case of "**Pawan Kumar Pandey v. State of U.P.**"; **1997 Cr.L.J. 2686** it has been reiterated by the Hon'ble High Court of Allahabad that, Section 437, Cr. P.C. clearly provides that bail can be granted by a Magistrate to an accused involved in a non-bailable offence when he is arrested or detained without warrant by an officer in charge of a Police Station or appears or is brought before a Court. A perusal of S. 437 shows that the bail can be granted by a Magistrate only to that accused who is either arrested or detained or appears or is brought before a Court which means that the accused should be in the custody of the Court where bail application has been moved. The accused must be either in the custody of the Court or must be physically present before that Court or must be in the custody of the police under his jurisdiction. It means that the Court where the bail application is presented, must be in control of the accused.

Hon'ble Supreme Court in the case of "**Niranjan Singh v. Prabhakar Rajaram Kharote**"; **AIR 1980 SUPREME COURT 785** said," Custody, in the context of S. 439, (we are not, be it noted, dealing with anticipatory bail under S. 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

He can be in custody not merely when the police arrest him, produce him before a Magistrate and get a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before the Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of S. 439 Cr. P.C. We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to

consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Art. 136 do not feel that we should interfere with a discretion exercised by the two courts below.” This judgment has been followed in the case of **Chaudhury Jitendra Nath vs. State of U.P; ACC 1991 (28) 497**

Query 4-;fn fd'kksj U;k; cksMZ ds nksuks lnL;x.k vius in ls R;kxi=k ns fn;s gSA ,slh fLFkfr esa fuEu fo''k;ksa ij foLr`r fn'kk funsZ'k nsus dh d`ik djsaA

D;k mDr nksuks lnL;ksa dh vuqifLFkfr esa D;k iz/kku eftLV^asV }kjk vUrfje vkns'k tSlS fd'kksj vij/kh ?kksf''kr fd;k tkuk rFkk tekur izkFkZuk i=k dk fuLrkj.k fd;k tk ldrk gSA

D;k mDr nksuksa lnL;ksa dh vuqifLFkfr esa D;k iz/kku eftLV^asV }kjk vUrfje fuLrkj.k IEcU/kh vkns'k ikfjr fd;k tk ldrk gSA

Ans. With reference of query “whether in the absence of both the members of juvenile Board the Principal Magistrate can pass interim order like, declaring an offender as juvenile or disposal of other interim matters and whether the Principal Magistrate can pass final orders?”

Sub Section 2 of Section 4 of Juvenile Justice (Care & Protection of Children) Act, 2000 provides that-

- (1)
- (2) “A Board shall consist of Metropolitan Magistrate or a

Judicial Magistrate of the First Class, as the case may be, and two social workers of whom at least one shall be a woman, forming a bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be a Judicial Magistrate of the First Class and the Magistrate on the Board shall be designated as the Principal Magistrate”

Sub section (3) of Section 5 of Juvenile Justice (Care & Protection of Children) Act, 2000 provides that-

- (1)
- (2) A child in conflict in law may be produced before an individual member of the board, when the board is not sitting.
- (3) A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any state of proceedings:

Provided that there shall be at least two members including the principal magistrate present at the time of final disposal of the case.

Likewise, sub rule 4 & 5 of Rule 6 of Juvenile Justice (Care & Protection of Children) Rules, 2007 provides as under:-

- (1)
- (2)
- (3)
- (4) A member may resign any time, by giving one month’s advance notice in writing or may be revoked from his office as provided in sub-section (5) of Section 4 of the Act.

(5) Any vacancy in the Board may be filled by appointment of another person from the penal of names prepared by the Selection Committee, and shall hold office for the remaining term of the Board.

Likewise, sub Rule 10 & 14 of Rule 11 of Juvenile Justice (Care & Protection of Children) Rules, 2007 provides as under:

- (1)
- (2)
- (3)
- (4)
- (5)
- (6)
- (7)
- (8)
- (9)
- (10) In case the Board is not sitting the juvenile in conflict with law shall be produced before the single member of the Board as per the provision laid down under the sub-section (2) of Section 5 of the Act.
- (11)
- (12)
- (13)
- (14) When a juvenile is produced before an individual member of the Board, and an order obtained, such order shall need ratification by the Board in its next meeting.

The cumulative effect of above noted Sections and Rules gives an impression that perhaps a principal Magistrate of juvenile Justice Board, in the absence of both Members, can perform judicial work of a very urgent, immediate and interim nature. However, in such condition, he shall not be in a position to pass final orders.

Query answered accordingly.

Query- 5: ,d ttf'ki ls fdlh nwljh ttf'ki esa LFkkukUrfjr fd;s x;s ewy okn o l=k ijh{k.k okn ds uEcj ifjofrZr gksus ds lEcU/k esa lwpuka

Ans. Rule -21, Chapter-VI of General Rule (Criminal) in this context, which is quoted below:-

“Court of Session exercising criminal jurisdiction over two or

more district shall keep a separate series of numbers for each district”

Besides this, the circular letter of Hon’ble High Court of Allahabad is being quoted below for your information:

“C.L. No 16/D-2 dated 4th February 1952 as amended by C.L. No. 69/26-B, dated 9th June, 1952.

As under Rule 2 Chapter IV General Rules (Criminal), 1957 a separate series of number is to be allotted to each district, a separate register in Form No. 15 should be maintained for each revenue district in a sessions division.”

Further, for exercising a original civil suit transferred from one court to another court, the rules are given below:

“C.L. No. 1578/44 dated 15th May, 1912

The number on a suit transferred from one court to another should not be altered.

The following is the correct procedure in this case:

A case is instituted, say, in the court of the Munsif of Mohammadabad and on institution is marked:

Munsif of Muhammadabad

No 10 of 1910

It remains in that court till, say, issues have been struck and is then transferred to the court of the Munsif of Azamgarh. On reaching that court it will be entered in the register on the date of receipt as an entry after the last entry in the resister, but instead of getting a serial number it will be entered as-

Munsif of Azamgarh

No. 10 of 1910 of Munsif of Muhammadabad

A v. X

and this will be the inscription on the papers following:

It will go into the record room when completed as a complete record of the court of the Munsif of Azamgarh but the record-keeper will on examination place it in the basta of the Munsif of

Muhammadabad according to the date of institution, making an entry in the list of the fact of transfer of the case to the court of Munsif Azamgarh.”

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