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

Quarterly Digest

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

January – June, 2011
(Combined Issue)

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Administrative Tribunals Act

S. 14 – Jurisdiction of Central Administrative Tribunal – Scope – It has jurisdiction to consider the statutory notification

In this case, the appellants were in appeal whereby the learned single Judge was pleased to hold that the writ court exercising jurisdiction under Article 226/227 of the Constitution of India would not have jurisdiction to entertain the petition preferred by the appellants and the remedy for the appellants will be to approach the Central Administrative Tribunal (CAT).

On behalf of the appellants, learned counsel submits that the issue of vires of a notification cannot be gone into by the CAT, as it is an existing condition of service and consequently, it was open to the Association of Employees to have moved the Court in the exercise of its extraordinary jurisdiction.

On the other hand, on behalf of the respondents, learned counsel has drawn court's attention to Rule 4(5) of the Rules framed under the Administrative Tribunals Act, 1985 (hereinafter referred to as 'the Act, 1985), which are known as the Central Administrative Tribunal (Procedure) Rules, 1987 (hereinafter referred to as 'the Rules, 1987).

The question, that the court really called upon to answer, is as to whether it is open to the CAT to consider the vires of the notification which has been challenged before the High Court. It would thus be clear from the reading of judgment of Constitutional Bench of Hon'ble High Court in Chandra Kumar's case (AIR 1997 SC 1125) even a challenge to the vires of the statutory legislation/subordinate legislation/administrative action could also be examined by the CAT by virtue of Section 14 of the above mentioned Act. Hence, Central Administrative Tribunal have jurisdiction to consider vires of statutory notification. **(Process and Product Development Centre Employees Association, Agra & Ors. V. Govt. Of India & Ors.; 2011 (1) ALJ 797 (All HC)**

Advocates Act

S. 6 – Professional ethics – Resolution of Bar Association that lawyers will not defend certain accused persons would against constitution, Statute and professional ethics

Professional ethics requires that a lawyer cannot refuse a brief provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. All such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita. **(A.S. Mohammed Rafi v. State of Tamil Nadu; AIR 2011 SC 308)**

Arbitration and Conciliation Act

S. 11 – Scope of proceeding U/s. 11 – Determination of

In a proceeding under Section 11 of the Act, what is relevant is existence of arbitration agreement and not the defence on merits. Further, in view of Court's finding on the first contention, it is not necessary to examine this contention. It is open to appellant to urge this contention, if and when first respondent initiates action against him in accordance with law. **(S.N. Prasad v. M/s. Monnet Finance Ltd.; AIR 2011 SC 442)**

S. 16 – Powers of Arbitrator appointed by Chief Justice – He cannot go beyond decisions of CJ and Rule on his own jurisdiction or on existence of arbitration clause

In SBP & Co. Patel Engineering Ltd.; 2005 (8) SCC 618: AIR 2006 SC 450, a Constitution bench of the Court held that once the Chief Justice or his designate appoints an Arbitrator in an application under section 11 of the Act, after satisfying himself that the conditions for exercise of power to appoint an arbitrator are present, the Arbitral Tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause. **(M/s. APS Kushwaha (SSI Unit) v. Municipal Corporation, Gwalior & Ors.; AIR 2011 SC 1935)**

Arms Act

S. 17 – Cancellation of arms licence on ground of 'Janhit' – No reasons recorded by District Magistrate regarding Janhit – Cancellation of arms licence was invalid.

In the present case, neither the District Magistrate, Sitapur nor appellate authority while passing the impugned order has recorded the reasons as on what grounds and under what circumstances if the petitioner possesses the Arm licence, the same would be against the society or public peace or public safety but the same had cancelled on the ground of 'Janhit' taking into consideration the two criminal cases in respect of which a report was submitted against the petitioner, however the said two criminal cases he was acquitted, so the impugned action on the part of respondents thereby cancelling his arm licence is arbitrary action, in violation to the provisions of the Arms Act. **(Awadhesh Kumar Pandey v. Commissioner, Lucknow Div. Lucknow & Anr.; 2011 (1) ALJ 567 (All HC, LB)**

S. 17(3) – Suspension of arms licence on the ground that there was likelihood of licensee misusing his power in pressuring witnesses during trial in his favour – Validity of

Keeping in view the involvement of the petitioner in criminal case registered in case crime No. 216/2009, under sections 498A/ 304B, IPC and Ss. 3 & 4 of Dowry Prohibition Act, the Licensing Authority held that the petitioner can misuse his power in pressurizing the witnesses during trial in his favour. In this situation, it is not proper in the public interest to retain the arms by the petitioner. Involvement of the petitioner in the aforesaid case is not disputed. Only the question for consideration is whether he is entitled to hold the arms licence during the trial of the aforesaid case till it is cancelled finally. The nature of right of holding the arms licence has been discussed by the Full Bench of the Court in the case of Kailash Nath; AIR 1985 All 291.

It has been answered by the Full bench of the Court in the case of Kailash Nath, therefore, the Court is of the view that the petitioner cannot claim right of retaining of that very arms licence. **(Ram Sanehi v. Commissioner, Lucknow Division, Lucknow & Anr.; 2011(1) ALJ 606 (All HC, LB)**

Benami Transactions Prohibition Act

S. 4 – Applicability of Act

The Apex Court in Mithilesh Kumari; AIR 1989 Sc 1247, has held that the provisions of the 1988 Act shall apply to any pending suit or the appeal arising out of such suit, irrespective of the date of the transaction, that is to say, even if in respect of the transaction, which were completed prior to the 1988 enactment. That being the position, the provisions of 1988 Act shall apply in the present suit also the same having been instituted in the year 1994. **(Surendra Chandra Paul v. Sunil Chandra Paul & Ors.; AIR 2011 Gauhati 88)**

Civil Procedure Code

S. 2(2), 2(9), O. 20, R. 4(2) – Executability of decree – consideration of

Even a judgment passed on basis of admission made by defendant should comply with requirements which may constitute it to be a judgment so as to bring it in conformity with the definition of judgment as contained in Section 2(9) CPC and as indicated in O.XX, R. 4(2) CPC. Even a judgment pronounced under O. VII, R.10 CPC must satisfy the requirement of a 'judgment' as defined in Sec. 2(9) of the CPC.

On a plain reading of the judgment as order in question it would be apparent that it does not determine rights of parties with regard to any matter in controversy in suit and there is no adjudication.

Thus, it does not satisfy two of basic tests which are necessary for drawing an executable decree. Thus, judgment and order passed by Civil Court decreeing suit for permanent prohibitory injunction as against only one of defendants is not a judgment within meaning of Sec. 2(9) read with O. 20, R. 4, CPC and as such decree drawn on its basis is not legally valid which is capable of execution. **(Sabbir Ahmad v. Addl. District Judge, Kaushambi, 2011 (3) ALJ 209 (All HC)**

S. 2(8) – Judge – Meaning of

'Judge' is a generic term and other terms like. Umpire, Arbiter and Arbitrator are only species of this term. A Judge, primarily, determines all matters of disputes and pronounces what is law now, as well as what will be the law for the future and acts under the appointment of the Government. Pollock C.B. in ex parte Davis; [(1857) 5 WR 523] said, "Judges are philologists of the highest orders. They are not mere administrative officers of the Government but represent the State to administer justice." Thus, the Court have no hesitation in coming to the conclusion that the Family Court constituted under Section 3 of the Act has all the trappings of a Court and, thus, is a court and the Presiding Officer, that is, Judge of the Family Court is a 'Judge' though of limited jurisdiction. **(S.D. Joshi**

& Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)

S. 9 – Court – Distinguished from Tribunal – All courts are Tribunal but Tribunal, unless it has all trapping of court is not court

It was held that all tribunals are not Courts though all Courts are tribunals. This view has been reiterated by the Court, more particularly, in relation to drawing a distinction between a tribunal and a Court. A tribunal may be termed as a Court if it has all the trappings of a Court and satisfies the above-stated parameters. Every Court may be a tribunal but every tribunal necessarily may not be a Court. The essential features of 'Court' have been noticed by court above and once these essential features are satisfied, then it will have to be termed as a 'Court'. The statutory provisions of the Family Court squarely satisfy these ingredients and further Presiding Officers of Family Courts are performing judicial and determinative functions and, as such, are Judges. **(S.D. Joshi & Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)**

S. 11 – Plea as to res-judicata and bar to suit under O. 2, R. 2 are different and one will not include other

Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas O. 2, R. 2 of CPC requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

S. 11 – Constructive res judicata – Plea must be clearly established

Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or

defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2, Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from Greenhalgh v. Mallard [1947 (2) All ER 2571] thus:

> "…..it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them". (Emphasis supplied)

In Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra; [1990(2) SCC 7151: (AIR 1990 SC 1607: 1991 AIR SCW 2226), A Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal; [1986 (1) SCC 100]: (AIR 1986 SC 391) thus:

> "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.

The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

S. 11 – Res-judicata – Applicability of – Dismissal of special leave petition summarily by SC without going into merits of case and without deciding question of law would not operate as res judicata

In Kunhayammed v. State of Kerala; AIR 2000 SC 2587, a three-Judge Bench considered the questions whether summary dismissal of the special leave petition and that too without deciding any question of law operates as res judicata qua the special leave petition filed by other party and the judgment/order of the High Court merges in the order of the Court. After examining various facets of the doctrines of res judicata and merger, the Court laid down seven propositions including the following:-

> "(i) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.
>
> (ii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the

content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iii) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(iv) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings in recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the

special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

In view of Court, proposition Nos. (iii) and (iv) extracted hereinabove are attracted in the present case because special leave petition (C) No. 1608 of 1999 filed by the Union of India and the Land Acquisition Collector was summarily dismissed without going into the merits of the petitioners challenge to the judgment of the High Court and no question of law was decided by the Court. **(Delhi Development Authority v. Bhola Nath Sharma; AIR 2011 SC 428)**

S. 11 – Doctrine of res judicata – Meaning and importance

The principles of res judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of res judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the question litigated and should forever set the controversy at rest.

This principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a

technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties. **(M. Nagabhushana v. State of Karnataka & Ors.; AIR 2011 SC 1113)**

S. 11, Expln. IV – Whether principle of constructive res judicata applies to writ petition –Held, "Yes"

In view of authoritative pronouncement of the Constitution Bench of the Court, there can be no doubt that the principles of constructive res judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions. **(M. Nagabhushana v. State of Karnataka & Ors.; AIR 2011 SC 1113)**

S. 24 – Transfer of cases – Transfer of cases cannot be ordered on ground that court where case was pending has no jurisdiction

An order of transfer of a case can be passed where both the Courts, namely, the transferor Court as well as the transferee Court, have jurisdiction to hear the case and the party seeking transfer of the case alleges that the transferee Court would be more convenient because the witnesses are available there or for some other reason it will be convenient for the parties to have the case heard by the transferee Court. There is no question of transfer of a case which has been filed in a Court which has no jurisdiction at all to hear it.

In a case where a party alleges that the Court where the case is pending has no jurisdiction, he should apply to that Court for dismissing it on this ground. There is no question of transfer of such a case. **(Neha Arun Jugadar & Anr. V. Kumari Palak Diwan Ji; AIR 2011 SC 1164)**

S. 47 – Execution of decree – Limitation for objection – No limitation is prescribed for filing objection U/s. 47

The question whether the objections filed by the respondent-judgment debtor were barred by limitation should also not detain by Court, for Court endorse the view taken by the High Court that such objections could not be ignored or rejected on the ground that the same were filed beyond the period of limitation. **(Arun Lal and others v. Union of India and others; AIR 2011 SC 506)**

S. 89 – Alternate Dispute Redressal Mechanisim – Family Disputes, Business disputes should be resolved through mediation/arbitration

In the court's opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties. **(B.S. Krishna Murthy & Anr. V. B.S. Nagaraj & Ors.; AIR 2011 SC 794)**

S. 100-A – Whether special leave to appeal against interlocutory orders should be maintainable – Held, No

In view of Court, though the judgment of the learned Single Judge is a final judgment, it is in another sense an interlocutory order as it is well settled that an appeal is a continuation of the original proceedings. Since the original order of the learned Additional District Judge was an interlocutory order, hence the appeal against that order and the judgment of learned Single Judge in that sense was also interlocutory.

It is well settled that the Court does not ordinarily interfere under Article 136 of the Constitution with interlocutory orders. **(Mohd. Saud v. Shaikh Mahfooz; AIR 2011 SC 485)**

Ss. 151, 152 – Powers of court to reopening of reference case regarding land acquisition matter – Determination

It is patently obvious that the reference case and the matter of payment of compensation to the appellants became final and binding after the award was passed and the judgment was pronounced by the reference court and further by the High Court and thereafter, no appeal having been filed in the Court. Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under Section 151 and 152 of CPC. **(Sarup Singh and another v. Union of India and another; AIR 2011 SC 514)**

O. 1, R. 8 – Representation suit – Leave of court – Necessity of

In this case, the plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order 1, Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use Public Street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order 1, Rule 8 of the CPC. **(Hari Ram v. Jyoti Prasad & Anr.; AIR 2011 SC 952)**

O. 1, R. 10(2) – Necessary party – Who is – Determination of

Two requirements are to be satisfied for determining question as to whether who is a necessary party. These are (1) There must be a right of some relief against such party in respect of controversy involved in the proceedings and (2) No effective decree can be passed in absence of such party. **(Basant Kumar Soni v. Mukund Das Soni and Others; AIR 2011 (NOC) 103 (AP)**

O. 2, Rule 2 – Bar to subsequent suit – When not applicable

In the instant case, the dispute in earlier suit related to the property of Sarvarahkar. Since the plaintiffs filed the suit to declare them as Sarvarahkar even being fully aware with the sale deed

executed by the petitioners, unless they were declared as Sarvarahkar, they had no locus to challenge the sale deed executed by the petitioners being null and void. The plaintiff succeeded in earlier suit and they were declared as Sarvarahkar. The proprietorship of Sarvarahkar of the petitioners was disputed nevertheless the other claimants (respondents) of suit executed sale deed in favour of the petitioners. The Sarvarahkar always keeps the status of Trustee and it is the Deity who is beneficiary of the offerings as well as the property attached thereto, being Trustee, the Sarvarahkar has had no right to transfer the property. After being successful in the suit the plaintiff filed the subsequent suit before the Civil Court for declaration of sale deed as void. Though the earlier dispute was still pending before High Court in the second appeal, but the decree passed by the trial Court as well as the appellate Court has not been interfered with till date, therefore, under the strength of the said decree having been attained the locus to challenge the sale deed, the plaintiffs filed the suit, which cannot be rejected merely on the basis of a technical plea raised by the petitioners. The cause of action of the subsequent suit was the illegal transaction of sale, which is altogether different to the earlier cause of action of earlier suit therefore, the subsequent suit was not barred by Order 2, Rule 2, CPC. **(Rameshwar Singh & Anr. V. District Judge, Faizabad & Ors.; AIR 2011 All 43)**

O. 2, R. 2 – Bar to suit under – Consideration of

Unless the defendant pleads the bar under O. 2, R. 2 and an issue is framed focusing the parties on that bar to suit, obviously the Court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In the instant case, the defendant did not contend that suit was barred by O. 2, R.2. No issue was framed as to whether the suit was barred by O. 2, R. 2. Therefore dismissal of suit being barred

under O. 2, R. 2 would be illegal. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

O. 3, Rr. 1 and 2 – Whether Principal is bound to his attorney before signing compromise petition?

In his order dated 7.6.2002, the learned Subordinate Judge-V, Bhagalpur has held that Dr. Sanjeev Kumar Mishra was only an attorney and he cannot claim any independent capacity in the proceedings. The Court agrees with this view. The principal Pushpa Biswas and Apurva Kumar Biswas have signed the compromise for partition of the property, which in opinion of the court in law amounts to implied revocation of power of attorney in favour of Dr. Sanjeev Kumar Mishra vide illustration to Section 207 of the Indian Contract Act. Pushpa Biswas and Apurva Kumar Biswas cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent.

The learned Subordinate Judge-V, Bhagalpur has gone into the evidence in great detail and recorded findings of fact which could not have been interfered with by the High Court in civil revision.

The High Court has observed that defendant Nos. 2 and 2a viz., Pushpa Biswas and Apurva Kumar Biswas should have consulted the power of attorney Dr. Sanjeev Kumar Mishra before signing the compromise petition. This is a strange kind of reasoning. The principal is not bound to consult his attorney before signing a compromise petition. **(Deb Ratan Biswas & Ors. V. Most. Anand Moyi Devi & Ors.; AIR 2011 SC 1653)**

O. 6, R. 17 – Application for amendment moved at stage of hearing of appeal – Rejection of

It is settled law that all amendments which have been sought by the petitioner, do not in any way help the Court in determining the real controversy in dispute and cannot therefore be allowed on the touchstone of legal framework of Order VI Rule 17 CPC.

Admittedly also the amendment application has been moved at the stage of hearing of the appeal and the Court below has come to a conclusion that amendment sought for by the petitioner would not help the Court in deciding the matter and hence has rightly rejected the amendment application. **(Awadh Behari Lal v. Vijay Chandra Gupta & ors., 2011 (3) ALJ 138 (All HC)**

O. 6, R. 17 – Limitation Act, Art. 54 – Delay in seeking amendment of pleadings – Effect of

The appellant wanted to defend his action by referring to two facts (i) there was an acquisition proceeding over the said land under the Land Acquisition Act and (ii) in view of the provisions of the Ceiling Act, the appellant could not have made the prayer for specific performance. The said purported justification of the appellant was not tenable in law since if the alleged statutory bar referred to by the appellant stood in its way to file a suit for specific performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction.

The appellant had the cause of action to sue for specific performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. Its omission to include the relief of specific performance in the suit which it filed when it had cause of action to sue for specific performance would amount relinquishment of that part of its claim. The suit filed by appellant, therefore, would be hit by the provisions of Order 2, Rule 2 of the Civil Procedure Code. Though the appellant. Though the appellant had not subsequently filed a second suit, as to bring his case squarely within the bar of Order 2, Rule 2, but the broad principles of Order 2, Rule 2, which are also based on public policy, would be attracted to the facts of instant case.

The subsequent inclusion of the plea of specific performance by way of amendment would virtually alter the character of the suit,

and raise the pecuniary jurisdiction of Court and the plaint had to be transferred to a different Court. Therefore such a plea when not included in the original suit it could not be included after a period of 11 years having regard to Article 54 of the Limitation Act. Hence plea of specific performance, which is a discretionary relief, cannot be granted to the appellant in instant case. **(Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Regd.) v. Ramesh Chander & Ors.; AIR 2011 SC 41)**

O. 6, R. 17 – Amendment of WS at Appellate stage to incorporate counter claim to seek relief of possession – Validity of

Where the possession of the appellant in respect of the plaint schedule property as against the respondent was long, settled and uninterrupted and appellants had decree of permanent injunction in their favour and defendant respondents at appellate stage sought to incorporate relief of possession by way of counter claim, it was held that the amendment cannot be allowed. Permitting a counter claim at such stage would be to reopen a decree which had been granted in favour of appellants by trial court. The respondents had failed to establish any factual or legal basis for modification/nullifying the decree of the trial court.

There was also wholly untenable delay in filing the application. Generally the counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed. In the instant case, the counter claim was sought to be introduced at the stage of appeal before the High Court therefore the amendment cannot be allowed. **(Gayathri Women's Welfare Association v. Gowramma and Another; AIR 2011 SC 785)**

O. 8, R. 6-A – Counter claim in SLP – Tenability of

In some of the counter affidavits filed in the special leave petitions by the claimants, they have alleged that their special leave petitions (challenging the judgment of the High Court and seeking

higher compensation) were dismissed as barred by time and therefore, they may be permitted to make a counter claim for a higher compensation. Such counter-claims in counter-affidavits in special leave petitions are impermissible and not maintainable and cannot be entertained. **(Land Acquisition Officer-cum-RDO, Chevella Division, Ranga Reddy District v. A. Ramachandra Reddy and others; AIR 2011 SC 662)**

O. 9, R. 13 – Setting aside exparte decree – Expression 'sufficient cause' means the cause for which defendant could not be blamed of his absence

In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the Court with a reasonable defence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. **(Parimal v. Veena; AIR 2011 SC 1150)**

O. 9, R. 13 – Setting aside exparte decree – Exparte decree liable to be set aside if no reason given as to why summons were served on son of petitioner and not upon petitioner

Respondent No. 3 instituted O.S. No. 301 of 1990 against the petitioner in court of Civil Judge, Hapur, District Ghaziabad for specific performance of agreement for sale of land dated 04.06.1990. The plaint was filed on 11.12.1990. Summons of the suit was served upon the petitioner's son from his previous wife. According to the petitioner after the death of his first wife he had settled as Delhi and remarried, however his son Prem Singh from his previous wife continued to reside in the village in question where the land in dispute is situate alongwith his maternal grant-parents.

In this case, the suit was decreed ex parte on 04.04.1991. Defendant petitioner filed restoration application on 04.05.1992, which was registered as Misc. Case No. 23 (or 25) of 1992. The restoration application was rejected by the trial court on 24.08.1993. Against the said order, petitioner filed Misc. Appeal No. 171 of 1993, Atar Singh v. Hari Singh, District Judge, Ghaziabad dismissed the appeal on 27.10.1993, hence this writ petition.

Restoration application under Order IX, Rule 13, CPC was accompanied by application for condonation of delay under Section-5, Limitation Act.

Absolutely no reason was given as to why summons of the suit was served upon the son of the petitioner and not upon the petitioner. Under Order V, Rule 12, CPC it is provided that:

> "Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

Accordingly, writ petition is allowed. Both the impugned orders are set aside and the restoration application is allowed. **(Atar Singh v. District Judge, Ghaziabad & Ors.; 2011 (1) ALJ 640 (All HC)**

O. 14, R. 1 – Civil Suit cannot be dismissed without trial merely because court feels dissatisfied by conduct of plaintiff

Where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the Court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short circuited by deciding issues of fact merely on pleading and documents produced without a trial. A suit cannot be dismissed without trial merely because the Court feels dissatisfied

with the conduct of the plaintiff. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

Pre, O. 15, R. 1 – Civil suit – To be decided in accordance with law and provisions of CPC, not on whims of court

The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court.

Court has further held that civil suit cannot be dismissed without trial merely because court feels dissatisfied by conduct of plaintiff. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

O. 18, R. 4 – Motor Vehicle Rules, 205, 221 – Recording of evidence in claim petition – O.18, R.4 can be applied

In case there is no conflict between the provisions contained in the CPC to the extent of Rule 221 and the Motor Vehicles Act, 1988, then inference may be drawn and the procedure prescribed in the Code of Civil procedure may be made applicable. Since the Rules itself provide that the provisions contained in the Code of Civil Procedure to some extent may be made applicable, the affidavit of witness filed by the claimant while approaching the Tribunal shall not suffer from inadmissibility of evidence. **(New India Assurance Co. Ltd. v. Richa Singh Kattiar, 2011 (3) ALJ 325 (All HC, LB)**

O. 19, R. 3 – Examination in chief – When affidavit in lieu of examination in chief is in accordance with law

Affidavit is a written or printed declaration or statement of facts made voluntarily and confirmed under the affirmation before a person authorized to administer affirmation.

When the affidavit in lieu of chief-examination would go to show that it was solemnly affirmed and sincerely stated on oath and

sworn and signed before the advocate at Hyderabad, the affidavit in lieu of chief examination filed by the election petitioner would be in accordance with law. **(Ajameera Hari Naik v. Smt. Suman Rathod & Ors.; AIR 2011 (NOC) 233 (AP)**

O. 23, R. 1 – Application praying for withdrawal of withdrawal application is maintainable

Rules of procedure are handmaids of justice. S. 151 of the Code of Civil Procedure gives inherent powers to the Court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the Court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

Accordingly, the application praying for withdrawal of the withdrawal application would be maintainable. **(Rajendra Prasad Gupta v. Prakash Chandra Mishra & Ors.; AIR 2011 SC 1137)**

O. 23, R. 1 – Withdrawal of suit – Permission for

Once application under O. 23, R. 1 was made no one can be permitted to withdraw application for withdrawal of suit even before any order was passed on withdrawal application. But signatures on application if obtained fraudulently, party can be permitted to seek withdrawal of application. **(Abdul Malik & Ors. V. Additional District Judge, Kannauj & Ors.; 2011 (1) ALJ 267 (All HC)**

O. 41, R. 27 – Additional evidence – Situation in which it can be permitted

When an application for reception of additional evidence under Order 41, Rule 27 of CPC is filed by the parties, it is the duty of the High Court to deal with the same on merits.

Thus, if any petition is filed under Order 41, Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider

at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. In the light of the separate application filed under Order 41, Rule 27 of CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion. **(Malyalam Plantations Ltd. V. State of Kerala; AIR 2011 SC 559)**

O. 41, R. 31 – First Appeal – Duty of appellate court

Order 41, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final Court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts.

The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallized by the trial Court's judgment without opening the whole case for re-hearing both on question of facts and law. Moreso, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order 41, Rule 31 CPC and such judgment and order would be liable to be set aside. **(Parimal v. Veena; AIR 2011 SC 1150)**

Constitution of India

Art. 14 – Constitutional validity of State Amendment to Art. 125 – State Amendments enabling maximum maintenance which could be granted from Rs. 500 to higher figure are no longer valid being inconsistent to 2001 amendment to S. 125 by parliament

Counsel for the appellant submitted that the amount which could be granted as maintenance under Section 125 Cr.P.C. in the State of Madhya Pradesh could at most be Rs. 3,000/- in view of the amendment to Section 125 Cr.P.C. by Madhya Pradesh Act 10 of 1998. It appears that Section 125 Cr.P.C. has been further amended in Madhya Pradesh by a subsequent amendment by Madhya Pradesh Act 15 of 2004 which does not contain any upper limit in the maintenance to be granted under Section 125 Cr.P.C. and it is left to the discretion of the Magistrate. Hence, there is no substance in the submission of the learned counsel for the appellant.

Moreover, the Court is of the opinion that after the amendment to Section 125 Cr.P.C., which is a Central Act, by the Code of Criminal Procedure (Amendment) Act, 2001 which deleted the words "not exceeding five hundred rupees in the whole", all State amendments to Section 125 Cr.P.C. by which a ceiling has been fixed to the amount of maintenance to be awarded to the wife have become invalid. **(Manoj Yadav v. Pushpa & Ors.; AIR 2011 SC 847)**

Art. 16 – Compassionate appointment – Object of – Its object is to grant immediate succour to family of deceased's employee

It has been said a number of times earlier but it needs to be recalled here that under the scheme of compassionate appointment, in case of an employee dying-in-harness one of his eligible dependents is given a job with the sole objective to provide immediate succour to the family which may suddenly find itself in dire straits as a result of the death of the bread winner. An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased-employee would be directly in conflict with Articles 14 and 16 of the Constitution and hence, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this

vital aspect in mind. **(Local Administration Department & Anr. V. M. Selvanayagam @ Kumaravelu; AIR 2011 SC 1880)**

Art. 16 – Regularisation of service claimed by temporary employee – Being temporary employee petitioner has no right to post – Her service being discontinued, relief or reinstatement cannot be granted

A regular appointment can only be made after selection by the U.P. Public Service Commission. Also, admittedly, the respondent was only a temporary employee and had not worked after 16.4.1991

It has been held in a recent decision of the Court in State of Rajasthan v. Daya Lal; 2011(2) SCC 429 that the High Court in exercise of its power under Article 226 canot regularize an employee. Merely because some others had been regularized does not give any right to the respondent. An illegality cannot be perpetuated.

Also, it is well-settled that a temporary employee has no right to the post vide State of U.P. v. Kaushal Kishore Shukla; (1991) 1 SCC 691. The respondent's service was not terminated as a measure of punishment. Hence no opportunity of hearing was necessary for terminating her service. The direction for her reinstatement is not sustainable as she was only a temporary employee and hence had no right to the post. **(State of U.P. & Ors. V.Rekha Rani; AIR 2011 SC 1893)**

Art. 20(3) – Silence of accused – No adverse inference can be drawn against accused

The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2), 313(3), and proviso (b) to Section 315, Cr.P.C. remains that in India, law provides for the rule against adverse inference from silence of the accused. **(State of M.P. v. Ramesh & Anr.; 2011 Cri.L.J. 2297 (SC)**

Art. 21 – Right to life – Honour killing – Administrative and police officials directed to take strong measure to prevent such atrocious Act

In recent years heard of 'Khap Panchayats' (known as katta panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. The Court of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh's case, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can the Court stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

Hence, the Court directs the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in opinion of the Court they will be deemed to be directly or indirectly accountable in this connection. **(Arumugam Servai v. State of Tamil Nadu; AIR 2011 SC 1859)**

Art. 21 - Cr.P.C. S. 437 – Bail – Right to speedy trial – In granting bail, delay in concluding trial is important factor which should be taken into consideration

In deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. **(State of Kerala v. Raneef; AIR 2011 SC 340)**

Art. 21 – Right to live with dignity – Extent of

Mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence. Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. Mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. **(Arup Bhuyan v. State of Assam; AIR 2011 SC 957)**

Art. 21 – Cr.P.C. 438 – Personal liberty – Deprivation of – Accused once released on anticipatory bail cannot be compelled to surrender before trial court and again apply for regular bail, it amounts to deprivation of his personal liberty

The restrictions imposed by Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic

intention and spirit of Section 438, Cr.P.C. **(Siddharam Satlingappa Mhetre v. State of Maharashtra; AIR 2011 SC 312)**

Art. 72 – Power of President or Governor to grant parden or remission not restricted by S. 433-A of Cr.P.C.

The Court make it clear that the power of the President of India under Article 72 or of the Governor under Article 161, being a constitutional power cannot be under the restriction imposed by Section 433-A Cr.P.C. In other words, it cannot restrict the constitutional powers under Articles 72 or 161 of the Constitution, just as no limitation can restrict the constitutional power of the High Court under Article 226 of the Constitution. This is because the Constitution is a higher law and the statute is subordinate to it. **(Samjuben Gordhanbhai Koli v. State of Gujarat; 2011 Cri.L.J. 654 (SC)**

Art. 136 – SLP against order of acquittal – Interference with – Finding of fact based on appreciation of evidence cannot be interfered with unless approach of HC is clearly erroneous, perverse or improper

It is well settled that in an appeal by special leave under Article 136 of the Constitution, against an order of acquittal passed by the High Court, the Court would not normally interfere with a finding of the fact based on appreciation of evidence, unless the approach of the High Court is clearly erroneous, perverse or improper and there has been a grave miscarriage of justice. **(State of U.P. v. Munni Ram and Others; 2011 (1) ALJ 557 (SC)**

Art. 137 – Review of criminal judgments and order would be permissible on grounds of errors apparent on face of record

In the judgment which is under review in the second review petition, the Court concluded:

(a) NHRC has no jurisdiction to interfere and make a recommendation, and

(b) The order of the Governor in commuting the sentence of death to one of life is bad in law as it did not disclose any reason.

On a review, the Court is constrained to hold that both findings on (a) and (b) are vitiated by errors apparent on the face of the record. **(Ramdeo Chauhan v. Bani Kant Das; AIR 2011 SC 615)**

Art. 141 – Precedent – Binding nature – Statement of law by Bench is binding on Bench of same or lessor number of Judges

It is an accepted rule or principle that the statement of the law by a Bench is considered binding on a Bench of the same or lesser number of Judges. In case of doubt or disagreement about the decision of the earlier Bench, the well accepted and desirable practice is that the later Bench would refer the case to a larger Bench. **(Safiya Bee v. Mohd. Vajahath Hussain alias Fasi; AIR 2011 SC 421)**

Art. 141 – Precedents – Single bench decision would have only persuasive value if at all; insofar as division bench is concerned

Single Bench decision would have only persuasive value, if at all, insofar as Division Bench is concerned. **(Dilip v. State; 2011 Cri.L.J. 334 (Del HC)**

Art. 161 – Grant of pardon is executive power so judicial courts do not have such power

If the petitioner has a grievance against that judgment, he has a right of appeal to the High Court on the judicial side. He can also approach the concerned executive authority under Section 432, Cr.P.C. or to the Governor under Article 161 of the Constitution of India. This is a judicial Court and hence this Court has no power which the executive has under Section 432, Cr.P.C. or which the

Governor has under Article 161 of the Constitution. **(Mahamudul Hassan v. Union of India & Ors.; 2011 Cri.L.J. 165 (SC)**

Art. 217 – Family Courts Act, Ss. 2(d), (3) – Judicial Office – Judge of Family Court do not hold judicial office, Hence, cannot be considered for elevation as High Court Judge

Judges of the Family Court do not hold "Judicial Office" as such they are not eligible to be considered for elevation as High Court Judges. **(S.D. Joshi & Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)**

Art. 226 – Quashing of criminal proceedings – Power has to be exercised very sparingly and with circumspection and that too in the rarest of rare case

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the FIR/Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft-pedal the course of justice' at a crucial stage of investigation/proceedings. The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as Cr.P.C.) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. **(State of Maharashtra & ors. V. Arun Gulab Gawali & Ors.; 2011 Cri.L.J. 89 (SC)**

Art. 226 – Public Interest Litigation – Tenability of

The parameters within which Public Interest Litigation can be entertained by the Court and the High Court, have been laid down and reiterated by the Court in a series of cases. By now it ought to be plain and obvious that the Court does not approve of an approach that would encourage petitions filed for achieving oblique motives on the basis of wild and reckless allegations made by individuals, i.e. busybodies; having little or no interest in the proceedings. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise the petition is liable to be dismissed at the threshold. **(P. Seshadri v. S. Mangati Gopal Reddy; AIR 2011 SC 1883)**

Art. 226 – Extra ordinary jurisdiction – Limit

In this case, there was no petition before the High Court on which the impugned order was passed. The High Court took suo motu action on the basis of some information which has not been disclosed in the impugned order.

To say the least, this was a strange procedure adopted by the High Court. In opinion of the court, such suo motu orders, without even a petition on which they are passed, are ordinarily not justified nor sustainable. Ordinarily, there must be a petition on which the Court can pass an order. In opinion of the Court, the High Court was not justified in taking suo motu action in this case. Judges must exercise restraint in such matters. **(Bharat Ratna Indra Gandhi College of Engineering & Ors. V. State of Maharashtra & Ors.; AIR 2011 SC 1912)**

Art. 226 – Writ jurisdiction – Power of High Court to order for investigation by CBI can be directed in rare and exceptional case

The following propositions emerge from the judgments relied upon by both the sides.

(i) The High Court in an appropriate case can direct investigation by the CBI but the same must be done in a rare and an exceptional case.
(ii) The victim of a crime is entitled to a fair investigation.
(iii) When accusations are made against the local police personnel it would be desirable in the larger public interest to entrust the investigation to CBI to assure credibility to the investigation.
(iv) Ordinarily the High Court would not interfere with the domain of investigation of crime by police in discharge of statutory duties;
(v) The High Court in exercise of powers under Article 226 cannot direct the investigating agency to carry out investigation in a particular manner and it can interfere with the functioning of investigating agency in an exceptional case.

(Smt. Vimal Ashok Thakre & Anr. V. Incharge, Police Station Officer, Nagpur & Ors.; 2011 Cri.L.J. 139 (Bom HC)

Art. 226 – Direction for investigation – Is not amenable to revisional jurisdiction of High Court but a writ petition for quashing FIR registered on basis of order would be maintainable

It is only at the stage that an FIR has been lodged, and in the rarest cases where the FIR does not prima facie disclose the commission of a cognizable offence, or where there is legal bar to proceeding with the complaint/FIR or if it is a case of no evidence or the evidence is wholly inadequate for proving the charge, or it is demonstrated that the FIR has been lodged in a mala fide manner, only in those circumstances, with the exercise of extreme circumspection can a writ petition be filed challenging the lodging of the FIR and that too strictly in accordance with the parameters and subject to the restrictions mentioned in State of Haryana v. Bhajan Lal; AIR 1992 SC 604 and the Full Bench decision of the Court in Ajit Singh alias Muraha v. State of U.P.; 2006(56) ACC 433: 2006

(6) All LJ 110, and a catena of decisions of the Apex Court and the Court on the issue. In view of what has been stated the view taken in Ajay Malviya's case cannot be held to be laying down the correct law and needs to be clarified as above.

The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C. directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued. **(Father Thomas v. State of U.P. & Anr.; 2011(2) ALJ 217 (All HC, FB)**

Arts. 243-F, 243-K & Art. 191 – United Provinces Panchayat Raj, 1947, S. 5(A)(c) – Panchayat elections – Disqualification – Statute prohibited person who was receiving honourarium, from contesting election

The right to elect and right to be elected are statutory rights. Statutory creations they are and, therefore, subject to statutory limitations as held by the Supreme Court in AIR 1982 SC 983; Jyoti Basu and others v. Debi Ghosal and others. Therefore, when the statute prohibits that no person, who is receiving honorarium, can contest the election and no exception has been shown under the Act to contest the election even having office of profit, the Court is of the firm opinion that Shiksha Mitra and/or Anganbari workers having attached to the office of Panchayat on payment of honorarium cannot be eligible to contest the election. **(Smt. Sarita Devi v. State of U.P. & Ors.; 2011(1) ALJ 506 (All HC)**

Art. 309 – Rajasthan Administrative Services Rules, R. 33 – Reservation with consequential seniority can be provided only if there is inadequacy of representation of SC/ST/BC Class employees and an ascertaining whether reservation is at all necessary

Reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition

of ascertaining as to whether such reservation was at all required. As no exercise was undertaken by the State in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public services before issuing the notification dated 28.12.2002 and 25.4.2008 providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes communities the notifications deleting the proviso in Rajasthan Various Service Rules are liable to be struck down. **(Suraj Bhan Meena & Anr. V. State of Rajasthan & ors.; AIR 2011 SC 874)**

Consumer Protection Act

S. 2(1)(d) – Consumer – Scope of

"Chandigarh Allotment of Land to Co-operative House Building Societies Scheme, 1991" was ostensibly framed for allotment of land to the Societies for construction of multistoried structures (dwelling units/ flats) for their members, but the provisions contained therein not only regulated the relationship of the Societies with their members but also made them jointly and severally responsible for payment of the earnest money etc. The Finance Secretary and the Chandigarh Housing Board issued directions from time to time for payment of the earnest money and interest by the members of the Societies. If the scheme had nothing to do with the members of the Societies then it would not have contained provisions to regulate their eligibility and entitlement to get dwelling units to be constructed on the land allotted by the Board and made them jointly and severally responsible for payment of the premium etc. and the Finance Secretary would not have issued directions in the matter of refund of earnest money and interest. The board too would not have entertained the request made by the members of the Societies for refund of the earnest money and remitted the amount to the Societies after deducting 10%. Thus even though no formal contract had been entered into between the Chandigarh Administration and the Board

on the one hand and the members of the Societies on the other hand the former exercised sufficient degree of control over the latter. By making applications for allotment of land the Societies will be deemed to have hired or availed the services of the Chandigarh Administration and the Board in relation to housing construction. If the scheme had been faithfully implemented and land had been allotted to the Societies their members would have been the actual and real beneficiaries. Therefore they were certainly covered by the definition of "consumer" under S. 2(d)(ii). **(Chandigarh Housing Board v. Avtar Singh; AIR 2011 SC 130)**

S. 2(1)(f) – Manufacturing defect – Meaning of

In this case, Motor vehicle was running on diesel. The only complaint was relating to noise from engine and gear box. There was no other major defect which made the vehicle incapable of operation. Engine operating on diesel makes rattling noise which does not occur in petrol driven engine cannot be said that there was manufacturing defect. So, directions issued by National Commissioner to remove defect if any and make vehicle road working and deliver vehicle to purchaser after having same properly checked by an independent technical expert, not improper and further direction issued by SC that vehicle be replaced if independent agency finds that there is manufacturing defect. **(C.N. Anantharam v. Fiat India Ltd.; 2011 AIR SCW 191)**

S. 2(g) – Deficiency in service – Consideration of – Failure to refund entire earnest money on cancelling demand before allotment amounts to 'deficiency in service'

The Board had deducted 10% earnest money and declined to refund 18% interest to the members of the Societies strictly in accordance with the directives given by the Finance Secretary and in the absence of challenge to memos dated 9.6.1993 and 9.3.2000, the complainants were not entitled to any relief. At the cost of repetition, the Court may observe that in terms of clause 8 of the 1991 Scheme, a

Society would have become entitled to refund of the earnest money without any deduction if it were to cancel the demand before allotment of land.

An analysis of the above reproduced rule would show that an application for allotment of site or building by way of lease can be entertained only if it is accompanied by 10% of the premium as earnest money. The allottee is required to deposit 15% of the premium within 30 days of allotment. The balance amount is to be paid in accordance with Rule 12. An applicant who refuses to accept allotment within 30 days is entitled to refund of the amount paid by him. If the applicant neither refuses to accept the allotment nor deposits 15% the premium, the Estate Officer can forfeit the whole or part of the earnest money. The provision relating to refund of the premium/earnest money or forfeiture of the whole or part thereof gets attracted only after the allotment is made and not before that.

In any case, after the Finance Secretary decided that earnest money will be refunded to the societies and their members without any deduction, the Board should have refunded forfeited portion of the earnest money to the members of the Societies and its failure to do so certainly amounted to deficiency in service. **(Chandigarh Housing Board v. Avtar Singh; AIR 2011 SC 130)**

S. 2(1)(g), 21 – Deficiency of service – Whether to issue of provisional certificate of M.Sc. by University would amount to deficiency in service – Held, "No"

The Court observed that it is not in dispute that the respondent is employed as a teacher in Mathematics in Agarwal Mahila Mahavidyalaya. Such an appointment could not have been possible without producing evidence of his having secured post-graduate degree. Therefore, the appellant's plea that the respondent had demanded duplicate provisional certificate appears to be plausible and the Consumer Fora committed serious error by ordering payment of compensation to the respondent by assuming that the appellant had

not issued the provisional certificate in the first instance. **(Ranchi University v. Sneh Kumar; AIR 2011 SC 1824)**

Ss. 12(3) & 18 – Complaint – Significance time for admission of complaint – If complaint is barred by time, consumer forum is bound to dismiss the same unless consumer makes out case for condonation of delay U/s. 24-A(2)

The District Forum, the State Commission and the National Commission are not bound to admit each and every complaint. Under Section 12(3), the District Forum is empowered to decide the issue of admissibility of the complaint. The District Forum can either allow the complaint to be proceeded with, which implies that the complaint is admitted or reject the same. Similar power is vested with the State Commission under S. 18 and the National Commission under S. 22. If the concerned Forum is prima facie satisfied that the complainant is a 'consumer' as defined in S. 2(d) and there is a 'defect', as defined in S. 2(f) in relation to any goods or there is 'deficiency in service' as defined in S. 2(g) read with S. 2(o) and the complaint has been filed within the prescribed period of limitation then it can direct that the complaint may be proceeded with. On the other hand, if the concerned Forum is satisfied that the complaint does not disclose any grievance which can be redressed under the Act then it can reject the complaint at the threshold after recording reasons for doing so.

The power conferred upon the Consumer Forums under Ss. 12(3), 18 or 22 to reject the complaint at the stage of admission should not be exercised lightly because the Act has been enacted to provide for better protection of the interest of consumers and the speedy and inexpensive redressal mechanism enshrined therein is in addition to other remedies which may be available to the consumer under the ordinary law of land. Therefore, admission of the complaint filed under the Act should be the rule and dismissal thereof should be an exception. Of course, if the complaint is barred by time, the Consumer Forum is bound to dismiss the same unless the consumer makes out a case for condonation of delay under Section 24A(2) of

the Act. **(V.N. Shrikhande v. Mrs. Anita Sena Fernandes; AIR 2011 SC 212)**

S. 24-A – Complaint of medical negligence – Bar of Limitation

In cases of medical negligence, no strait-jacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative-complainant discovers the harm, injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence. The Discovery Rule was evolved by Courts in United States because it was found that the claim lodged by the Complainant in cases involving acts of medical negligence were getting defeated by strict adherence to statutes of limitation. **(V.N. Shrikhande v. Mrs. Anita Sena Fernandes; AIR 2011 SC 212)**

Contempt of Courts Act

S. 2- Contempt – What does amount to

Scandalizing the Court in substance is an attack on individual Judge or the Court as a whole with or without referring to particular cases casting unwarranted and defamatory aspersions upon the character or the ability of the Judges. "Scandalising the Court' is a convenient way of describing a publication which although it does not relate to any specific case either post or pending or any specific Judge, is scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the Courts and public confidence in the administration of justice. **(Hari Singh Nagra & ors. V. Kapil Sibal & Ors.; 2011 Cri.L.J. 102 (SC)**

S. 2(b) – Civil contempt – What constitutes

Even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void.

Thus, even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the Court for seeking such declaration. **(Krishnadevi Malchand Kamathia & Ors v. Bombay Environmental Action Group & ors.; AIR 2011 SC 1140)**

S. 2(c) – Criminal contempt – When does not amount

Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of 'deliberate falsehood' on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge. **(Muthu Karuppan v. Parithi IIamvazhuthi & Anr.; AIR 2011 SC 1645)**

S. 2(c) – Criminal contempt – What amounts to

Freedom of expression as contemplated by Article 19(1)(a) of the Constitution is available to the Press and to criticize a judgment fairly albeit fiercely is no crime but a necessary right.

A fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt.

In fact such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. **(Hari Singh Nagra & ors. V. Kapil Sibal & Ors.; 2011 Cri.L.J. 102 (SC)**

S. 12 – Contempt proceedings – Burden and standard of proof – Where lies

The contempt proceedings being quasi criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt, keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. As observed above, the contempt proceeding being quasi criminal in nature require strict adherence to the procedure prescribed under the Rules applicable in such proceedings. **(Muthu Karuppan v. Parithi IIamvazhuthi & Anr.; AIR 2011 SC 1645)**

Contract Act

S. 4 – Acceptance of offer – What does not amounts to

If applications are invited by addressee for an interview or recruitment from eligible members from the general public, by advertisement either expressly by one mode or more, one of which is post office, and the applicant chooses to sent his application through post, though the letter is posted in time but delivered late after last date of receipt, the postal rule would not apply. When applications are to be received by a particular cutoff date assuming that there is an offer and acceptance, receipt of the application by that cutoff date only would make the acceptance complete. In such case, the post office does not become the agent of the addressee. A contract between the sender and the post office cannot bind the addressee.

The postal rule however applies, the moment an acceptance is posted through post, then the post office becomes the agent of the addressee (offeror). An advertisement inviting applications for examination or recruitment is merely an invitation to offer and not an offer itself. The person, who sends his application by post or by any other mode assuming it is based on an offer, must send the acceptance by the particular date, in terms of offer. If it does not reach by that date, there can be no acceptance and the postal rule would not apply. **(Neena Chaturvedi v. Public Service Commission; 2011 (6) ALJ 382 (All HC, FB)**

S. 30 – Contract when can be termed as wager – Tests to be applied

Three tests are to be satisfied if a contract is to be termed as a wager. The first test is that there must be two persons holding opposite views touching a future uncertain event. The second test is that one of those parties is to win and the other is to lose upon the determination of the event. The third test is that both the parties have no actual interest in the occurrence or non-occurrence of the event, but have an interest only on the stake. **(M/s. Rajshree Sugars &**

Chemicals Ltd. V. M/s. Axis Bank Ltd. & Anr.; AIR 2011 Mad 144)

S. 73 – Breach of Contract – Entitlement of Damages

In this case, the conditions of auction sale nowhere provided that he auction would be subject to approval by the Collector. In fact none of the documents concerning the terms and conditions of the auction sale provided that the auction of the bonds has to be approved by the Collector. In such a situation, the auction sale of the bonds stood completed with the approval of the Sub-Divisional Officer and its cancellation by the Collector by refusing to endorse the name of the plaintiff on the bonds was certainly a breach of a concluded contract.

The contract stood completed with the acceptance of the highest bid and its approval, but the transfer remained incomplete as the Collector refused endorsement on the bonds. However, that was not material and the breach of the completed contract coupled with the proof of loss sustained on account of such breach entitled the plaintiff for damages in law.

In view of aforesaid facts and circumstances, it is held that auction sale was complete in favour of the plaintiff even though the goods/bonds may not have been actually transferred in his favour and, as such, the plaintiff became entitled for damages under Section 73 of the Contract Act. **(Prem Nath Mehrotra v. State of U.P. & Ors.; 2011(1) ALJ 656 (All HC)**

S. 74 – Earnest money – Forfeiture of – When can be justified

In this case, clause 6 of the Notice clearly stipulated that "if any firm revokes its offer during the validity period, its earnest money shall be forfeited". Hence, the question that arose before the High Court for decision was whether the petitioner by revising one of the figures in its tender from Rs. 23,76,000/- to Rs. 32,76,000/- revoked its offer and the High Court has taken the view in the

impugned judgment that as a consequence of the change in the figures, the offer of the petitioner for the work was enhanced from Rs. 32 crores to Rs. 41 crores and, therefore, the original offer of Rs. 32 crores for the work stood revoked. In para 12 of the counter-affidavit filed in reply to the Writ Petition in the High Court the respondents have stated that after receiving the letter dated 06.05.2004 of the petitioner correcting the figures in its tender, the respondents sent letters to the petitioner giving opportunity to the petitioner to withdraw its letter dated 06.05.2004 on or before 04.06.2004 and yet the petitioner did not withdraw its letter dated 06.05.2004. These facts clearly establish that the petitioner was not willing to stand by its original offer of Rs. 32 crores for the work and was willing to do the work only at the revised bid of Rs. 41 crores. The High Court was thus right in coming to the conclusion that the petitioner had revoked its offer of Rs. 32 crores for the work.

The legal principles relating to "Earnest Money" are well settled. In Chiranjit Singh v. Har Swarup; AIR 1926 PC 1, the Judicial Committee of the Privy Council held:

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reasons of the fault or failure of the vendee."

These observations of the Judicial Committee have been quoted in the judgment of the Court in Shri Hanuman Cotton Mills & Ors. V. Tata Air Craft Limited; (1969) 3 SCC 522: AIR 1970 SC 1986 in which the principles relating to earnest money have been laid down.

It is thus clear that when earnest money is furnished by a tenderer it forms part of the price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted, but if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting

the tender is entitled to forfeit the earnest money furnished by that tenderer.

In facts of the present case, the respondents have stated in their reply to the Writ Petition before the High Court that as a consequence of the failure of the petitioner to stand by its offer dated 05.05.2004 the tender for the work had to be re-invited by the respondent No. 2 on revised costs of the construction and in the circumstances, the respondent No. 2 had to forfeit the earnest money of the petitioner. This was thus a case where on account of failure on the part of the petitioner to stand by its offer, the transaction or the contract did not come through and therefore the respondents were entitled to forfeit the earnest money furnished by the petitioner in terms of Clause 6 of the Notice. **(Villayati Ram Mittal (Pvt.) Ltd. V. Union of India & Anr.; AIR 2011 SC 301)**

Court Fees Act

S. 6-A (U.P. Amendment) – Appeal against order to pay court fees – Locus standi – To whom it available

Sub-section (1) of Section 6A of the Court-fees Act, 1870 provides that any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under section 104 of the Code of Civil Procedure.

Thus, the only person who can file appeal under sub-section (1) of Section 6A of the Court fees Act, 1870, is the person called upon to make good a deficiency in court-fee. A person raising objection on the ground of insufficiency of court-fee paid in the suit has not been given any right to file an appeal under sub-section (1) of Section 6A of Court Fees Act, 1870. **(Nagar Panchayat, Akbarpur v. M/s. Bajrang Bali Rice Mills, Kanpur & ors.; 2011(1) ALJ 500 (All HC)**

S. 7(iv)(a) – Court Fees for suit declaration that sale deed was null and void – Determination of – Plaintiff liable to pay court fees ad valorem on valuation of property covered by sale deed

Section 7(iv) along with Proviso reads as follows:-

"Computation of fees payable in certain suits for money: - The amount of fee payable under this Act in the suit next hereinafter mentioned shall be computed as follows:

For declaratory decree with consequential relief. – (iv) In suits – (a) to obtain a declaratory decree or order, where consequential relief other than reliefs specified in sub-section (iv-a) is prayed."

In view of the aforesaid the Court below appears to be justified in asking the petitioner to pay the Court fee ad valorem on the valuation of the property covered by the sale deed, declaration whereof was prayed along with a consequential injunction restraining the defendant from interfering in possession. **(Khem Chand v. State of U.P. & Ors.; 2011(2) ALJ 1 (All HC)**

Criminal Procedure Code

S. 102 – Seizure of property at stage of investigation – For attachment of Bank account notice of seizure not required to be given to account holder before or at time of attachment

Like any other property a bank account is freezable. Freezing the account is an act in investigation. Like any other act, it commands and behoves secrecy to preserve the evidence. It does not deprive any person of his liberty or his property. It is necessarily temporary i.e. till the merit of the case is decided. It clothes the Investigating officers with the power to preserve a property suspected to have been used in the commission of the offence in any manner. The property, therefore, requires to be protected from dissemination, depletion or destruction by any mode. Consequently, under the guise of being

given information about the said action, no accused, not even a third party, can overreach the law under the umbrella of a sublime provision meant to protect the innocent and preserve his property. It would indeed be absured to suggest that a person must be told that his bank account, which is suspected of having been used in the commission of an offence by himself or even by another, is being frozen to allow him to have it closed or to have its proceeds withdrawn or transferred upon such notice. Section 102 of the Cr.P.C. does not require issuance of notice to a person before or simultaneously with the action of attaching his bank account. **(Vinoskumar Ramachandran Vallavar v. The State of Maharashtra; 2011 Cri.L.J. 2522 (Bom HC)**

S. 125 – Effective date for granting maintenance – Determination of

Section 125 Cr.P.C. was amended by U.P. Act No. 36 of 2000 and sub-section 6 was inserted which is as follows:

> "When in a proceeding under this section it appears to the Magistrate that the person claiming maintenance is in need for immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the maintenance, during the pendency of the proceeding such monthly allowance not exceeding five thousand rupees and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance."

Inclusion of this provision by the State Legislature recognizes the need of the destitute woman or child during the pendency of a petition under Section 125 Cr.P.C. and the idea underlying is that the deserted wife and children should be given a financial help from the very beginning of the case under Section 125 Cr.P.C. The provision of Chapter IX of the Code is a measure to social justice extended to

protect the woman and children and its object is to prevent vagrancy and destitution. It provides the speedy remedy to deserted women and children. Therefore, in normal circumstances a petition under Section 125 Cr.P.C., if allowed, should be allowed from the date of the petition. In appropriate cases are should be allowed from the date of the order, but the court concerned should give cogent reasons for it. Such an order may be passed when the Court feels that the petition has been unduly delayed due to deliberate negligent attitude of the petitioner.

In the instant case, the court does not find that there is anything which may indicate that the proceeding before the learned lower Court was deliberately delayed by the revisionist. The petition was filed on 17.2.2006 and it was finally disposed of within a period of less than three years. Therefore, it cannot be said that the matter has been unduly lingered. In these circumstances the court of the view that the petition should have been allowed from the date when it was moved before the learned lower Court. **(Ved Ram Sharma v. State of U.P. & Anr.; 2011(1) ALJ 536 (All HC)**

S. 125 – Maintenance to wife and daughter – Enhancement of from Rs. 500 to 1500 – Validity

In the year 2000, when maintenance allowance was granted under section 125 Cr.P.C., respondent No. 3 was aged about 7 years and at the time of order passed under section 127 Cr.P.C., she was aged about 12 years and was studying in class VII. Naturally, with the passage of time and growing up of respondent No. 3, her needs and requirements have increased. Besides this, after a gap of about 7-8 years, the prices have also risen considerably. In these times of high inflation and rising prices, maintenance allowance at the rate of Rs. 800/- per month to the wife and Rs. 700/- per month to the child of 12 years of age cannot be said to be unjustified in any manner. Rather, it can be said that the amount awarded by the Magistrate is on the lower side, which does not require any interference by the Court. As far as the petitioner is concerned, no evidence was given by him on the

point of his income. However, whatever may be the income of the petitioner, being a father and the husband, he is bound to maintain his wife and daughter. **(Bharat Singh v. State of Uttar Pradesh & Ors.; 2011(1) ALJ 274 (All HC)**

S. 125 – Petition filed by wife about 12 years after while wife came to know that her husband deserted her after 2 or 3 years of marriage – Burden on her wife to satisfactorily explain delay

It is the own case of the respondent herein that the appellant left her in 1988 or 1989 (i.e. two or three years after the alleged marriage in 1986). Why then was the petition under Section 125, Cr.P.C. filed in the year 2001, i.e. after a delay of about twelve years, shall have to be satisfactorily explained by the respondent. This fact also creates some doubt about the case of the respondent. **(D. Velusamy v. D. Patchaiammal; AIR 2011 SC 479)**

S. 154 – FIR – Failure to give name of one accused by itself cannot tilt balance in favour of accused

It is settled legal proposition that FIR is not an encyclopaedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. **(State of U.P. v. Naresh & ors.; 2011 Cri.L.J. 2162 (SC)**

S. 154 – Recording FIR – Pre-condition for starting investigation

The direction to conduct investigation requires registration of an FIR preceding investigation and, therefore had to be treated as casting an obligation on the CBI to first register an FIR and thereafter proceed to find out the cause of death, whether suicidal or homicidal. In order to find out whether the death of Rizwanur Rahman was suicidal or homicidal, investigation could have been done only after registration of an FIR. **(Ashok Kumar Todi v. Kishwar Jahan & Others; 2011 Cri.L.J. 2317 (SC)**

S. 154 – Rape case – Delay of few days in lodging FIR is inconsequential

Court of the opinion that in a case of rape the fact that the FIR had been lodged after a little delay is of very little significance. There can be no doubt that an allegation of rape, and that too of a young child 15 years of age, is a matter of shame for the entire family and in many such cases the parents or even the prosecutrix are reluctant to go to the police to lodge a report and it is only when a situation particularly unpleasant arises for the prosecutrix that an FIR is lodged. The Court also see from the evidence that PW-2 had first gone to the Head Master of the School (in which the accused was a teacher) and he had advised him to wait for a few days to see if something could be done in the matter and it was only after having failed to get any reply from the Head Master that an FIR was lodged. This also explains the fact that the doctor had found nothing to suggest that rape had been committed and was not in a position to give any definite opinion on that account as the incident had happened on the 8th October, 1997 and the medical examination had been conducted on the 11th October, 1997, that is after three days. The doctor nevertheless found that there was a minor injury on the finger which was about four days old and that the hymen was also missing.

In the light of the very categoric statements of PW-1 as corroborated by PW-2 and PW-3 and in the light of the fact that no cause for false implication has been pointed out by the accused, the court finds no merit in the appeal. Hence, appeal liable to be

dismissed. **(Ashok Surajlal Uike v. State of Maharashtra; 2011 Cri.L.J. 2330 (SC)**

S. 154 – Delay in lodging FIR – When not fatal the prosecution

It is the admitted case that the incident had happened at 6 a.m. on the 29th October, 1991 in village Kosli. Bimla's statement Ex. PA had been recorded in the village and on its basis the FIR had been registered at 7.20 p.m. on the same day and the special report also delivered to the Illaqa Magistrate about 5 hours later. It is the admitted position that the distance between Kosli and Jatusana i.e. the place of occurrence and the police station was about 12 km. And Rewari and Jatusana were 25 km. Apart. It is in evidence that Umed Singh had been removed from the Primary Health Center to the Civil Hospital and it was after he had died in the hospital that the FIR had been recorded. It has also come in the evidence that ASI Balbir Singh PW 7 had received information about the incident from the Primary Health Center and had gone to that place and found that Umed Singh had been removed to the hospital at Rewari on which had followed him only to see that he was already dead and it was thereafter that he had returned to Kosli and recorded the statement of Bimla at 6 p.m. It must also be borne in mind that in a case where the deceased is the husband and the eye-witness is the wife it is but natural that she should be overwhelmed and completely distraught by the turn of events and if there is some delay in the recording of her statement that cannot be taken against the prosecution in any way. Significantly, also the presence of Bimla and Raj Kumar has been admitted by the defence.

The delay in the lodging of the FIR, even presuming that there is indeed some delay, loses all significance, more particularly as both Bimla PW-2 and Raj Kumar PW-6 were injured. **(Sher Singh v. State of Haryana; AIR 2011 SC 373)**

S. 154 – FIR – There cannot be second FIR in respect of same offence/event

So far as the submission with regard to the filing of second FIR is concerned, in opinion of the Court, the said submission cannot be accepted. First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/even because whenever any further information is received by the investigating agency, it is always in furtherance of the First Information Report.

In the case in hand, the first FIR, i.e. FIR No. 46/99 was recorded on 21st April, 1999, the date on which the offence had taken place. On that day, R. Gangaram, Assistant Sub Inspector (P.W. 11) had recorded the statement made by the deceased, when she was admitted to the Government Civil Hospital, Nizamabad and on the basis of the said statement the aforesaid FIR was recorded. At the relevant time, the deceased had received serious burn injuries and, therefore, offence under the provisions of Section 307 of the IPC had been registered. Subsequently, the deceased suffered from septicaemia, which was caused due to the burn injuries and as a result thereof she expired on 1st August, 1999. The said fact was reported by the husband of the deceased to the police authorities and there upon the said fact was recorded as FIR No. 152/99 on 2nd August, 1999. Thus, by virtue of the second FIR, further development which had taken place had been recorded. The said development was with regard to the death of the deceased and, therefore, an offence under the provisions of Section 302 of the IPC had been registered.

If one looks at the facts of the case and both information given to the authorities, it is clear that in fact FIR No. 46/99 was recorded on the basis of the statement made by the deceased when the deceased was alive and upon her death, which had nexus with the injuries, further information was given on 2nd August, 1999, and that was recorded as FIR no. 152/99. In opinion of the court, it was not necessary to record another FIR as the death was result of septicaemia which was due to the burn injuries.

Looking to the facts of the present case, in view of the Court, in fact the second FIR was nothing but a consequence of the event which had taken place on 21st April, 1999. In the circumstances, the contents of the so called second FIR being FIR No. 152/99, could have been incorporated in the police diary as a result of further information or event which had been taken place in pursuance of the first offence, which had been recorded under FIR No. 46/99. **(Chitra Shivraj v. State of Andhra Pradesh; AIR 2011 SC 604)**

S. 154 – FIR – Accused not named in FIR – Effect of – It would not fatal the prosecution when accused is named at earliest possible opportunity at stage when statements of witnesses had recorded

Accused not named in the FIR:

In Roshan v. State of Rajasthan; (2006) 12 SCC 64, the Court while dealing with a similar issue held as under:

> "The first information report, as is well known, is not an encyclopedia of the entire case. It need not contain all the details. The Court, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein the Court have seen that he had been named in the earliest possible opportunity. Even assuming that PW 1 did not name him in the first information report, the Court do not find any reason to disbelieve the statement of Mooli Devi, PW 6. The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case. PW 6 received as many as four injuries."

In Rattan Singh v. State of H.P.; AIR 1997 SC 768, the Court held as under:

> "Omission of the said detail is there in the First Information Statement, no doubt. But Criminal Courts should not be

> fastidious with mere omissions in First Information Statement, since such Statements cannot be expected to be a chronicle of every detail of what happened, nor to contain an exhaustive catalogue of the events which took place. The person who furnishes first information to authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing therefrom. Some may miss even important details in a narration. Quite often the Police Officer, who takes down the first information, would record what the informant conveys to him without resorting to any elicitatory exercise. It is the voluntary narrative of the informant without interrogation which usually goes into such statement. So any omission therein has to be considered along with the other evidence to determine whether the fact so omitted never happened at all."

(See: also podda Narayana v. State of Andhra Pradesh; AIR 1975 SC 1252; Sone Lal v. State of U.P.; AIR 1978 SC 1142; Gurnam Kaur v. Bakshish Singh & Ors.; AIR 1981 SC 631; and Kirender Sarkar & Ors. V. State of Assam; (2009) 12 SCC 342.

While dealing with a similar issue in Animireddy Venkata Ramana & Ors. V. Public Prosecutor, High Court of Andhra Pradesh; (2008) 5 SCC 368: AIR 2008 SC 1603, the Court held as under:

> "While considering the Effect of some omissions in the first information report on the part of the informant, a court cannot fail to take into consideration the probable physical and mental condition of the first informant. One of the important factors which may weigh with the court is as to whether there was a possibility of false implication of the appellants. Only with a view to test the veracity of the correctness of the contents of the report, the court applies certain well-known principles of caution."

Therefore, from the law referred to hereinabove, it is evident that in case the informant fails to name a particular accused in the FIR, and the said accused is named at the earliest opportunity, when the statements of witnesses are recorded, it cannot tilt the balance in favour of the accused. **(Ranjit Singh & Ors. V. State of Madhya Pradesh; AIR 2011 SC 255)**

S. 154 – Delay in lodging FIR in Rape case – Determination of

As regards the belated FIR, suffice it to observe that PW-1 (brother of the prosecutrix) has given plausible explanation. PW-1 deposed that when he returned to his home in the evening from agricultural field, he was informed that her sister (Prosecutrix) who had gone to ease herself had not returned. He searched his sister and he was told by the two villagers that her sister was seen with the accused. He contacted the relatives of the accused for return of his sister. He did not lodge the report immediately as the honour of the family was involved. It was only after few days that when his sister did not return and there was no help from the relatives of the accused that he made the complaint on September 28, 1989 to the Superintendent of Police, Hardoi who marked the complaint to the Circle Officer and the FIR was registered on September 30, 1989. The delay in registration of the FIR is, thus, reasonably explained. The High Court was in grave error in concluding that there was no reasonable and plausible explanation for the belated FIR and that it was lodged after consultation and due deliberation and that creates doubt about the case. Unfortunately, the High Court did not advert to the evidence of PW-1 and the reasoning of the trial court in this regard. **(State of U.P. v. Chhotelal; AIR 2011 SC 697)**

S. 156 – Faulty investigation in murder case – Effect of

While relying upon these extracts of the examination-in-chief and cross-examination of this witness, the learned Counsel appearing for the appellant contended that since the blood-stain earth and nothing else recovered from the premises including the empties of the

gun shots. The entire investigation of the case is faulty and cannot be relied upon. The statement of the Investigating Officer is found to be not supporting the case of the prosecution. The whole case of the prosecution should fall. Firstly, the Court cannot read these statements out of context and they must be examined in their entirety. In other words, the statement of the Investigating Officer has to be read in its entirety and then any conclusion can be drawn. Certainly, this Investigating Officer has failed to conduct the investigation as per the expected standards and the Court have no hesitation in observing that the case could have been investigated with greater care, caution and by application of scientific methods. It will not give the accused/appellants any benefit because PW 1 was never confronted with his statement under Section 161, Cr.P.C. by the appellant during her cross-examination with regard to the above facts. What she had stated before PW 14, would be best recorded in the statement under Section 161, Cr.P.C. That steps having not been taken by the appellant in accordance with law, now, they cannot drive any benefit. Secondly, not only PW 2 but even other witnesses have stated that there was sufficient light in and around the place of occurrence because of street light, light from the house of the deceased, bus stand and the Nursing Home. There is no reason for Court to disbelieve PW 1, PW 3 and other witnesses who said that there was sufficient illumination at the place of occurrence and the argument advanced by the appellants hardly has any merit. Yes, it was expected of the Investigating Officer to seize from the place of occurrence such articles or items including the blood-stain earth or empties, which were available even as per his statement. This lacuna in investigation stands completely covered by the statement of the witness, the medical report and the eye-witness version. Dr. K. Raja Gopal Reddy, Professor and Head of the Forensic Department, Gandhi Medical College who had performed post-mortem was examined as PW 24 and he stated that his opinion had been sought by the Investigating Officer. After going through the report and the

inquest report, he had stated that the probable weapon used was rifle fire-arm and Ext. P13 was his opinion.

The above evidence of the doctors as well as that of the PW 1 clearly establishes the story of the prosecution. According to PW 1, the assailants fired three armed shots and as per medical evidence also, there are three injuries and exit injuries on the body of the deceased. The court have also noticed that the Investigating Officer failed to perform his duties appropriately in not recovering the blood-stain earth as well as the empties since they were not in the body of the deceased. According to the Investigating Officer, there were few other people and there was a bus stand near the place of occurrence. The Investigating Officer fully corroborated the statement of PW 1 and other witnesses.

The Court is of the considered view that the prosecution has been able to prove its case beyond reasonable doubt. The gravity of the offence, the manner in which it had been committed and the conduct of the accused do not call for any interference by the Court even on the question of quantum of sentence. **(Maqbool alias Zubir alias Shahnawaz & Anr. V. State of Andhra Pradesh; AIR 2011 SC 184)**

Ss. 161, 32 & 157 – Statement of injured witness – Evidentiary value of

It can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high degree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under S. 157 of the Act, 1872. **(Ranjit Singh v. State of Madhya Pradesh; AIR 2011 SC 255)**

S. 162 – Statement to police – Omission to state material facts – Consequences

PW-2 Kishori Lal, the father of the victim and PW-10 Rajinder Gaur, her brother, a bare reading of their statements shows that the

entire story with regard to the factum of the cruelty, the manner in which the deceased was dealt with, and the behaviour of the accused towards her had been built up during the evidence recorded in Court. The Court may refer to one significant fact which has been omitted in the statements under Section 161 Cr.P.C. This is with regard to the oral dying declarations made to them by the deceased and when confronted could give no explanation for the omission. In addition, it is clear that the dying declaration recorded Ex. PCC had been manoeuvred at the instance of Rajinder Gaur PW. As already indicated above, the trial court as well as the High Court has not placed much reliance on the statements of these two witnesses. The court is of the opinion that their statements, in fact, inspire no confidence. The court may also refer to the Explanation to Section 162 of the Cr.P.C. The same is reproduced herein below:

Explanation:- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

A bare reading of this Explanation would reveal that if a significant omission is made in the statement of a witness recorded under Section 161 of the Cr.P.C., the same may amount to a contradiction and that whether it so amounts is a question of fact in each case. It is clear to Court that the ocular evidence with regard to the events preceding the actual incident rested exclusively on the statements of PWs. 2 and 10.The glaring omissions made by them are writ large in the cross-examination. The courts are, therefore, of the opinion that the present case is one of no evidence and the possibility that the deceased had been burnt in an accident cannot be ruled out. **(Subhash v. State of Haryana; AIR 2011 SC 349)**

S. 164 – Recording of confession – Compliance of provisions

The facts of this case are gruesome and horrifying. It seems that several children had gone missing over 2 years from Sector 31, Nithari Village, Gautam Budh Nagar, Noida from 2005 onwards. Several of such children were alleged to have been killed by the appellant who is also alleged to have chopped and eaten the body parts after cooking them. Appellant Surendra Koli was the servant of accused No. 1 Moninder Singh, and they lived together at D-5, Sector 31, Noida.

The High Court in the impugned judgment dated 11.09.2009 has discussed the evidence in great detail and we have carefully perused the same. We entirely agree with the findings, conclusion and sentence of the High Court so far as accused Surendra Koli is concerned.

Admittedly, there was a confession made by Surendra Koli before the Magistrate under Section 164 Cr.P.C. on 10.03.2007 and we are satisfied that it was a voluntary confession. The Magistrate repeatedly told the accused Surendra Koli that he was not bound to make the statement and it can be read against him. In our opinion the provisions of Section 164 Cr.P.C. have been fully complied with while recording the said statement. **(Surendra Koli v. State of U.P., 2011 (3) ALJ 203)**

S. 167(2) Proviso – Right to bail – Charge sheet was already filed on date accused sought to enforce his right to be released on bail, hence refusal to release accused on bail proper

Where charge sheet has not been filed within the stipulated period and the accused moves an application before the concerned Magistrate for being released on bail and offers to furnish bail bonds then in such a case, even if the concerned Magistrate fails to pass any order on the bail application of the accused and keeps the same pending and in the meantime charge sheet is submitted the indefeasible right which has accrued to the accused under proviso to Section 167(2) Cr.P.C. shall not be extinguished. If, however, an

accused fails to enforce his right under proviso to Section 167(2) Cr.P.C. and a charge sheet is submitted after the stipulated period in that case the indefeasible right accruing to an accused shall stand extinguished and his bail application shall be considered on merits only in accordance with the relevant provisions of the Code. In the instant case it was held that trial court did not commit any error in refusing to release the accused on bail under the proviso to Section 167(2) Cr.P.C. as the date on which the accused enforced his right under proviso to Section 167(2) Cr.P.C. charge sheet had already been filed. **(Chandra Pal v. State of U.P.; 2011 (1) ALJ 620 (All HC)**

S. 173 – Direction for conducting investigation by CBI after filing of charge sheet by police – Whether it is valid – Held, "Yes"

In Rubbabuddin Sheikh; AIR 2010, where also it was held that considering the fact that the allegation have been levelled against higher level police officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by the CBI. Without entering into the allegations levelled by either of the parties. The court is of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.

In this case, although, charge-sheet has been filed by the State of Gujarat after a gap of 3½ years after the incident, that too after pronouncement of judgment in Rubbabudin's case and considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, the Court are satisfied that the investigation conducted and concluded in the present case by the State police cannot be accepted. In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two

other States, i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, the Court feels that the CBI should be directed to take the investigation. **(Narmada Bai v. State of Gujarat and Ors.; AIR 2011 SC 1804)**

S. 174 – Inquest report – Omission to mention crime no., Names of accused, penal provisions under offences have been committed does not fatal to prosecution

The whole purpose, of preparing an inquest report under Section 174 of Criminal P.C. is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary not obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.P.C. is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the person accused must be mentioned. Omissions in the inquest report are not sufficient to put the prosecution out of Court. The basic purpose of holding inquest is to report regarding the apparent cause of death, namely whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses cannot be discarded if their names do not figure in the inquest report prepared at the earliest point to time. The inquest report cannot be treated as substantive evidence but may be utilized for contradicting

the witnesses of inquest. **(Brahm Swaroop & Anr. V. State of U.P.; 2011 (1) ALJ 231 (SC)**

S. 190 – Cognizance of offence by Magistrate – Procedure

At the stage of taking cognizance of an offence or framing of a charge against the accused, the trial court is not required to make an inquiry for finding out truth in the allegations made against the accused. At that stage, the defence evidence or version cannot be looked into. Whatever materials are collected during the investigation and placed in support of the charge sheet, are the only relevant material on which basis the Magistrate is required under law to take cognizance of the offence. If those materials make out a prima facie case regarding commission of an offence, the Magistrate had jurisdiction to take cognizance and issue process to the accused. In the instant case, the Magistrate had passed a well reasoned order, while taking the cognizance and arrived at the conclusion that a prima facie case under Section 420 IPC was made out against the accused as there were sufficient materials on record against the accused, therefore, the order being based on evidence on record, cannot be upset in exercise of revisional jurisdiction. **(Ved Ram Sharma v. State of U.P. & Anr.; 2011(1) ALJ 536 (All HC)**

Sec. 190(1)(b) – Cognizance of offence – Cognizance of offence taken only on basis of affidavit furnished by witnesses would be improper

After receipt of protest petition filed by the complainant against the final report submitted by the police, the Magistrate could take cognizance on the basis of police report, if there was sufficient material available on the case diary, or could accept the final report, or could direct further investigation, or could great the protest petition as a complaint case and proceed in accordance with the procedure prescribed for the complaint cases.

In the instant case, the Magistrate had neither taken cognizance on the basis of material available on the case diary, nor had the

procedures prescribed in the complaint case been adopted. The cognizance was taken on the basis of affidavits furnished by the witnesses, which was improper. The only option open to the Magistrate was to take cognizance under section 190(1)(b) Cr.P.C., if there was sufficient material in the case diary to summon the accused. If the material was not sufficient, the Magistrate can treat the protest petition as a complaint case and take action in accordance with complaint case and take action in accordance with provisions as contained in Section 200 and 202 Cr.P.C. In these circumstances, the order taking cognizance cannot be sustained and was liable to be set aside. **(Meraj Beg & ors. v. State of U.P. & anr., 2011 (3) ALJ 142 (All HC)**

S. 197 – Sanction to prosecute – Consideration of

In this case, PW-48 deposed that a request had been received from the CBI for according sanction for the prosecution of the appellant's alongwith the investigation report and a draft of the sanction order. He further stated that on receipt of the aforesaid documents the matter had been referred first to the Law Department of the Delhi Administration and then forwarded to the Home Department and then to the Chief Secretary and finally, the entire file had been put up before the Lt. Governor who had granted the sanction for the prosecution of the ten officials. It is true that certain other material which was not yet available with the CBI at that stage could not obviously have been forwarded to the Lt. Governor, but the Court see from the various documents on record that even on the documents, as laid, adequate material for the sanction was available to the Lt. Governor. The court have perused the sanction order dated 10th of October, 2001 and the Court finds it to be extremely comprehensive as all the facts and circumstances of the case had been spelt out in the 16 pages that the sanction order runs into. **(Satyavir Singh Rathi v. State thr. CBI; AIR 2011 SC 1748)**

Ss. 205, 482 – Dispensation with personal appearance of accused – Discretion of Magistrate

Section 205 of Code confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application under Section 205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence. Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and non else.

Further, the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial.

Where High Court U/s. 482 while allowing an application for dispensing with personal appearance before Magistrate in case any out of complaint filed U/s. 138 NI Act, felt that there was great need for rationalizing, humanizing and simplifying the procedure in criminal courts with particular emphasis on the attitude to the "criminal with no normal turpitude" or the criminal allegedly guilty of only a technical offence, including an offence under Section 138 of the N.I. Act, issued 'rules of guidance'. With a direction that these can and must certainly be followed by the court below in the instant case as also by all criminal courts which are called upon to deal with trials under Section 138 of the N.I. Act, held, is not proper. It is trite that the inherent powers of the High Court under Section 482 of the Code have to be exercised sparingly with circumspection, and in rare cases to correct patent illegalities or to prevent miscarriage of justice. **(TGN Kumar v. State of Kerala and others; AIR 2011 SC 708)**

S. 207 – Supply of documents to accused – Necessity of – Order framing of charges against accused without supply of copies of statements of witness and documents relied in support of charges would not proper

Before framing of the charge or charges against the accused compliance of section 207 of the Code is mandatory and its non-compliance may result in causing prejudice to the accused. The purpose behind furnishing of documents and statements of witnesses to the accused at the commencement of the trial is to provide an opportunity to the accused to know the evidence and the materials being relied on in support of the charges and to meet those evidence and statements and set up a proper defence. In the case of non-compliance of S. 207 of the Code, the accused may not be able to defend the charges or to contend that no charge is made out against him. In this view of the matter, the provisions of section 238 of the Code seem to be mandatory in nature. However, there may be a departure in a case where the statements of the witnesses or the documents submitted in support of the charge sheet are voluminous and preparation of copies thereof is not practicable. In that situation the accused may be permitted to inspect the record. Therefore, framing of charges against the accused without compliance of S. 207 of the Code would be improper. **(Pramod Kumar Sharma v. State of U.P. & Anr.; 2011(1) ALJ 265 (All HC)**

S. 221 – Non framing of particular charge – Effect of

In this case, Court do not find much substance in the submission of Mr. Mahajan that the High Court could not have convicted the appellant under Section 306, IPC as the charge had been framed under Section 304-B, IPC. On scrutiny of the entire evidence, the High Court has come to the conclusion that the deceased had not committed suicide on account of demands for dowry but due to harassment caused by her husband, in particular. The harassment by the appellant had compounded the acute depression from which the deceased was suffering after the murder of

her father. There was no evidence of any demand for dowry soon before the death, and there was no demand whatsoever that the house in question should be transferred to either of the accused. Under Section 304-B, IPC, the cruelty or harassment by her husband or any relative of her husband "for, or in connection with, any demand for dowry" is a prelude to the suicidal death of the wife. Such suicidal death is defined as 'dowry death'. The High Court has recorded a firm finding that the harassment was not for or in connection with any demands for dowry. But, at the same time, the High Court has concluded that the wife committed suicide due to the harassment of the appellant, in particular. In such circumstances, the High Court was, therefore, fully justified in convicting the appellant under Section 306, IPC.

Court also do not find any substance in the submission of Mr. Mahajan that the appellant could not have been convicted under Section 306 IPC in the absence of a charge being framed against him under the aforesaid section.

In the present case, both the trial court and the High Court have held that the deceased had committed suicide. Therefore, the nature of the offence under Sections 304-B and 306, IPC are not distinct and different categories.

It is a settled proposition of law that mere omission or defect in framing charge would not disable the Court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Section 221(1) and (2) of the Cr.P.C. In the facts of the present case, the High Court very appropriately converted the conviction under Section 304-B to one under Section 306, IPC.

In court's opinion, there has been no failure of justice in the conviction of the appellant under Section 306, IPC by the High Court,

even though the specific charge had not been framed. **(Narwinder Singh v. State of Punjab; AIR 2011 SC 686)**

S. 223(d) – Cross cases related to same incident – Duty of investigating officer ought to brought to notice of trial court about two FIR arising out same incident to avoid gross injustice to parties concerned

In view of the factual details coupled with the statements made by prosecution witnesses and in the light of the principles enunciated by the Court, the Investigating Officer ought to have brought to the notice of the trial Judge about the two FIRs arising out of the same incident to avoid gross injustice to the parties concerned. **(Kuldip Yadav & Ors. V. State of Bihar; AIR 2011 SC 1736)**

S. 227 – Discharge – Offence of attempt to murder – Application for discharge can be considered only by Sessions Court and not by Magistrate

Applicant is an accused for an offence under section 307 IPC, which is triable by court of Sessions, Discharge prayer of an accused in respect of such offence can be considered only by a Sessions Court and not by the Magistrate, who is not competent to try the applicant for that offence. It is only under sections 227 and 228 of the Code that the discharge prayer of an accused in a Sessions triable offence can be considered. So far as Magistrate is concerned, since it has no power to try the accused, question of discharge cannot be considered by him as it will amount to passing an order beyond his competence. **(Ram Pal Sharma v. State of U.P. & Anr.; 2011(1) ALJ 273 (All HC)**

S. 228 – Framing charges – Powers of court

The legal position is that at the stage of charge the Court is not required to consider pros and cons of the case and to consider pros and cons of the case and to hold an enquiry to find out truth, Marshalling and appreciation of evidence is not in the domain of the

Court at that point of time. What is required from the Court is to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case for framing a charge against the accused has been made out. Even in a case of grave or strong suspicion charge can be framed. The Court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge. The Court should not weigh the evidence as if it were holding trial. Accused can be discharged only when the charge is groundless. **(Vijay Kumar Trivedi v. State of U.P., 2011 ALJ 226 (All HC, LB)**

S. 300 – Double jeopardy – Bar to second prosecution and punishment for same offence would only arise where ingredients of both offences are same

Even if facts based on which the appellant was prosecuted and punished by a competent Court of jurisdiction at Lisbon and the facts based on which prosecution has been initiated resulting in conviction are the same, conviction of appellant cannot be said to be in teeth of S. 300 of the Code of Criminal Procedure, for the simple reason that the same set of facts can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time constitute an offence under any other law. The bar to the punishment to the offender twice over for the same offence would arise only where the ingredients of both the offences are the same. **(Monika Bedi v. State of A.P.; 2011 Cri.L.J. 427 (SC)**

S. 300(1) – Constitution of India, Art. 20(2) – S. 300(1), Cr.P.C. is wider than Art. 20(2)

It may be noticed that there is a difference between languages used in Art. 20(2) of the Constitution of India and S. 300(1) of Cr.P.C. It can be seen that S. 300(1) of Cr.P.C. is wider than Art.

20(2) of the Constitution. While, Art. 20(2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once. S. 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. **(Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Anr.; AIR 2011 SC 641)**

S. 308 – Withdrawal of pardon – Effect of

Once an accomplice is granted pardon, he stands discharged as an accused and becomes witness for the prosecution. As a necessary corollary once the pardon is withdrawn or forfeited on the certificate given by the Public Prosecutor that such person has failed to comply with the condition on which the tender was made he is reverted to the position of an accused and liable to be tried separately and the evidence given by him, if any, has to be ignored in toto and does not remain legal evidence for consideration in the trial against the co-accused albeit such evidence may be used against him in the separate trial where he gets an opportunity to show that he complied with the condition of pardon. Neither Ss. 114, 132, 133, 154 of Evidence Act nor Art. 20(3) militate against this position. **(State of Maharashtra v. Abu Salem Abdul Kayyum Ansari & Ors.; 2011 Cri.L.J. 1 (SC)**

S. 311 – Application for recalling of witness for further cross-examination – Ground for rejection

The application under Section 311, Cr.P.C. was moved by the revisionist on the ground that PW-1 has to be cross examined on some important points. What were the questions, which had to be asked from PW-1 in further cross-examination, were not mentioned in the application nor important points, which required cross-examination were mentioned. Earlier, the revisionist had already availed the opportunity of cross-examination. Application under Section 311, Cr.P.C. was vague and was rightly rejected by learned Sessions Judge. **(Anurag Srivastava v. State of U.P. & Anr.; 2011(1) ALJ 538 (All HC)**

S. 313 – Dispensation within summons case – Discretion lies with Magistrate, to be exercised keeping in view certain parameters and not as a matter of course

As regards to accept and consider the written statement made by the accused, in court's opinion, it is again not in accord with the language of Section 313 of the Code as also the dictum laid down by the Court in Basavaraj R. Patil & Ors. V. State of Karnataka & Ors.; AIR 2000 SC 3214. Section 313 of the Code deals with the personal examination of the accused, and provides that:

> "313. Power to examine the accused:- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court –
>
> (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
>
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b)".

On the plain language of Section 313, it is evident that in a summons case, when the personal appearance of the accused has been dispensed with under Section 205 of the Code, a discretion is vested in the Magistrate to dispense with the rigour of personal examination of the accused under Section 313 of the Code as well.

It is manifest from the afore-extracted passage that dispensation with the personal examination of an accused in terms of the said provision is within the trial court's discretion, to be exercised

keeping in view certain parameters, enumerated therein and not as a matter of course. **(TGN Kumar v. State of Kerala and others; AIR 2011 SC 708)**

Ss. 313 and 228 – Examination of accused and framing of charges are two important stages in criminal trial – High Court to take note of it.

It is experienced by the court that in criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under section 313 of the Code of Criminal Procedure, the two very important stages in a criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful and mechanical manner. The court wish that the Patna High Court should take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps. **(Sajjan Sharma v. State of Bihar; AIR 2011 SC 632)**

S. 313 – Examination of accused – Failure to put incriminating circumstances to accused in his examination then same circumstances cannot be relied upon against him

Examination of accused – Failure to put incriminating circumstances to accused in his examination – Same circumstances cannot be relied upon against him. **(Shyambir Singh v. State; 2011 Cri.L.J. (NOC) 119 (All)**

S. 313 – Examination of accused – Provision is based on fundamentals of fairness which is mandatory

In Asraf Ali v. State of Assam; (2008) 16 SCC 328, the Court observed:

> "Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in

the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced."

The provisions of Section 313 Cr.P.C. make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 319 – Order summoning additional accused to face trial – Powers and discretion of court

Phraseology of Section 319, Cr.P.C. further indicates that power under Section 319, Cr.P.C. can be utilized to add any person as an accused who is not already facing trial, only during pendency of the inquiry or trial. That section further ordains that in the event the trial Judge harbingers intention to add any accused he should have stayed the trial and take up trial in respect of newly added accused simultaneously including examination of the witnesses afresh.

Section further indicates that only that person who could have been or ought to have been tried along with already being tried accused, can be arrayed as an accused and can be asked to stand the trial. **(Ajay v. State of U.P., 2011 (3) ALJ 93 (All HC)**

S. 320 – IPC, S. 307 – Nature of – Offence U/s. 307 of IPC is not compoundable

The offence under Section 307 is not compoundable in terms of Section 320(9) of the Code of Criminal Procedure, 1973 and, therefore, compounding of the offence in the present case is out of question. However, the circumstances pointed out by the learned senior counsel do persuade the Court for a lenient view in regard to the sentence. The incident occurred on May 17, 1991 and it is almost twenty years since then. The appellants are agriculturists by occupation and have no previous criminal background. There has been reconciliation amongst parties; the relations between the appellants and the victim have become cordial and prior to the appellants' surrender, the parties have been living peacefully in the village. The appellants have already undergone the sentence of more than two and a half years. Having regard to these circumstances, the Court are satisfied that ends of justice will be met if the substantive sentence awarded to the appellants is reduced to the period already undergone while maintaining the amount of fine. **(Rajendra Harakchand Bhandari & Ors. V. State of Maharashtra & Anr.; AIR 2011 SC 1821)**

S. 378 – Appeal against acquittal – Interference with acquittal, where other view is possible should be avoided unless there are good reasons

In State of Uttar Pradesh v. Banne @ Baijnath & Ors.; (2009) 4 SCC 271, the Court gave illustrations of certain circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include:

(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) The Court must always give proper weight and consideration to the findings of the High Court.

(vi) The Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

(Brahm Swaroop v. State of U.P.; AIR 2011 SC 280)

S. 386 – Extraordinary jurisdiction of Supreme Court to interfere with judgments of acquittal – When warranted

An Appellate Court has full power to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded. The Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power and an Appellate Court is free to arrive at such conclusion, both on question of fact and of law. An Appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. The presumption of innocence is available to a person and in the criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. It is also settled law that 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. **(V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.; AIR 2011 SC 1037)**

S. 386 – Interference of High Court to appeal against acquittal – When warranted

The High Court should not interfere in an appeal against acquittal save in exceptional cases, and that interference in such an appeal was called for only if the findings of the trial court were not borne out by the evidence and were perverse. It is however equally well established that the High Court can reappraise the evidence so as to find out as to whether the view taken by the Trial Court was justified or not and if it finds that the Trial Court's findings were not possible on the evidence, interference must be made failing which there would be a travesty of justice. **(Kilakkatha Parambath Sasi & Ors. V. State of Kerala; AIR 2011 SC 1064)**

S. 386 – Interference with appeal against acquittal – When permissible – Only in case judgment is perverse but not on the ground that two views are possible

The appellate Court dealing with an appeal against acquittal can interfere only if judgment under appeal is perverse. The appellate Court being the final Court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribed any limitation, restriction or condition on exercise of such power and the appellate Court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record the appellate Court should not disturb the findings of acquittal. **(State of M.P. v. Ramesh & Anr.; 2011 Cri.L.J. 2297 (SC)**

S. 389 – Power of High Court regarding disposal of application seeking suspension of service pending appeal – Consideration of

It is true that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory

right, suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. But if for any reason, the sentence of a limited duration cannot be suspended, every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise, the very valuable right of appeal would be an exercise in futility by efflux of time. [See: Bhagwan Rama Shinde Gosai & Ors. V. State of Gujarat; AIR 1999 SC 1859]. But, suspension of sentence, pending any appeal by a convicted person and consequential release on bail is not a matter of course. The appellate Court is required to record reasons in writing for suspending the sentence and release of a convict on bail pending the appeal. Therefore, the only question that falls for court's consideration in the instant case is whether the High Court has taken into consideration all the facts and recorded any reason directing the release of the respondent pending the appeal preferred by him challenging his conviction by the trial Court? **(Kanaka Rekha Naik v. Manoj Kumar Pradhan & Anr.; AIR 2011 SC 799)**

S. 394 – Power of Registrar – Registrar cannot grant leave to continue appeal U/s. 394 Cr.P.C., such power can be exercised only by court

In the present appeal the spouse of the deceased-appellant filed application seeking leave of the court to continue the appeal. The Registrar of the Court allowed the application and directed the cause title to be amended accordingly. No leave to continue the appeal has been granted by the Registrar. The Registrar of the Court in considered opinion could not have granted leave to continue the appeal. Order VI of the Supreme Court Rules, 1966 confers the powers of the Court in relation to the matters mentioned therein to be exercised by the Registrar which includes application for substitution, except where the substitution would involve setting aside an abatement. The application filed in the instant case by the spouse of the deceased appellant is not one for substitution but an application

seeking the leave of the court to continue the appeal. The Registrar of the Court is not conferred with any such power to grant leave to continue the appeal. That power can be exercised only by the Court and by none else. **(Jugal Kishore Khetawat v. State of West Bengal; 2011 Cri.L.J. 2170 (SC)**

S. 397(2) – Order passed by Magistrate directing police officer to investigate case is an interlocutory order – Hence, remedy of revision is barred against such order U/s. 397(2) of above Act

Order which appeared to infringe substantial rights acquired by the appellants would be considered an order of moment and not a mere interlocutory order, which would invite the bar to entertaining the revision under S. 397(2) of the Code.

Orders for investigation are only an ancillary step in aid of the investigation or trial, and are clearly interlocutory in nature, similar to orders granting bail, or calling for records, or issuing search warrants, or summoning witnesses and other like matters which infringe no valuable rights of the prospective accused, and are not amenable to challenge in a criminal revision, in view of the bar contained in S. 397(2) of the Code.

As the direction for investigation passed by the Magistrate under S. 156(3) is purely interlocutory in nature, and involves no substantial rights of the parties, the bar under S. 397(2) Cr.P.C. to the entertainment of a criminal revision can also not be circumvented by moving an application under Section 482 Cr.P.C. **(Father Thomas v. State of U.P. & Anr.; 2011 Cri.L.J. 2278 (All HC (FB)**

S. 401 – Revision challenging acquittal – When two views possible on evidence then view favourable to accused is normally to be adopted

Supreme Court has observed that the High Court has acted in accordance with the well-known principles that if two views are possible on the evidence adduced, one pointing to the guilt of the

accused and the other to innocence, the view which is favourable to the accused is normally to be adopted. **(State of U.P. v. Munni Ram and Others; 2011 (1) ALJ 557 (SC)**

S. 406 – Transfer Application – Consideration of disposal

This is a case of murder of a Superintending Engineer. There is no manner of doubt that brutal assault was mounted on him which resulted into his death. The son of the deceased is seeking transfer of proceedings on ground of coercion and threat to the witnesses as well as doubtful sincerity of the investigating agency and prosecuting agency. In effective cross-examination by public prosecutor of the driver who realized from the statement made during investigation speaks volumes about the sincerity/effectiveness of the prosecuting agency. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge Presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers. 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.

From the averments made in the petition it is evident that the accused belong to powerful gang operating in U.P. from which State of Uttarakhand is carved out. The petitioner has been able to show the

circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court at Haridwar in spite of receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eye-witnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition. **(Vikas Kumar Roorkewal v. State of Uttarakhand and others; AIR 2011 SC 726)**

S. 406 – Transfer of criminal case – Ground

It is the case of the respondents that the transfer petition is wholly misconceived. The investigation has been transferred to the CBI. The CBI has submitted a closure report in the case registered against the deceased and his companion. Clearly, therefore, the police officers cannot be said to be exerting any influence on the proceedings in court. Once the investigation has been entrusted to the CBI, the local police has no further role to play. Furthermore, answering respondents are no longer posted at Dehradun. Even otherwise the respondents are not high officials and cannot exert any influence on the State. One of the respondents is an Inspector. Five respondents are Sub-Inspectors and the rest are in the rank of Constables. The impartiality of the State is also apparent that all the respondents have been transferred out of Dehradun.

The justification given by the respondents is, however, controverted by the complainant illustrating the influence wielded by the respondents. It is highlighted that even the transfer of the case to the CBI has made no difference. In fact, none of the police officers were even suspended. All the accused had managed to create such circumstances which led to the High Court granting bail to the respondents. The complainant apprehends that the prosecuting agency at Dehradun will not properly conduct the case. It will not be able to

resist the influence of the accused. The influence of the accused is such that the complainant was not able to even engage an advocate to file application for cancellation of bail in the High Court against the respondents. Even the CBI counsel was deliberately absent when the application for bail was heard by the High Court only to help the respondents.

In opinion of court, given the peculiar facts and circumstances of this case, it is necessary to ensure that there is no possibility of any undue influence being exerted by the respondents on the prosecution. The complainant has made a serious grievance about the manner in which the prosecution has been conducted. The court would refrain from recording any firm opinion on the issue at this stage. However, at the same time it must be ensured that the prosecution witnesses are able to depose without any fear of repercussions. This can only be ensured by transferring the criminal case out of the area in which no allegations could be made of undue influence, against the prosecution.

The prayer made by the petitioner was for transfer of this case to the CBI Court at Ghaziabad/Lucknow. However, the accused had expressed similar apprehension about undue influence being exerted by the petitioner. If the case is transferred to the Court at Ghaziabad/Lucknow, therefore, purely in the interest of justice, the Court deem it appropriate to transfer the case to Delhi. Case Crime No. 3 of 2010 titled State through CBI v. S.K. Jaiswal is transferred from the Court of Special Judicial Magistrate, CBI, Dehradun to the Court of Special Judge, CBI, Delhi, for trial or its assignment to an appropriate court, as the Special Judge may consider it fit and proper. **(Ravindra Pal Singh v. Santosh Kumar Jaiswal; 2011 Cri.L.J. 2160 (SC)**

S. 437 – Powers of Magistrate for cancellation of Bail – Magistrate who granted bail U/s. 437(1) & (2) has right to cancel bail U/s. 437(5)

In Manjit Prakash v. Shobhadevi; 2009 (13) SCC 785: AIR 2008 SC 3032, where it was held:

> "Once the order of release is by fiction of law an order passed under Section 437(1) or (2) or Section 439(1) it follows as a natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in Raghubir Singh v. State of Bihar the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc.

Both the provisions do not use the expression 'cancel' but deal with the power of the Court to order arrest of the accused and to commit him to custody. While S. 439(2) has been regarded as the source of power enabling the Court of Session and High Court to cancel the bail, S. 437(5) has been regarded and understood as the source of power enabling the Magistrate to cancel the bail granted U/s. 437(1) or 437(2). The decisions rendered by the Apex Court while dealing with the power of the Court of Session and of the High Court to cancel bail U/S. 439(2) would therefore apply to cases dealing with the power of the Magistrate to cancel the bail U/s. 437(5), Cr.P.C.

In the light of the decisions cited supra there is no doubt in court's mind that the Magistrate who granted bail U/s. 437(1) and (2),

Cr.P.C. has the right to cancel the bail U/s. 437(5) of the Cr.P.C. Section 437(5) is the source of power for the Magistrate to cancel the bail granted U/s. 437(1) and (2), Cr.P.C. **(Latheef alias Abdul Latheef v. State of Kerala; 2011 Cri.L.J. 2568 (Kerala HC)**

S. 437 – Scope of – Power of Court to grant anticipatory bail U/s. 438 is not subject to limitations mentioned in S. 437

The question which arises for consideration is whether the powers under section 438, Cr.P.C. are unguided or unanalyzed or are subject to all the limitations of section 437, Cr.P.C.? The Constitution Bench in Sibbia's case has clearly observed that there is no justification for reading into section 438, Cr.P.C. and the limitations mentioned in section and the limitations mentioned in section 437, Cr.P.C. The Court further observed that the plentitude of the section must be given its fully play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438, Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438, Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable." **(Siddharam Sarlingappa Mhetre v. State of Maharashtra; AIR 2011 SC 312)**

S. 437 – Bail – Ground of parity – Question of grant of bail on ground of parity does not arise as accused was named in FIR and other co-accused were not

Applicant accused was main person whose money was allegedly misappropriated by deceased and assault on deceased was also made in factory of applicant. After that deceased was brought to house of applicant wherefrom his dead body was recovered. Therefore, in such circumstances, applicant cannot be released on

bail. **(Ramu @ Sanjay Srivastava v. State of U.P., 2011(3) ALJ (NOC) 262 (ALL.)**

S. 438 – Anticipatory bail – This section need not be invoked in ordinary case but only in exceptional or rare cases

It is a matter of common knowledge that a large number of under-trials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section 438, Cr.P.C. has not been allowed its fully play. The Constitution Bench in Sibbia's case clearly mentioned that section 438, Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439, Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section 438, Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution bench in Sibbia's case. According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-à-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court.

It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with

the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage. **(Siddharam Sarlingappa Mhetre v. State of Maharashtra; AIR 2011 SC 312)**

S. 438 – Grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case and factors considered

Grant of bail for limited period is contrary to the legislative intention. Section 438, Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned Court would be fully justified in imposing conditions including direction of joining investigation. In pursuance to the Order of the Court of Sessions or the High Court, once the accused is released on bail by the trial Court, then it would be unreasonable to compel the accused to surrender before the trial Court and again apply for regular bail.

The Court must bear in mind that at times the applicant would approach the Court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the Court and gets the relief from the Court for a limited period and thereafter he has to surrender before the trial Court and only thereafter his bail application can be considered and life of

anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so.

The restrictions imposed by Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of Section 438, Cr.P.C. **(Siddharam Satlingappa Mhetre v. State of Maharashtra; AIR 2011 SC 312)**

S. 438 – Anticipatory bail factors and parameters

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 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 implicated 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 cases 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.

(Siddharam Satlingappa Mhetre v. State of Maharashtra; AIR 2011 SC 312)

S. 439 – Grant of bail without considering case diary is not sustainable

The Magistrate should not grant confirm bail to the accused persons without considering the Case Diary on the concession shown by the Public Prosecutor. The question of bail always be considered judiciously and must be an independent decision of the Court, irrespective of the opinion expressed by the Counsel of the State. The Magistrate if after considering the nature of allegation made in the FIR against the accused persons and the other factors viz., the nature of the offence, the severity of the punishment in case of conviction, chances of absconding, thought it fit that there was no necessity of detaining the accused persons in custody till the production of the case Diary, in that case the Magistrate is in no way precluded from releasing the accused on interim bail and then to pass the final order of bail after considering the Case Diary. **(Mrs. Sonia Bhattacharjee v. The State of West Bengal & Ors.; 2011 Cri.L.J. (NOC) 101 (Cal)**

S. 457 – Release of confiscated vehicle – Power of Magistrate

Section 21(4a) Mines and Minerals (Regulation and Development) Act, 1957 is specific on the point that a competent court i.e. Magistrate is competent to confiscate the vehicle and is also competent to dispose it of in accordance with directions given by it. The District Magistrate or the Collector or any other authority has not been given power to confiscate the vehicle either under the Act, or in the Rules. This power is reserved for the Court, which is a competent to try the case after a complaint in respect of which same has been filed by the District Magistrate.

In this view of the matter, it cannot be said that the Magistrate has no jurisdiction to release the vehicle pending trial or even before the trial as the complaint has not yet been filed by the competent authority. The District Magistrate or Judicial Magistrate cannot compel the petitioner to compound the case against her will. If the petitioner is not ready to compound the case, she cannot be compelled to do so. Since the complaint has not yet been filed even after a period of nine months from the incident, a vehicle lying at the police

station is likely to become junk, and it was desirable for the Magistrate to pass an order for release in favour of its registered owner subject to certain conditions, which he might impose. **(Smt. Sudha Kesarwani v. State of U.P. & Ors.; 2011 (1) ALJ 529 (All HC)**

S. 457 – Release of seized property – Grant of

Application for release was rejected by the Magistrate on the ground that the petitioner was guilty of cable network piracy and the seized goods are case property and investigation is pending. The revision was also dismissed on the same grounds. Now more than seven months have passed. Investigation must have been completed. The seized goods are electronic items. If they are kept at the police station for a long time, they are likely to become junk. There is no dispute that the petitioner is the owner of the seized goods.

The Apex court, in the case of Sunder Bhai Ambalal Desai v. State of Gujarat (AIR 2003 SC 638) has held that the powers under Sec. 457 Cr.P.C. should be exercised expeditiously and judiciously and articles are not to be kept for a long time at the police station.

In view of the aforesaid decision of the Apex Court, I am of the view that orders passed by the Magistrate as well as the Sessions Judge cannot be sustained and are liable to be set-aside. The Magistrate ought to have directed release of the seized articles in favour of the petitioner on furnishing adequate security. **(Mohammad Aaved v. State of U.P. & ors., 2011(3) ALJ 15 (All HC)**

S. 482 – Inherent powers to quash complaint – Consideration of

The Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power under section 482, Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests

specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute. **(Asmathunnisa v. State of A.P.; AIR 2011 SC 1905)**

S. 482 – Inherent jurisdiction – Exercise of inherent jurisdiction to quash criminal proceedings though very wide but not unbridled, it to be exercised sparingly

Section 482 of the Criminal P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely (i) to give effect to an order under Cr.P.C.; (ii) to prevent an abuse of the process of Court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Courts. Court would be justified in invoking its inherent jurisdiction to quash criminal proceedings where the allegations made in the Complaint or Charge-sheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged. **(Sushil Suri v. CBI & Anr.; AIR 2011 SC 1713)**

S. 482 – Powers of Court regarding bar of revision cannot be circumvented by moving application U/s. 482 against order of Magistrate directing police officer to investigate cognizable case

Order which appeared to infringe substantial rights acquired by the appellants would be considered an order of moment and not a mere interlocutory order, which would invite the bar to entertaining the revision under S. 397(2) of the Code.

Orders for investigation are only an ancillary step in aid of the investigation or trial, and are clearly interlocutory in nature, similar to orders granting bail, or calling for records, or issuing search warrants, or summoning witnesses and other like matters which infringe no valuable rights of the prospective accused, and are not amenable to challenge in a criminal revision, in view of the bar contained in S. 397(2) of the Code.

As the direction for investigation passed by the Magistrate under S. 156(3) is purely interlocutory in nature, and involves no substantial rights of the parties, the bar under S. 397(2) Cr.P.C. to the entertainment of a criminal revision can also not be circumvented by moving an application under Section 482 Cr.P.C. **(Father Thomas v. State of U.P.; 2011 Cri.L.J. 2278 (All HC (FB)**

S. 482 – Inherent powers for quashing complaint – Consideration of

It is well settled that though the inherent powers of the High Court under Section 482 of the Code are very wide in amplitude, yet they are not unlimited. However, it is neither feasible nor desirable to lay down an absolute rule which would govern the exercise of inherent jurisdiction of the Court. Nevertheless, it is trite that powers under the said provision have to be exercised sparingly and with caution to secure the ends of justice and to prevent the abuse of the process of the Court. Where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged, the High Court would be justified in invoking its powers under Section 482 of the Code to quash the criminal proceedings. **(Maharashtra State Electricity Distribution Co. Ltd. & Anr. V. Datar Switchgear Ltd. & Ors.; 2011 Cri.L.J. 8 (SC)**

S. 482 – Exercise of inherent powers for quashing of complaint at stage of issuance of process – Inherent powers cannot be exercised to stifle prosecution

In this case, the original complainant Iridium India Telecom Ltd. (hereinafter referred to as the appellant) has preferred this appeal against the judgment and order dated 8th August, 2003, passed by a learned single Judge of the Bombay High Court quashing the criminal complaint dated 3rd October, 2001 filed by the appellant, inter alia, against respondent No. 1, namely, Motorola Incorporated. **(Iridium India Telecom Ltd. V. Motorola Incorporated & Ors.; AIR 2011 SC 20)**

Criminal Jurisprudence – Every person shall be presumed to be innocent unless he is proved guilty by competent court of law

The presumption of innocence is available to a person and in the criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. It is also settled law that 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. **(V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.; AIR 2011 SC 1037)**

Delhi Special Police Establishment Act

S. 5 – Cr.P.C., S. 156 – CBI investigation can be directed by High Court in exercise of extraordinary powers under Article 226 of the Constitution

In State of West Bengal and Others v. Committee for Protection of Democratic Rights, West Bengal and Others; (2010) 3 SCC 571: AIR 2010 SC 1476, the issue which was referred for the opinion of the Constitution Bench was whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the CBI established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act") to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government. The Constitution Bench, after adverting to the

required factual details, rival contentions and the relevant constitutional provisions has concluded:-

"69. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

After saying so, the Constitution Bench has clarified that this extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and in still confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. **(Ashok Kumar Todi v. Kishwar Jahan & Others; AIR 2011 SC 1254)**

Doctrine

Doctrine of prospective overruling – Invocation

The argument of Shri Ranjit Kumar that the doctrine of prospective over ruling should be invoked and the allotment made in favour of respondent No. 5 may not be quashed sounds attractive but cannot be accepted because the Court have found that the impugned allotment is the result of an exercise undertaken in gross violation of Article 14 of the Constitution and is an act of favouritism and nepotism. **(Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh; AIR 2011 SC 1834)**

Dowry Prohibition Act

S. 4 – Dowry death – Proof of

In this case, the prosecution has been able to prove the following:

(1) The death of the deceased was caused by strangulation and burning within seven years of her marriage.
(2) The deceased had been subjected to cruelty by her husband and mother-in-law (the two accused appellants) over the demand of Maruti Car in dowry raised and persistently pressed by them after about six months of the marriage and continued till her death.
(3) The cruelty and harassment was in connection with the demand of dowry i.e. Maruti Car.
(4) The cruelty and harassment is established to have been meted out soon before her death.
(5) The two accused were the authors of this crime who caused her death by strangulation and burning on the given date, time and place.

In court's opinion, the trial Judge recorded an acquittal adopting a superfluous approach without in depth analysis of the evidence and circumstances established on record. On thoroughly cross-checking the evidence on record and circumstances established by the prosecution within the findings recorded by the trial court, the court finds that its conclusion are quite inapt, unjustified, unreasonable and perverse. Proceeding on wrong premise and irrelevant considerations, the trial court has acquitted the accused. The accused are established to have committed the offences under Sections 498-A and 304-B, IPC and under Section 4 of Dowry Prohibition Act hence, the findings of the High Court are correct. **(Satya Narayan Tiwari v. State of U.P.; 2011 (1) ALJ 539 (SC)**

Election Laws

Representation of the People Act, S. 10 – Election Laws – Election disqualification – Whether Lambardar is an office of profit and on account of this reason he would be disqualified for contesting election of Panch of Gram Panchayat – Held, "No"

The Office of Lambardar is not an office of profit and, therefore, Lambardar would not be disqualified from contesting the election as Panch of Gram Panchayat.

Since, the Lambardar is not holding any post under the Government, no salary is payable to him. There is no pay scale attached to the office of Lambardar. Therefore, it cannot be said that he is in receipt of any remuneration.

Currently the Lambardar receives Rs. 900/- per month as honorarium. This honorarium is merely compensatory to meet the out of pocket expenses, incurred in the performance of his duties. Although purely 'honorary' being a Lambardar gives the incumbent a certain status in the village. In some cases, the office of Lambardar has been in the same families for generations. For them, it becomes a matter of honour and prestige that the office remains in the family. The office of Lambardar is a heritage office. Therefore, some families would cherish the office of Lambardar, even though the incumbent does not get any salary, emoluments or perquisites.

Therefore, it would seem a little incongruous that a Lambardar would not be permitted to seek election to the Panchayat. **(Anokh Singh v. Punjab State Election Commission; AIR 2011 SC 230)**

Representation of the people Act, S. 100(1)(d)(iv) – Whether rule of appreciation of hearsay evidence applies in election petition – Held, "Yes"

The argument that the rule of appreciation of hearsay evidence would not apply to determination of the question whether change of venue of polling station has materially affected the result of the election of the returned candidate, cannot be accepted for the simple

reason that, this question has to be determined in a properly constituted election petition to be tried by a High Court in view of the provisions contained in Part VI of the Representation of the People Act, 1951 and Section 87(2) of the Act of 1951, which specifically provides that the provisions of the Indian Evidence Act, 1872, shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. The learned counsel for the appellant could not point out any provision of the Act of 1951, which excludes the application of rule of appreciation of hearsay evidence to the determination of question posed for consideration of the Court in the instant appeal. **(Kalyan Kumar Gogoi v. Ashutosh Agnihotri & another; AIR 2011 SC 760)**

S. 123(b) – Corrupt practice – Proof of

It would be unsafe to accept the oral evidence on its face value without seeking for assurance from other circumstances or unimpeachable document. It is very difficult to prove a charge of corrupt practice merely on the basis of oral evidence because in election cases, it is very easy to get the help of interested witnesses. Oral evidence has to be analyzed by applying common sense test. In assessing the evidence, which is blissfully vague in regard to the particulars in support of averments of undue influence, cannot be acted upon because the Court is dealing with a quasi-criminal charge with serious consequences and, therefore, reliable, cogent and trustworthy evidence has to be led with particulars. If this is absent and the entire case is resting on shaky ipse dixits, the version tendered by witnesses examined by election petitioner cannot be accepted. **(Joseph M. Puthussery v. T.S. John & Ors.; AIR 2011 SC 906)**

Essential Commodities Act

S. 3 – Whether complaint about irregularities in selection process, award of marks and preparation of merit panel can be brushed aside or ignored – Held, "No"

Where complaint was filed alleging irregularities in selection, award of marks and preparation of merit panel and Indian Oil Corporation scraped the selection and in writ petition finding was arrived at that the marks were wrongly assigned to the complainant and consequently, respondent had benefited, it does not follow that when the complainant dies, the irregularity in assigning marks could be brushed aside or ignored. In such selections, any illegality or material irregularity in assigning marks in regard to any person with the intention of favouring someone or excluding someone vitiates the entire selection process. Such a selection process cannot be saved by holding that the person in regard to whom lesser marks were given had died or failed to pursue his remedy. **(Senior Law Manager, Indian Oil Corporation Ltd. & Anr. V. Guru Shakti Singh & Anr.; AIR 2011 SC 1207)**

S. 3 – Fair price shop dealership – Cancellation merely on ground of filing FIR would not be proper

Mere filing of a FIR cannot result in holding a fair price shop owner guilty of the offences charged. If there be a conviction, then it is possible to proceed, based on the conviction and not otherwise. In case if the FIR is lodged, it is still open to the respondents to proceed by leading independent evidence and statements of the persons recorded.

The said order purports to cancel the license merely on the ground of lodging of an Fir and that suspension is going on for a long time thereby causing inconvenience in distribution of essential commodities to the card holders. The said reasons cannot be justified in law to cancel the dealership. **(Raj Kumar Singh v. State of U.P., 2011 (3) ALJ 140 (All HC)**

Evidence Act

S. 3 – Conviction on basis of circumstantial evidence – When can be based – Where no direct evidence is available in shape of eye-witnesses

When the prosecution case hinges on circumstantial evidence, it is an accepted proposition of law that even in cases where no direct evidence is available in the shape of eye-witnesses etc. a conviction can be based on circumstantial evidence alone. The hypothesis which can form the basis for conviction purely on circumstantial evidence was stated by the Court in the case of Hanumant Govind Nargundkar v. State of M.P.; AIR 1952 SC 343. In the aforesaid judgment, Mahajan, J. speaking for the Court stated the principle which reads thus:

> "It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

(Abuducker Siddique v. State; AIR 2011 SC 91)

S. 3 – Contradictions in Medical and ocular evidence – Whether can be ignored

It has been submitted by learned Senior Counsel for the appellants that there is a contradiction between the medical and ocular evidence. From the post mortem report of Virendra Singh (D-3) (Ext.Ka-8), it is evident that this body was having contusions; the post mortem report of Rajendra Singh (D-2)(Ext.Ka-9) reveals that he was having abrasions; and the post mortem report of Nathu Singh (D-1) (Ext.Ka-10) also reveal several abrasions. The High Court has

given cogent reasons explaining these discrepancies by saying that at the time of firing, the deceased must have reacted to the assault and might have received some abrasions and contusions in order to save themselves. Rajendra Singh (PW-2) has stated that he remained at the place of occurrence till 7 p.m. and he denied his signatures. The High Court has furnished a cogent explanation for such contradiction, and held that his statement had been recorded after 3 years of the incident and thus, such infirmity is bound to occur but does not affect the credibility of the witnesses.

It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety.

Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. **(Brahm Swaroop & Anr. V. State of U.P.; 2011 Cri.L.J. 306 (SC)**

S. 3 – Injured witness – Reliability of – His evidence should be relied upon unless there are major contradictions and discrepancies therein

The High Court disbelieved both the witnesses Subedar (PW-1) and Balak Ram (PW-5) as being closely related to the deceased and

for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused. A mere relationship cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. **(State of U.P. v. Naresh; 2011 (3) ALJ 254 (SC)**

S. 3 – If no evidence to show that injuries could be connected with incident, then prosecution not required to be called upon to explain injuries

Much emphasis has been placed by the learned counsel on the fact that the injuries on the person of Parvati DW-9, had not been explained. The basis for this argument is the statement of DW4 Dr. Ravinder Nath, who had examined Parvati at 10.30 a.m. on the 29th September, 1991 and had found three injuries on her person and had suggested that an X-Ray be taken. Surprisingly, however, despite the fact that Parvati had three painful injuries, and an X-ray had been suggested by the doctor Parvati was subjected to an X-ray examination byDW7 Dr. N.K. Sharma of the ESI Hospital, Faridabad on the 28th of October, 1991 and it was at that stage that a fracture of the middle femur bone had been detected. This doctor further stated that the X-ray had been conducted on the directions of the Deputy Commissioner, Rewari as well as the SHO, Jatusana, and the Medical Officer, Primary Health Center, Kosli, but he admitted that the X-ray film was not on the file of the case and was not traceable at that moment and without seeing the film, he could not comment as to the

duration of the frcture. When questioned about the delay in the X-ray examination, DW9 stated that she had made several complaints to the higher authorities that the incident had not been properly recorded by the police and that an X-ray was not being carried out. When questioned further, she deposed that no copy of any such application was with her. The Court is, therefore, of the opinion that the prosecution was not called upon to explain the injuries on Parvati as there was no evidence to show that they could be connected with the incident. **(Sher Singh v. State of Haryana; AIR 2011 SC 373)**

S. 3 – Conviction of testimony of sole eye-witness can be relied upon – Consideration for

In a case involving an unlawful assembly with a very large number of persons, there is not rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless that the Court is of the view that the testimony of such sole eye-witness is not reliable. Though, generally it is a rule of prudence followed by the Courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident in a fit case the Court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot. **(Ranjit Singh & Ors. V. State of Madhya Pradesh; 2011 Cri.L.J. 283 (SC)**

S. 3 – Medical evidence and ocular evidence – Whether inconsistent – Ocular evidence should prevail over medical evidence

The trial court as well as the High Court has also considered the submissions as to whether injury No. 9 was inconsistent with the ocular version that only one shot was fired by the appellant. It was also sought to be submitted before Court that injury No. 9 is

definitely from a different weapon. This according to Mr. Nagendra Rai would clearly show that the genesis of the crime has been suppressed by the prosecution. The trial court as well as the High Court, upon consideration of the same submission have concluded that both the doctors examined i.e. PW-5 and PW-10 were not ballistic experts. They were not able to state as to whether the injuries were caused by a single shot from a double-barrelled gun. Relying on "Modi's Medical Jurisprudence and Toxicology" (19th Ed. Pg. 221), the trial court has concluded that when a projectile strikes the body at a right angle, it is circular and oval when it strikes the body obliquely. Dr. V.P. Kulshrestha, PW-5, in his injury report has stated that injury No. (i) is 2 cm x 2 cm muscle deep and is on right shoulder. According to him, if this pellet had moved slightly to the inner side, it would have caused injury on the right side of the neck like injury No. 9 on the left side. This apart, it is not disputed that all the other injuries on the deceased could have been caused by a single shot from a double-barrelled gun. Both the trial court as well as the High Court has held that the medical evidence is consistent with the ocular evidence. So did not see any reason to interfere with the findings recorded by both the Courts. **(Om Pal Singh v. State of U.P.; 2011 Cri.L.J. 439 (SC)**

S. 3 – Circumstantial Evidence – Basis of conviction

Though a conviction may be based solely on circumstantial evidence, this is something that the court must bear in mind while deciding a case involving the commission of a serious offence in a gruesome manner. In **Sharad Birdhichand Sarda v. State of Maharashtra; AIR 1984 1622,** the Court observed that it is well settled that the prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. The Court also discussed the nature, character and essential proof required in a

criminal case which rests on circumstantial evidence alone and held as under:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)

S. 3 – Hostile witnesses – Their evidence need not to be rejected embloc but should be considered with caution

When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 3 – Abscondance of witness is not conclusive proof of guilt

Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere abscondance by the appellant after commission of the crime and remaining untraceable for a period of six days itself cannot establish his guilt. Absconding by itself is not conclusive proof of either of guilt or of a guilty conscience. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 3 – Related witness – Credibility of

Merely because the witnesses were closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. **(Brahm Swaroop v. State of U.P.; AIR 2011 SC 280)**

S. 3 – Motive – If evidence of eye-witness is trustworthy and believed by court then motive is irrelevant

If the evidence of the eye-witnesses is trustworthy and believed by the court, the question of motive becomes totally irrelevant. **(Brahm Swaroop v. State of U.P.; AIR 2011 SC 280)**

Ss. 3 & 60 – Hearsay evidence – Evidentiary value – Stated

Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a

witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds are deemed to be irrelevant for the purpose of proving the truth of matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. The reasons why hearsay evidence is not received as relevant evidence are "(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility. i.e., every witness must give his testimony, under such circumstances, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is concerned, he has a line of escape by saying "I do not know, but so and so told me", (b) truth is diluted and diminished with each repetition, and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible. **(Kalyan Kumar Gogoi v. Ashutosh Agnihotri and another; AIR 2011 SC 760)**

S. 3 – Appreciation of evidence of prosecution in case of kidnapping and rape – Prosecutrix illiterate and rustic young woman – Consideration of

In this case, the prosecutrix at the relevant time was less than 18 years of age. She was removed from the lawful custody of her brother in the evening on September 19, 1989. She was taken to a different village by two adult males under threat and kept in a rented room for many days where A-1 had forcible sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. Although the court finds that there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are natural as her

recollection, observance, memory and narration of chain of events may not be precise. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

Ss. 3 & 134 – Indian Penal Code – 149 – Conviction on testimony of sole eye-witness in offence of unlawful assembly – Reliance on

In a case involving an unlawful assembly with a very large number of persons, there is not rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless that the Court is of the view that the testimony of such sole eye-witness is not reliable. Though, generally it is a rule of prudence followed by the Courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident in a fit case the Court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot. **(Rajnit Singh v. State of Madhya Pradesh; AIR 2011 SC 255)**

S. 24 – Extra judicial confession – Admissibility of

The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162(1) Cr.P.C. but as mentioned in the proviso to Section 162(1) Cr.P.C. it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the police to whom she had stated that her son (the accused)had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such statement.

The court of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to

Section 162(1) Cr.P.C., and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in the court she denied that she had made such statement before the police. The court is of the opinion that her statement to the police can be taken into consideration in view of the proviso of Section 162(1) Cr.P.C.

In opinion of the court, the statement of the accused to his mother Smt. Dhillo Devi is an extra judicial confession. In a very recent case the Court in Kulvinder Singh & Anr. V. State of Haryana Criminal Appeal No. 916 of 2005 decided on 11.4.2011 (reported in 2011 AIR SCW 2394, referred to the earlier decision of the Court in State of Rajasthan v. Raja Ram; (2003) 8 SCC 180: AIR 2003 SC 3601, where it was held –

> "An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.".

No doubt Smt. Dhillo Devi was declared hostile by the prosecution as she resiled from her earlier statement to the police. However, as observed in State v. Ram Prasad Mishra & Anr.; AIR 1996 SC 2766:

> "The evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but can be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

Similarly in Sheikh Zakir v. State of Bihar; AIR 1983 SC 911, the Court held:

> "It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the conviction."

In Himanshi alias Chintu v. State (NCT of Delhi); (2011) 2 SCC 36: AIR 2011 SC (Cri) 426, the Court held that the dependable part of the evidence of a hostile witness can be relied on.

Thus, it is the duty of the Court to separate the grain from the chaff, and the maxim "falsus in uno falsus in omnibus" has no application in India vide Nisar Ali v. The State of Uttar Pradesh; AIR 1957 SC 366. In the present case the Court is of the opinion that Smt. Dhillo Devi denied her earlier statement from the police because she wanted to save her son. Hence, the Court accepts her statement to the police and reject her statement in court. The defence has not shown that the police had any enmity with the accused, or had some other reason to falsely implicate him. **(Bhagwan Dass v. State (NCT) of Delhi; AIR 2011 SC 1863)**

S. 25 – Extra judicial confession – Confession made by accused before ex-sarpanch – Reliability

On the issue of extra-judicial confession, Phool Singh (PW-10) has deposed that he was the Ex-Sarpanch and both the appellants/accused approached him on 13.10.1997 and disclosed that they had committed the murder of Amardeep-deceased and he should take them to the police. He deposed that both the accused came to him at about 1.00 p.m. and he produced them before the police at about 3.30/4.00 p.m. Undoubtedly, both the appellants/accused had been arrested by the police only on 13.10.1997, as it is not the defence version that they had been arrested earlier to 13.10.1997, neither have they challenged the deposition of Phool Singh (PW-10) that he did not produce them before the police, not it had been their

case that they had been arrested from somewhere else. Phool Singh (PW-10) faced the gruelling cross-examination but defence could not elucidate anything to discredit him and the courts below have found that the deposition of Phool Singh (PW-10) in respect of the extra-judicial confession made to him by the accused remained a trustworthy piece of evidence as rightly been relied upon. **(Kulvinder Singh & Anr. V. State of Haryana; AIR 2011 SC 1777)**

S. 25 – Confession to police by accused who committed offence under NDPS Act – Admissibility of

The consent statement signed by the appellant has not been used as a confession; therefore, the bar under Section 25 would not be applicable. A statement in order to be treated as a confession must either admit in terms of an offence or at any rate substantially all the facts which constitute the offence. No confession has been made in this case through the consent given by the appellant with regard to any of the ingredients of the offence with which he was subsequently charged. **(Jarnail Singh v. State of Punjab; AIR 2011 SC 964)**

S. 25 – Confession to police officer inadmissible U/s. 25 of evidence though its admissible in TADA cases U/s. 15 of TADA

Confession to a police officer is inadmissible vide Section 25 of the Evidence Act, but it is admissible in TADA cases vide Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987.

Confession is a very weak kind of evidence. As is well known, the wide spread and rampant practice in the police in India is to use third degree methods for extracting confessions from the alleged accused. Hence, the courts have to be cautious in accepting confessions made to the police by the alleged accused. **(Arup Bhuyan v. State of Assam; AIR 2011 SC 957)**

S. 32 – Dying declaration – Veracity

Declaration recorded by Magistrate without making efforts to find out as to whether Magistrate of area in which hospital lay was available or not. The endorsement of doctor that deceased was fit to make statement taken by Magistrate after recording dying declaration. The conduct of witness and manner in which he recorded declaration, renders declaration suspicious. **(Subhash v. State of Haryana; AIR 2011 SC 349)**

S. 32 – Multiple dying declarations – Acquittal of accused in view of minor discrepancies – Propriety of

It has rightly been pointed out by the learned counsel for the appellant that the entire prosecution story would depend on the dying declarations. It must be borne in mind that all three dying declarations, the first one which formed the basis of the FIR, the second recorded by the ASI as a statement under Section 161 of the Cr.P.C. and a third recorded by the Tahsildar are unanimous as all the accused find mention therein. The High Court has by way of abundant caution, already given the benefit to three of the assailants on the plea, that they, though armed, had not caused any injury to the deceased. The motive too has also been established as there appeared to be deep animosity between the parties and that the accused Abrar, the appellant had, in fact, appeared as a witness in several cases in which Mohd. Ashfaq or his sons were the accused. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To court mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter-se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. The court, particularly, notice that the dying declaration had recorded by the Tahsildar after the Doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar.

The court is therefore, of the opinion that no fault whatsoever could be found in the dying declarations. **(Abrar v. State of Uttar Pradesh; AIR 2011 SC 354)**

S. 32 – Dying declaration recorded by Tahsildar – Ground for consideration

Factually, it is to be noticed that the Tehsildar, who recorded the dying declaration appeared as PW-6, he has clearly stated that although no doctor was present in the hospital, he was informed by the pharmacist that Rishipal Singh was in a fit state to make a statement. He, thereafter, isolated the injured Rishipal Singh and recorded his statement. He further stated that he wrote down word by word what Rishipal Singh had stated. The contents of the statement were read to the injured who stated that he understood and accepted the same. Only thereafter, he put his thumb impression on the statement. It is undoubtedly true that the statement has not been recorded in the question and answer form. It is also correct that at the time when the statement was recorded Rishipal Singh was in a "serious condition".

There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

In court's opinion, the trial court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer form

would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification by the doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. **(Om Pal Singh v. State of U.P.; 2011(1) ALJ 551 (SC)**

S. 32 – Dying declaration can be sole basis for conviction if it can be shown that person making statement was not influenced by any exterior factor and made statement which duly recorded

Where immediately after the incident, the deceased was taken to the Government Hospital, and upon getting information with regard to the offence Sub Inspector had rushed to the Government Hospital, and the deceased had made her statement before him and thereafter she had made her dying declaration before a judicial officer and said statement was scrupulously recorded by the Judicial Officer who had found the deceased to be conscious and fit to make statement, the dying declaration was trustworthy and reliable and can be sole basis for conviction of accused for offence punishable U/s. 304, Part 2 IPC. **(Chirra Shivraj v. State of Andhra Pradesh; AIR 2011 SC 604)**

S. 32 – Statement recorded as dying declaration but injured witness, however, survives then statement cannot be treated as dying declaration – But has to treated as of a superior high degree then statement recorded U/s. 161 of Cr.P.C.

In Sunil Kumar & Ors. V. State of M.P.; AIR 1997 SC 940, the Court dealt with the issue and held:

> "……that immediately after PW.1, injured witness was taken to the hospital and his statement was recorded as a dying declaration which, consequent upon his survival, is to be treated only as a statement recorded under Section164 Cr.P.C. and can be used for corroboration or contradiction. This statement recorded by the Magistrate at the earliest available

opportunity clearly discloses the substratum of the prosecution case including the names of the appellants as assailants and there is not an iota of material on record to show that this was the upshot of his tutoring. On the contrary, this statement was made at a point of time when PW 1 was in a critical condition and it is difficult to believe that he would falsely implicate the appellants leaving aside the real culprits…….that there was only some minor inconsequential contradictions which did not at all impair his evidence. Then, again, as already noticed, the evidence of the doctors fully supports his version of the incident." (Emphasis added)

In Maqsoodan & Ors. V. State of U.P.; AIR 1983 SC 126, the Court dealt with a similar issue wherein a person who had made a statement in expectation of death did not die. The court held that it cannot be treated as a dying declaration as his statement was not admissible under Section 32 of the Indian Evidence Act, 1872, but it was to be dealt with under Section 157 of the Act, 1872, which provides that the former statement of a witness may be proved to corroborate later testimony as to the same fact.

Thus, in view of the above, it can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high degree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under Section 157 of the Act, 1872. **(Ranjit Singh & Ors. V. State of Madhya Pradesh; 2011 Cri.L.J. 283 (SC)**

S. 45 – Expert opinion – Relevancy of

It is to be noted that in this case according to the medical evidence the shot had hit the head of the humerous that got punctured and the signs of the would were medically towards inside and slightly towards below and it was from the right to left. Once the pellets hit a hard substance like the humerous bone, they can get deflected in any direction and on that basis it cannot be said that there is any

inconsistency between the medical evidence and the ocular evidence. The Court is in agreement with the High Court that the ocular evidence in this case is highly consistent and leaves no room for any doubt about the commission of the offence by the appellant. **(Lallan Chaubey v. State of U.P.; AIR 2011 SC 241)**

S. 60 – Hearsay evidence – Newspaper reports would be regarded as hearsay evidence, hence cannot be relied upon

If one examines newspaper publications produced at Exts. P.5 and P.6, it becomes at once clear that the reports were entirely hearsay. The reporters of Exts. P.5 and P.6 were examined in this case. They have categorically, and in no uncertain terms, stated that they had no personal knowledge of the events published in Exts. P.5 and P.6. Therefore, what was reported in the newspapers could not have been regarded anything except hearsay. There is no manner of doubt that the High Court has misdirected itself in placing reliance on the hearsay evidence, which was produced before the Court in the form of Exts. P.5 and P.6. In view of clear proposition of law laid down by the Court in Quamarul Ismam v. S.K. Manta and Others; 1994 Supp. (3) SCC 5: AIR 1974 SC 1733, and Laxmi Raj Shetty and another v. State of Tamil Nadu; AIR 1988 SC 1274, the hearsay evidence could not have been used by the learned Judge for coming to the conclusion that contemporaneous newspapers publications Exts. P.5 and P.6 corroborate the testimony of the respondent No. 1. **(Joseph M. Puthussery v. T.S. John & Ors.; AIR 2011 SC 906)**

S. 63 – Document proof by secondary evidence – Duplicate copy of conversion certificate is acceptable under this section

It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduce in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in

another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where party is genuinely unable to produce the original through no fault of that party. **(M.Chandra v. M. Thangmuthu & Anr.; AIR 2011 SC 146)**

Ss. 101 & 104 – Criminal trial – Burden of proof is on prosecution in criminal trial, more serious crime stricter proof is required

In a criminal trial involving a serious offence of a brutal nature, the court should be vary of the fact that it is human instinct to react adversely to the commission of the offence and make an effort to see that such an instinctive reaction does not prejudice the accused in any way. In a case where the offence alleged to have been committed is a serious one, the prosecution must provide greater assurance to the court that its case has been proved beyond reasonable doubt. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 113-B – Presumption as to dowry death – The onus to prove shifts exclusively and heavily on accused

In such a fact situation, the provisions of Section 113B of the Indian Evidence Act, 1872 providing for presumption that accused is responsible for dowry death, have to be pressed in service. The said provisions read as under:-

> "Presumption as to dowry death:- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death."

It may be mentioned herein that the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where discretion has been conferred upon the court wherein it had been provided that court may presume to abatement of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. **(Bansi Lal v. State of Haryana; AIR 2011 SC 691)**

S. 114 – Presumption as to service of notice – Consideration of

In the present case it has already been established that the appellant had purchased the property out of her own funds. Therefore, it could certainly be expected that when she came to know about the clandestine sale of her property to respondent No. 1, she would send him a notice, which she sent on 8.4.1987. As noted earlier, the notice is sent from one house on the College Road to another house on the same road in the city of Pathankot. The agreement of purchase is signed by the defendant No. 3 five days thereafter i.e. 13.4.1987. The appellant had produced a copy of the notice along with postal certificate in evidence. There was no allegation that the postal certificate was procured. In the circumstances, it could certainly be presumed that the notice was duly served on respondent No. 1 before 13.4.1987. The High Court, therefore, erred in interfering in the finding rendered by the Additional District Judge that respondent No. 1 did receive the notice and, therefore, was not *bona fide* purchaser for value without a notice. **(Samittri Devi and another v. Sampuran Singh and another; AIR 2011 SC 773)**

S. 115 – Doctrine of Promissory Estoppel cannot be invoked for enforcement of promise made by Govt. Contrary to law

The rule of promissory estoppels being an equitable doctrine has to be moulded to suit the particular situation. It is not a hard and fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. This doctrine is a principle evolved by equity, to avoid injustice and though commonly named promissory estoppels, it is neither in the realm of contract nor in the realm of estoppels. For application of doctrine of promissory estoppels the promise must establish that he suffered in detriment or altered his position by reliance on the promise. Normally, the doctrine of promissory estoppels is being applied against the Govt. And defence based on executive necessity would not be accepted by the Court. However, if it can be shown by the Govt. That having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Govt. To the promise made by it, the Court would not raise an equity in favour of promise and enforce the promise against the Govt. Where public interest warrants, the principles of promissory estoppels cannot be invoked. Government can change the policy in public interest. However, taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppels cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Govt. or public authority cannot be compelled to make a provision which is contrary to law. **(M/s. Shree Sidhbali Steels Ltd. & Ors. V. State of U.P. & ors.; AIR 2011 SC 1175)**

S. 133 – Accomplice – Woman who is victim of sexual assault is not accomplice to crime and her evidence cannot be tested with suspicion as that of an accomplice

The expressions ‘against her will’ and ‘without her consent’ may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The

expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanies by deliberation. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

Family Courts Act

Ss. 2(d), 3 – CPC, S. 2(8) – Family Court – Family Court has all trappings of Courts, therefore, is Court hence, Presiding Officer of family court is Judge

The provisions of Act, clearly demonstrate that the Family Court, a creature of statute, has been vested with power to adjudicate and determine the disputes between the parties which fall within the scope and ambit of Explanation to Section 7(1). The persons, who are appointed as Judge of the Family Court, perform all duties and functions which are akin to the functions being performed by the Presiding Officer of a Civil or a Criminal Court, though to a very limited extent. The expression 'Judge' under Section 2(a) of the Act means the Principal Judge, Additional Principal Judge of a Family Court. The Presiding Judges of the Family Courts perform all the different statutory functions and decided the causes in accordance with the provisions of the Act. The primary object and duty of the Family Court Judges is to endeavour and persuade the parties in arriving at a settlement in respect of the suit or proceedings, in which it may follow such procedure, as it may deem, fit. The essential features of 'Court' are noticed in Family Court. Once these essential features are satisfied, then it will have to be termed as a 'Court'. The Presiding Officers of Family Courts are performing judicial and determinative functions and, as such, are Judges. The conclusion is therefore inevitable that Family Court constituted under Section 3 has all the trappings of a Court and, thus, is a Court and the Presiding Officer, that is, Judge of the Family Court is a 'Judge' though of limited jurisdiction. **(S.D. Joshi & Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)**

Hindu Adoptions and Maintenance Act

S. 6 – Adoption – Validity of

So far as adoption of Santhilkumar is concerned, in view of court, the said adoption had been duly established before the trial court. Late Arumugha Mudaliar had followed the rituals required as per the provision of Hindu Law while adopting Santhilkumar as his son. There was sufficient evidence before the trial court to establish that Santhilkumar had been validly adopted by late Arumugha Mudaliar. Kandasamy (PW-2) had been examined in detail, who had placed on record photographs taken at the time of the ceremony. The said witness had given details about the rituals performed and the persons who were present at the time of the adoption ceremony and the deed of adoption had also been registered. The aforestated facts leave no doubt in mind of court that the adoption was valid. Even photographs and negatives of the photographs which had been taken at the time of adoption are forming part of the record. In such a set of circumstances, the court does not find any reason to disbelieve the adoption. **(Saroja v. Santhilkumar and others; AIR 2011 SC 642)**

S. 7, Proviso – Consent of wife regarding adoption by male Hindu – Proof of

The consent of wife envisaged in proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If adoption by a Hindu male becomes subject-matter of challenge before the Court, the party supporting adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in ceremonies of adoption with an affirmative mindset to support the action of husband to take a son or daughter in adoption. The presence of wife as a spectator in assembly of people who gather at place where the ceremonies of adoption are performed cannot be treated as her

consent. In other words, the court cannot presume the consent of wife simply because she was present at time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption. **(Ghisalal v. Dhapubai (Dead) by L.Rs. and others; AIR 2011 SC 644)**

Hindu Marriage Act

S. 13(1)(i-a) – Divorce on cruelty – Proof of – Petitioner complaining of cruelty has to make out specific case that conduct alleged amount to cruelty

Cruelty has not been defined under the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors in different set of circumstances. Therefore it is essential for the appellant who claims relief to prove that a particular, part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will under all circumstances amount to cruelty, vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty. It is true that even a single act of violence which is of grievous and inexcusable nature satisfies the test of cruelty. Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse. The marital life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. **(Gurbux Singh v. Harminder Kaur; AIR 2011 SC 114)**

S. 13-B – Divorce by mutual consent – Period of 18 months to withdrawal of consent by parties – Significance of

The language employed in S. 13-B(2) of the Act shows that the Court is bound to pass a decree of divorce declaring the marriage of parties before it to be dissolved with effect from the date of decree, if the following conditions are met:

(a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;
(b) After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true; and
(c) The petition is not withdrawn by either party at any time before passing the decree.

In other words, if the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. Unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, the expression divorce by mutual consent would be otiose.

In the instant case the second motion was never made by both the parties as was the mandatory requirement of law, and therefore, no Court can pass a decree of divorce in the absence of that. The wife sought to withdraw consent before stage of second motion but after lapse of 18 months it was held that non-withdrawal of consent before the expiry of the said eighteen months had no bearing and the marriage cannot be dissolved. Eighteen months' period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent. **(Hitesh Bhatnagar v. Deepa Bhatnagar; AIR 2011 SC 1637)**

S. 25 – Lump Sum maintenance awarded in exparte decree – Determination

Before parting with the case, it may be pertinent to mention here that the court tried to find out the means of re-conciliation of the dispute and in view of the fact that the appellant got married in 1991 and has two major sons, it would not be possible for him to keep the respondent as a wife. A lump sum amount of Rs. 5 lakhs had been offered by Shri M.C. Dhingra, Ld. Counsel for the appellant to settle the issue. However, the demand by the respondent/wife had been of Rs. 50 lakhs. Considering the income of the appellant as he had furnished the pay scales etc., the court feels that awarding a sum of Rs. 10 lakhs to the wife would meet the ends of justice as a lump sum amount of maintenance for the future. **(Parimal v. Veena; AIR 2011 SC 1150)**

Hindu Minority and Guardianship Act

S. 8 – Property of minor sale by natural guardian in violation of conditions mentioned in S. 8 – Effect of

Property of minor, sale by natural guardian in violation of conditions mentioned in S. 8, is voidable at instance of minor. Suit for declaration of sale deed as void can be filed before civil Court and it can be filed within three years of date of attaining majority as per Article 60 of Schedule-I to Limitation Act. **(Hari Mohan v. Additional District Judge, Lalitpur & Ors.; AIR 2011 (NOC) 175 (All)**

Indian Penal Code

S. 84 – "Unsoundness of mind" – Expression not defined in IPC but treated as equivalent to insanity

An accused who seeks exoneration from liability of an act U/s. 84 of the IPC is to prove legal insanity and not medical insanity. Expression "Unsoundness of Mind" has not been defined in IPC and has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering

from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code. **(Surendra Mishra v. State of Jharkhand; AIR 2011 SC 627)**

Ss. 120-A & 120-B – Essential ingredients of criminal conspiracy is agreement to commit offence

The essential ingredient of the offence of "criminal conspiracy", defined in Section 120-A, IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the Statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by providing such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, IPC, then in that event mere proof of an agreement between the accused for commission of such crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by anyone of them would not be necessary. **(Sushil Suri v. CBI & Anr.; AIR 2011 SC 1713)**

S. 149 – Unlawful assembly – Common object of unlawful assembly has to be gathered from nature of assembly, arms possessed by them and behavior of assembly at or before occurrence

The common object of an unlawful assembly has to be gathered from the nature of the assembly, arms possessed by them and the behavior of the assembly at or before the occurrence. It is an inference which has to be deduced from the facts and circumstances of each case. To attract the mischief of S. 149, it is not necessary that each of the accused need not commit some illegal overt act. When the assembly is found to be unlawful and of offence is committed by any member of the unlawful assembly in prosecution of the common object, every member of the unlawful assembly shall be guilty of the offence committed by another member of the assembly. It has to be borne in mind that an assembly which is not unlawful when assembled may subsequently become an unlawful assembly. **(Ramesh v. State of Haryana; 2011 Cri.L.J. 80 (SC)**

S. 149 – Mere fact that accused were armed is not sufficient to prove common object

The provision makes it clear that before convicting accused with the aid of Section 149, IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149, IPC, essential ingredients of Section 141, IPC must be established. **(Kuldip Yadav & ors.; v. State of Bihar; AIR 2011 SC 1736)**

S. 300 – Murder – Proof of – Merely because injuries had largely been caused on non-vital parts is no ground to hold that accused had no intention to cause death

26 injuries in all were found on the person of the deceased. Injury No. 11 was a fracture of both bones of the right forearm. Injury No. 16 was a fracture of both bones of the left leg in the upper third and Injury No. 18 was a fracture of the left foot. The court also saw that Injuries Nos. 1, 13, 14 and 15 were caused on vital parts of the body. The Court has also minutely examined the post-mortem report Ex. PD. In addition to the above fractures, two other injuries were detected thereon which are no referred to in the statement of the Doctor. These are a fracture of the 9th and 10th ribs on the right side which had lacerated the underlying liver and when the abdomen had been opened 200 ml. of blood had been found in the peritoneal cavity and a hepatic haematoma with another 400 ml. of blood had been seen in the retroperitoneal cavity and the liver too was found to be lacerated alongside the fractured ribs which also indicated heavy bleeding. The doctor also opined that the injuries were sufficient to cause death in the ordinary course of nature.

A perusal of these injuries and the post-mortem report clearly reveal that the intention of the accused was evident and that was to cause death and merely because most of the injuries were on the extremities would not be a reason to bring the case within Section 304, Part II of the IPC more particularly as the doctor had opined that they were sufficient to cause death in the ordinary course of nature. It appears that great damage had been caused as the fracture of the 9th and 10th ribs had damaged vital organs both in the abdominal and thoracic cavities. The judgments relied upon by the Division Bench to hold that the case would fall within Section 304, Part II are on their peculiar facts. It is true, that as per the statement of the two eye-witnesses, some of the accused were armed with cutting weapons and there are no incised injuries on the person of the deceased. The post-mortem report, however, says that no opinion could be given with regard to the weapons used for injury Nos. 6, 10, 12, 17 to 20, 22, 24 and 25 as the said injuries had been stitched up at the time when Umed Singh was still alive. The post-mortem Doctor, however, testified that all the other injuries were blunt weapon injuries. It has

also come in evidence that some of the cutting weapons had been used from the wrong side as well.

The Courts are therefore, of the opinion that the judgment of the High Court cannot be sustained in fact or in law. Criminal Appeal Nos. 1071/2009 and 1294/2009 Sher Singh v. State of Haryana and Des Raj v. State of Haryana are, accordingly, dismissed whereas Criminal Appeal Nos. 97-98/2010 and 182-183/2010 are allowed. Ipso facto the judgment of the trial court is restored in all respects. The appeals are disposed of as above. **(Sher Singh v. State of Haryana; AIR 2011 SC 373)**

S. 302 – Honour killing – Whether honour killing comes within category of rarest of rare cases deserving death punishment – Held, "Yes"

Hon'ble Court has held that 'honour' killings have become common place in many parts of the country, particularly in Haryana, western U.P., and Rajasthan, often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. The courts have held in Lata Singh's case; AIR 2006 SC 2522: 2006 AIR SCW 3499, that there is nothing "honourable" in "honour" killings. And they are nothing but barbaric and brutal murders by bigoted, persons with feudal minds.

In opinion of the Court honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them. **(Bhagwant Dass v. State (NCT) of Delhi; AIR 2011 SC 1863)**

S. 302 – Murder – Name of wife of deceased who was alleged eye-witness not figured in FIR and other independent eye-witnesses have unanimously deposed to manner in which accused provoked

by statement made by deceased had caused injury – Whether acquittal would be proper – Held, "No"

In this case, it is true that PW-3's name does not figure in the FIR and there appears to be some uncertainty with regard to the motive for the murder. But the Court has no doubt that the evidence of PW's 4 to 6 who are truly independent witnesses ought to be believed in the facts of the case. It will be seen that the High Court has not discussed the evidence of these witnesses and has disposed off the matter in a somewhat sketchy manner. The Court has gone through the evidence these witnesses with the help of the learned counsel. The court saw no reason to disbelieve their testimony. They have given categorical statements as to the manner in which the incident had happened. The Court must highlight that these witnesses were completely independent and had no axe to grind either in favour of the prosecution or the defence. They unanimously deposed to the manner in which the accused, provoked by the statement made by the deceased that he was looking at PW3 and Manemma in an ugly manner, had caused one injury and while running away from the spot had threatened those who were close by with dire consequences in case they intervened.

The spontaneity of the FIR also supports the eye witness account. The incident happened at about 4 p.m. in village Yeshwantraopet about 12 km. Away from Police Station, Eldurti. An attempt was made to remove the injured to the hospital but he died on the way, on which the dead body was taken to the police station and the FIR was lodged at 8 p.m. The promptness of the FIR and the fact that the presence of PWs. 4 to 6 finds mention in it, clearly speaks to the truthfulness of the prosecution story.

The Court is of the opinion that there was no intention on the part of the accused to cause the very injury which he caused which ultimately led to the death of the deceased. The accused would thus be liable for conviction under Section 304 Part I of the IPC and not

under Section 302 thereof. **(State of A.P. v. Thummala Anjaneyulu; AIR 2011 SC 564)**

S. 302 – Death sentence – Rarest of rare case – Determination of

In this case the killings by the appellant Surendra Koli are horrifying and barbaric. He used a definite methodology in committing these murders. He would see small girls passing by the house, and taking advantage of their weakness lures them inside the house no. D-5, Sector 31, Nithari Village, Noida and there he would then cut off their body parts and eat them. Some parts of the body were disposed of by throwing them in the passage gallery and drain (nala) beside the house. House No.D-5, Sector 31 had become a virtual slaughter house, where innocent children were regularly butchered.

In court's opinion, this case clearly falls within the category of rarest of rare case and no mercy can be shown to the appellant Surendra Kohli. **(Surendra Koli v. State of U.P., 2011 (3) ALJ 203 (SC)**

S. 304-B – Dowry death – There must be material to show that soon before her death and victim was subjected to cruelty or harassment

On proper analysis of Section 304-B of the Indian Penal Code and Section 113-B of the Evidence Act, it shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution is under an obligation to rule out any possibility of natural or accidental death. Where the ingredients of Section 304B of the Indian Penal Code are satisfied, the section would apply. If death is unnatural, either homicidal or suicidal, it would be death which can be said to have taken place in unnatural circumstances and the provisions of Section 304B would be applicable. **(Sanjay Kumar Jain v. State of Delhi; AIR 2011 SC 363)**

Ss. 304-B, 302 – Sentence – Directions given by Hon'ble Supreme Court

Supreme Court has directed all trial courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women. **(Rajbir v. State of Haryana; AIR 2011 SC 568)**

Ss. 306, 107 – Abetment of suicide – There has to be clear mens rea to commit offence

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the Legislature is clear that in order to convict a person under Section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide. **(M. Mohan v. State Represented by Deputy Superintendent of Police; AIR 2011 SC 1238)**

Ss. 375, 376 – Rape – Expression "against her will" and "without her consent" occurring in clause first and second of S. 375 have different connotations

The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanies by deliberation. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

S. 406 – Breach of Trust – Refusal to return stridhan – Proof of

The daughter of the complainant died within seven years of her marriage and she was issue-less. As per statement of Dr. Subir Katiyar in S.T. No. 325 of 2008 (Annexure CA-3), the death of daughter of complainant was homicidal. In these circumstances, in view of Section 6(3-A) of the Dowry Prohibition Act, her parents are entitled to receive the Stridhan and dowry articles given at the time of marriage and husband is not entitled to the same. Therefore, it cannot be said at this stage that offence under section 406, IPC is not made out.

The impugned summoning order has been passed by the Magistrate on the basis of material available on record. There is a prima facie case against the revisionists. The court does not find any error, illegality or perversity in the impugned summoning order of accused. **(Sukhpal Singh & Anr. V. State of U.P. & Anr.; 2011(1) ALJ 638 (All HC)**

S. 415 – Offence of cheating – Ingredient of – Deception is necessary ingredient under both parts of section

A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived must be fraudulent or dishonest. Such deception must induce the person deceived to: either (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must be deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. **(Iridium India Telecom Ltd. V. Motorola Incorporated & ors.; AIR 2011 SC 20)**

S. 463 – Forgery – Basic elements – Basic elements of forgery are (i) making of false document (ii) Such making should be with such intention as is specified in the section

The definition of "forgery" in Section 463, IPC is very wide. The basic elements of forgery are: (i) the making of a false document or part of it; and (ii) such making should be with such intention as is specified in the Section viz. (a) to cause damage or injury to (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed. **(Sushil Suri v. CBI & Anr.; AIR 2011 SC 1713)**

Penalogy – Death sentence – Hon'ble Supreme Court has held that death sentence should be awarded in heinous and barbaric crimes against women

Court directs all trial Court to ordinarily add S. 302 to charge of S. 304-B, so that death sentence can be imposed in heinous and barbaric crimes against women. **(Rajbir v. State of Haryana; AIR 2011 SC 568)**

Suicide or Homicide – Determination of

Rendering victim incapable of pouring kerosene upon her with lighting of match stick setting her ablaze, ligature marks and body badly burnt and smell of kerosene coming out of body. All these things, rules out theory of suicide. **(Satya Narayan Tiwari v. State of U.P.; 2011 (1) ALJ 539 (SC)**

Industrial Disputes Act

Sch. 2, Item 3 – Departmental enquiry – Permissibility of judicial interference in departmental enquiry

It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, not

interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. **(State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya; AIR 2011 SC 1931)**

Sch. 2, Item 3 – Domestic Enquiry has to be completed fast

In this case, the respondent had not appeared for the enquiry on two earlier dates. On the third date too he was absent and there was no intimation from him before the Enquiry Officer, yet the Tribunal insists that it was the duty of the Enquiry Officer to find out from the concerned department of the bank whether any intimation or application was received from the respondent. Let us take a case where the enquiry is not being held in the bank premises or even in the same town, where the concerned branch of the bank is located. In such a situation, it may take hours or even a day or two to find out whether any letter or intimation from the person facing the enquiry was received in the bank and for all that time the Enquiry Committee would remain in suspended animation. The Tribunal's observation that it was only the third date of hearing and hence, it could not be said that the respondent had adopted dilatory tactics can only be described as unfortunate. The court completely rejects the notion that three barren dates in an in-house proceeding do not amount to delay. Let the in-house proceedings at least be conducted expeditiously and without in any undue loss of time. **(S.B.I. v. Hemant Kumar; AIR 2011 SC 1890)**

Interpretation of Statutes

Constitution provisions – Approach adopted by Court

When faced with a challenge to interpret such laws, Courts have to discharge a duty. The Judge cannot act like a phonographic recorder but he must act as an interpreter of the social context articulated in the legal text. The Judge must be, in the words of Justice Krishna Iyer, "animated by a goal oriented approach" because the judiciary is not a "mere umpire, as some assume, but an active catalyst in the Constitutional scheme".

It is well known that legislative entry is generic in nature and virtually constitutes the legislative field and has to be very broadly construed. **(Bhanumati etc. etc. V. State of U.P. & Ors.; 2011(1) ALJ 195 (SC)**

Literal rule – Applicability of

The literal rule of interpretation really means that there should be no interpretation. In other words Court should read the statute as it is without distorting or twisting its language. The literal rule of interpretation is not only followed by Judges and lawyers but it is also followed by the layman in his ordinary life. This rule would apply when language of statutory provision is plain and clear. **(B. Premanand & Ors. V. Mohan Koikal & Ors.; AIR 2011 SC 1925)**

Literal rule – Departure from – Should only be done in very rare cases

Once Court depart from the liberal rule then any number of interpretations can be put to a statutory provision each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience it has to be followed. Hence departure from the literal rule should lonely be done in very rare cases, and ordinarily there should be judicial restraint in this connection. **(B. Premanand & Ors. V. Mohan Koikal & Ors.; AIR 2011 SC 1925)**

Mimansa Principles of Interpretation – Can be used in appropriate occasions

It is not stated anywhere in the Constitution of India that only Maxwell's Principles of Interpretation can be utilized. Court can utilize any system of interpretation which can help to resolve a difficulty. Principles of interpretation are not principles of law but are only a methodology for explaining the meaning of words used in a text. There is no reason why Court should not use Mimansa Principles of Interpretation in appropriate occasions. **(B. Premanand & Ors. V. Mohan Koikal & Ors.; AIR 2011 SC 1925)**

Juvenile Justice Care & Protection of Children Act

S. 7-A – Claim of juvenility raised first time in Supreme Court – Effect of – Delay in making claim would not be fatal

It is true that in the ordinary course any one claiming to be a minor on the date of the incident ought to make such a claim at the earliest available opportunity before the Trial Court or at least before the High Court, but the very fact that no such claim is for any reason made, may not by itself disentitle him to do so before the Apex Court. The decision of the Court in Gopinath Ghosh, Bhoop Ram and Bhola Bhagat's case and in Hari Ram's case have recognized the beneficial nature of the provisions enacted by the Parliament and held that a technical plea based on delay in the making of the claim of juvenility would not itself disable the person concerned from making such a claim.

In Pawan's case reliance whereupon was placed on behalf of the respondent, the delay in the making of claim to juvenility was not held to be fatal provided the claim was supported by evidence that would prima facie establish that the claimant was a juvenile on the date of the commission of the offence. The burden of making out a prima facie case for directing an enquiry has been in court's opinion discharged in the instant case in as much as the appellant has filed along with the application a copy of School Leaving Certificate and

the Marks sheet which mentions the date of birth of the appellant to be 24th May, 1988. The medical examination to which the High Court has referred in its order granting bail to the appellant also suggests the age of the appellant being 17 years on the date of the examination. These documents are sufficient at this stage for directing an enquiry and verification of the facts. **(Jitendra Singh & another v. State of U.P.; 2011(1) ALJ 549 (SC)**

S. 7-A – Age of accused – Determination of

Section 7-A of the Act provides as under:

"7-A. Procedure to be followed when claim of juvenility is raised before any court? (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in term of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

It is apparent from the above provisions that for conducting an enquiry under Section 7-A of the Act, a Judge or the Board is not a

moot spectator or a referee between two parties, but should adopt an active role and must take all such evidence, which may be necessary for just decision on the point of determination of the age of the accused on the date of offence. If learned Sessions Judge was not satisfied with the certificate or the Mark-sheet, he could have summoned the relevant school authorities or the authorities of the Board of High School and Intermediate Examination to summon the documents relating to date of birth of the revisionist. A copy of the High School Mark sheet cannot be ignored simply on the ground that it has not been proved. Learned Sessions Judge was competent to summon every witness or document to get the same proved in accordance with law. In considered opinion by the Court, learned Sessions Judge ignored his duties provided by Section 7-A of the Act and relied on mere technicalities.

As Court already observed that the statement of Prema Devi cannot be relied upon to discredit the school Mark-sheet as she has no orientation of time. In these circumstances, the impugned order cannot be sustained and is liable to be set aside. **(Ram Sajiwan v. State of U.P.; 2011 (1) ALJ 617 (All HC)**

S. 7-A – Plea of juvenility can be taken by accused at any stage of trial, even at stage of conclusion of trial

There is no escape from the conclusion that once an application under Section 7-A of the Act is filed before any Court the Court is bound to hold an inquiry, as envisaged under Section 7-A of the Act and to take a decision in accordance with Rule 12 of the Rules 2007, as quoted above, to find out the age of the accused on the date of the incident, as nearly as possible, to conclude whether on the date of offence, the accused was juvenile or not. Learned trial court has not adopted the procedure and mandate provided under Section 7-A of the Act. A reference to Juvenile Justice Board is not necessary and it is the duty of the trial court to hold inquiry itself. Plea of juvenile can be taken by the accused at any stage of trial. **(Siya Ram v. State of Uttar Pradesh & Anr.; 2011(1) ALJ 39 (All HC)**

S. 12 – NDPS, S. 37 – Bail application by juvenile accused – Entitlement of – Bail to be considered U/s. 12 of Juvenile Justice Care & Protection of Children Act

It is true that section 37(1)(b) has imposed two conditions, fulfillment of which is necessary before grant of bail, firstly, the public prosecutor must be given an opportunity to oppose the application for bail and secondly, where the public prosecutor opposes the application for bail, the court must record its satisfaction before releasing the accused on bail that – (a) there are reasonable grounds for believing that the accused is not guilty of such offence, and (b) that he is not likely to commit any offence while on bail. Therefore, a non-juvenile accused who is involved in dealing with the narcotic substances involving commercial quantity is not entitled for bail in a routine manner. But the presence case is somehow different. The revisionist was admittedly a juvenile on the date of occurrence, therefore, his bail matter was liable to be governed by section 12 of the Juvenile Act and the provisions of section 37 of the NDPS Act was not applicable, specially when section 12 of the Juvenile Act overrides the provisions of section 37 of the NDPS Act in the case of a person who is a juvenile. **(Praveen Kumar Maurya v. State of U.P.; 2011 Cri.L.J. 200 (All HC)**

S. 49 – Determination of age of juvenile – Grounds for

From a perusal of the impugned orders, it appears that the learned Special Judge has neither relied upon the date of birth of the accused recorded in the school certificate nor relied upon the report of Chief Medical Officer about the age of the accused. He rather relied upon the copy of family register and the voter list for determination of age of the accused which are not contemplated under Sub-rule (3) of Rule 12 of the Rules. The documents relied upon the learned Special Judge could not be basis for determining the age of the accused. The learned Special Judge was expected to determine the age of the accused in accordance with the provisions laid down under sub-rule (3) of Rule 12 of the Rules. In fact the learned Special Judge

did not strictly complied with the procedure laid down in sub-rule (3) of Rule 12 of the Rules for determining the age of the accused. The impugned orders, therefore, passed by the learned Special Judge are illegal and are liable to be quashed. **(Nankannu alias Nanku alias Anil Kumar and etc. v. State of U.P. & Anr.; 2011 (1) ALJ 363 (All HC, LB)**

S. 49 – Declaration of accused as juvenile – Ground of

Order passed by Juvenile Justice Board and Sessions Judge by relying on date of birth mentioned in HSC mark-sheet and birth certificate issued by Municipal Corporation would be proper. **(Smt. Rajiya Begam v. State of U.P. & Anr.; 2011(1) ALJ (NOC) 82 (All HC)**

Land Acquisition Act

Sec. 3(f) – Public purposes – Concept of – It must be viewed from angle which is consistent with concept of welfare State

The Land Acquisition Act, a pre-constitutional legislation of colonial vintage is a drastic law, being ex-proprietary in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory.

The concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare state.

The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition. The said definition, having suffered several amendments, has assumed the character of an inclusive one. It must be accepted that in construing

public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people especially of the common people defeats the very concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles.

In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part III must be kept in mind.

Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under S. 17 with the consequential dispensation of right to hearing under S. 5-A of the said Act. The courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State.

If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the courts, especially the Higher Courts, cannot afford to act as mere umpires. **(Dev Sharan and others v. State of U.P. and others, 2011 (3) ALJ 193 (SC)**

S. 23(1-A) – Additional amount of compensation – Entitlement to

In the present case the acquisition proceeding commenced with the notification under Section 4 issued on 06.03.1965 and it culminated in passing of the award by the Collector on 09.07.1980,

i.e., before 30.04.1982, the date from which the amending Act 68 of 1984 was made applicable to the pending and subsequent proceedings. Therefore, in terms of the law laid down by the Constitution Bench decision of the Court in the case of K.S. Paripoornan; AIR 1995 SC 1012, the respondents are not entitled to the benefit of Section 23(1-A). **(Union of India v. Giani; AIR 2011 SC 977)**

Ss. 23(1-A), (2) – Additional amount U/s. 23(1-A) is awardable only on market value determined under first factor of S. 23(1) of Act and cannot be calculated on solatium payable U/s. 23(2) of Act

While market value and compensation are factors to be assessed and determined by the Court, no such judicial exercise is involved in regard to additional amount payable under Section 23(1-A) and solatium payable under Section 23(2) as they are statutory benefits payable automatically at the rates specified in those sub-sections, qua the market price. No reasons need be assigned for grant of additional amount or solatium.

Thus, the additional amount under Section 23(1-A) is awardable only on the market value determined under the first factor of S. 23(1) of the Act and cannot be calculated on the solatium payable under S. 23(2) of the Act. **(State of Punjab v. Amarjit Singh & Anr.; AIR 2011 SC 982)**

S. 23(2) – Solatium and interest – Enhancement to

The Constitution Bench of the Court in the case of Sunder had clearly stated that the Court has to keep in mind that the compulsory nature of acquisition is to be distinguished from voluntary sale or transfer. In the latter, there is a willing buyer and seller. In the case of acquisition, it is compulsory and deprives the owner of an opportunity to negotiate and bargain the sale price of its land as it will entirely depend on what the Collector or the Court determines as the amount of compensation in accordance with the provisions of the Act. The

solatium envisaged in sub-section (2) of Section 23 is "in consideration of the compulsory nature of acquisition". Thus, the solatium is not the same as damages on account of the landowner's disinclination to part with the land acquired. If such compensation as determined in terms of Section 23 of the Act is not paid within one year from the date of taking possession of the land, then in terms of proviso to Section 34 interest shall stand escalated to 15% per annum from the date of the expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry. The Court further held that it is inconceivable that the solatium amount would attract only the escalated rate of interest from the expiry of one year and that there would be no interest on solatium during the preceding period. Hence, the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium. **(Radha Mudaliyar v. Special Tahsildar (Land Acquisition) T.N.H. Board; AIR 2011 SC 54)**

S. 31 – Claim for alternative land in lieu of compensation is not vested right in person whose land is acquired

If the law in the field relating to Section 31(3) of the Act is understood in proper perspective there can be no iota of doubt that claim for alternative accommodation is not a vested right in a person whose land is acquired. The language of the section only gives an option to the Collector. It does not really make a provision for grant of alternative accommodation. Thus, there is no obligation in law on the part of the State to provide equal alternative site. It will depend upon the rules and the scheme if framed by the State. In the absence of any rule or scheme for consideration of allotment; no claimant could put forth a claim as a matter of right. **(Dewan Singh v. Government of NCT of Delhi & Ors.; AIR 2011 Delhi 76 (FB)**

Limitation Act

S. 5 – Applicability of section in condonation of filing revision before collector

The legal principle that the Courts and the statutory functionaries exercising judicial or quasi-judicial power for resolution of disputes arising under special enactments have no power to condone delay in filing cases beyond the time stipulated by such special statutes is fairly well settled. (See: CCE and Customs v. Hongo India (P) Ltd.; (2009) 5 SCC 791: 2000 AIR SC (Supp) 2325 and Chattisgarh State Electricity Board v. Central Electricity Regulatory Commission; (2010) 5 SCC 23: AIR 2010 SC 2061

Admittedly respondent No. 2 is not a Civil Court and therefore, the provisions of Section 5 of the Limitation Act have no application. **(Akula Veeraiah v. Commissioner of Civil Supplies, A.P. Hyderabad & Ors.; AIR 2011 AP 87)**

Art. 54 – Suit for specific performance – Limitation – Consideration of

Where appellant a Co-operative Housing Society entered into agreement to sell with respondent vendor and no date as fixed for performance in the agreement for sale entered between the parties and when by notice respondent had made his intentions clear about refusing the performance of the agreement and cancelled the agreement, the limitation of three years for seeking relief of specific performance would start running from that date and as appellant filed suit for declaration of title and injunction and omitted to include relief of specific performance it would amount to relinquishment of claim of specific performance and subsequent amendment after lapse of 11 years to include relief of specific performance cannot be allowed being barred by limitation. **(Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Regd.) v. Ramesh Chander & Ors.; AIR 2011 SC 41)**

Medical Jurisprudence

Medical Jurisprudence – Single shot from double barrelled gun can cause multiple injuries

The trial court as well as the High Court have also considered the submissions as to whether injury No. 9 was inconsistent with the ocular version that only one shot was fired by the appellant. It was also sought to be submitted before Court that injury No. 9 is definitely from a different weapon. This according to Mr. Nagendra Rai would clearly show that the genesis of the crime has been suppressed by the prosecution. The trial court as well as the High Court upon consideration of the same submission have concluded that both the doctors examined i.e. PW-5 and PW-10 were not ballistic experts. They were not able to state as to whether the injuries were caused by a single shot from a double-barrelled gun. Relying on "Modi's Medical Jurisprudence and Toxiocology" (19th Ed. Pg. 221), the trial court has concluded that when a projectile strikes the body at a right angle, it is circular and oval when it strikes the body obliquely. Dr. V.P. Kulshreshtha, PW-5, in his injury report has stated that injury No. (i) is 2 c.m. x 2 c.m. muscle deep and is on right shoulder. According to him, if this pellet had moved slightly to the inner side, it would have caused injury on the right side of the neck like injury No. 9 on the left side. This apart, it is not disputed that all the other injuries on the deceased could have been caused by a single shot from a double-barelled gun. Both the trial court as well as the High Court has held that the medical evidence is consistent with the ocular evidence. The Court did not see any reason to interfere with the findings recorded by both the Courts. **(Om Pal Singh v. State of U.P.; 2011(1) ALJ 551 (SC)**

Motor Vehicles Act

S. 2(30) – Owner of vehicle – If transferor or transferee did not take any step for change of name of owner, then transferor must be deemed to be continue as owner if accident took place

In T.V. Jose (Dr.) v. Chacko P.M. (reported in 2001 (8) SCC 748) wherein it is held that even though in law there would be a transfer of ownership of the vehicle, that by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person. The court is in agreement with the view expressed therein. Merely because the vehicle was transferred does not mean that the appellant stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person."

The decision in Dr. T.V. Jose was rendered under the Motor Vehicles Act, 1939. But having regard to the provisions of section 2(30). But having regard to the provisions of section 2(30) and section 50 of the Act, as noted above, the ratio of the decision shall apply with equal force to the facts of the case arising under the 1988 Act. On the basis of these decisions, the inescapable conclusion is that Jitender Gupta, whose name continued in the records of the registering authority as the owner of the truck was equally liable for payment of the compensation amount. Further, since an insurance policy in respect of the truck was taken out in his name he was indemnified and the claim will be shifted to the insurer, Oriental Insurance Company Ltd. **(Pushpa alias Leela and others v. Shakuntala and others.; AIR 2011 SC 682)**

S. 149 – Liability of insurer – Determination of – In view of dispute about licence of driver of offending vehicle, liability of insurer would on Insurance Co. at first instance and later will recover it from owner of vehicle

In respect of the dispute about licence, the Tribunal has held and, in view of Court rightly, that the Insurance Company has to pay and then may recover it from the owner of the vehicle. The Court is affirming that direction in view of the principles laid down by a three-Judge Bench of the Court in the case of National Insurance Company Limited v. Swaran Singh and others, reported in (2004) 3 SCC 297:

AIR 2004 SC 1531. **(Kusum Lata & Ors. V. Satbir and Ors.; AIR 2011 SC 1234)**

S. 163-A, Sch. II – Choice of multiplier if deceased was not above 40 years on date of accident – Held, compensation should be calculated by applying multiplier of 16 as per II Schedule

The short question which falls for in consideration by the court in these appeals whether in the facts and circumstances of the cases, the proper multiplier applied should be 12 or 16.

According to the Second Schedule appended to the Motor Vehicles Act, 1988, for the age of the deceased not exceeding 40 years, the multiplier given is 16. Accordingly, the Court direct that the compensation shall be calculated applying the multiplier of 16 and the impugned judgment is modified to this extent. **(Pushpa & Ors. V. National Insurance Co. Ltd. & Anr.; AIR 2011 SC 1165)**

Ss. 166, 163-A – Nature of remedy under both sections – Remedy under both sections being final and independent of each other, claimant cannot pursue them simultaneously

The remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. A claimant, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both.

The respondents having obtained compensation finally determined under S. 163-A of the Act are precluded from proceeding further with the petition filed under S. 166 of the Act. The exception mentioned by the High Court in the impugned judgment that a petition under S. 166 of the Act can be proceeded further if it is filed before passing of an award passed under S. 163-A of the Act is not supported by the scheme envisaged under Ss. 163-A and 166 of the Act and is contrary to the principles of law laid down by Supreme

Court in AIR 2004 SC 2107. **(Oriental Insurance Co. Ltd. V. Dhanbai Kanji Gadhvi & Ors.; AIR 2011 SC 1138)**

Ss. 166, 168 – Assessment of compensation – Multiplier methods should be logically sound

The multiplier method is logically sound and legally well established and must be followed; a departure from which can only be justified in rare and extraordinary circumstances and very exceptional cases. The multiplier method should remain the only method, as it has been for assessing the compensation under the 1988 Act. The multiplier method involves capitalization of the loss of annual dependency (i.e. multiplicand) by an appropriate multiplier. Thus, in an action under S. 166 of the 1988 Act, the Tribunal is required to first assess the annual value of the lost dependency. The first step in calculating the annual value of the loss of dependency is at the date of the deceased's death. The value of the dependency at the date of the deceased's death could then be revised in the light of the likely changes in the deceased's income that would have occurred taking into account future increase in the income. **(Shakti Devi v. New India Insurance Co. Ltd.; AIR 2011 SC (Civil) 164(A) (SC)**

S. 168 – Permanent disability – Assessment of future loss

The appellant-claimant was walking on the Byatarayanapura road near the bus stop, when the driver of a motorcycle (bearing No. KA-03-X-8591) came and dashed against the appellant, as a result of which the appellant sustained serious head injuries leading to weakness of his right hand and leg. The respondents are the Insurance Company and the owner of the offending vehicle respectively.

The appellant filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, claiming compensation to the tune of Rs. 4,00,000/-.

Though the doctor had assessed disability at 25% to the whole body, the Tribunal took it at 10%.The appellant was aged 35 years

and was involved in silk winding. He claimed to be earning Rs. 4,500 per month but there was no documentary evidence to prove his income. Hence, the Tribunal assessed it at Rs. 50/- per day, which amounted to Rs. 18,000/- annually and Rs. 6,30,000/- during his whole life. As 10% loss was caused due to disability, the Tribunal held that the appellant was entitled to Rs. 63,000/- towards loss of future income. The Tribunal also awarded Rs. 20,000/- for pain and suffering, Rs. 10,000/- for loss of future amenities, Rs. 1,200/- for medical expenses, Rs. 5,000/- for future medical treatment and conveyance. Accordingly, total compensation was fixed at Rs. 1,02,200/-, payable with interest @ 6% p.a. from the date of the claim petition till date of deposit by the Insurance Company on behalf of the owner of the offending vehicle.

Aggrieved by the compensation awarded by the Tribunal, the appellant appealed to the High Court of Karnataka at Bangalore. The High Court partly allowed the appeal by enhancing the compensation amount. It held that as the appellant was a silk weaver, he could not have been earning less than Rs. 3,500/- per month. Thus, it awarded loss of income during laid-up period as Rs. 10,500/- (Rs. 3,500 % 3 months). The High Court calculated the disability of the whole body at 25%. It held that annual loss of income would be Rs. 10,500/. As the claimant was aged 34 years, the applicable multiplier would be 16. Thus, loss of future income was calculated at Rs. 1,68,000/- (Rs. 10,500x16). Considering the nature of injuries suffered by the appellant, the High Court also enhanced amount awarded four pains and suffering to Rs. 35,000/- for loss of amenities to Rs. 50,000/- for medical and allied expenses to Rs. 10,000/-. Accordingly, total compensation amounted to Rs. 2,78,500/- along with interest on the enhanced amount @ 6% p.a. from the date of the claim petition till date of payment.

Being still aggrieved by the judgment of the High Court, the appellant filed the present appeal claiming further enhancement of compensation.

Supreme Court has observed that the appellant is a silk winder, an occupation for which he needs to use his hands. Weakening of his right hand would adversely affect his ability to perform his occupation as he had been doing before the accident. As a result, the Court assess the disability of the victim to earn in future at 30% as against 25% assessed by the High Court.

Thus, loss of future income amounts to Rs. 2,01,6000/- (30% of Rs. 6,72,000/-). The Court also enhance the compensation awarded for future medical expenses to Rs. 10,000/-. The compensation awarded by the High Court under the remaining heads is sustained. Thus, it comes to Rs. 3,17,100/- which the Court round off to Rs. 3,20,000/-. **(C. Mohanraju v. Divisional Manager, United India Assurance Co. Ltd. & Anr.; AIR 2011 SC 1897)**

S. 168 – Determination of compensation for permanent disability

It is to be noted that in a case where injury sustained by victim is of permanent nature, he suffers much more than the person who succumbs to the injury. In such cases, the injured has to carry on the burden of permanent disability throughout his life, which is certainly much more painful to the victim. In the present case, the Appellant had suffered an injury of permanent nature as a result of which he is not able to control his urine. He has to suffer with it throughout his life; thus the compensation should not only be adequate but proper also.

On account of aforesaid injury, his permanent physical disability has been assessed at 50%. This report of the experts further shows that he is unable to control urine and suffers from continence disability which could not be cured even after surgical operation and frequent dilatation still takes place.

He has also been accordingly issued a permanent disability certificate by the said Medical Board. Therefore, the said certificate clearly establishes that Appellant had sustained permanent disability to his own body to the extent of 50% and even after several surgeries;

he was not able to control his urination. The court can well appreciate and imagine the problems and difficulties of a young boy aged 16 years, who is not able to control his urination and spoils his clothes even while attending school. The court have been given to understand that he is required to go with additional sets of clothings so that he could change the same, in case they are spoiled. This is the state of affairs even as on date. The courts do not doubt the genuineness and correctness of the aforesaid certificate. Even otherwise, Respondents have also not contended that this certificate is forged or fabricated and has been obtained with an intention to get compensation.

Thus, looking into the matter from all angles, it is clearly established that in the said accident, Appellant had suffered severe injuries of permanent nature which have not been cured till date despite several surgeries. In court's most modest computation, looking into the nature of injuries which are permanent in nature, the Court are of the opinion that a total amount of Rs. 2,50,000 (Rs. 2.5 Lakhs) to be awarded to the Appellant payable by Respondents jointly and severally, would meet the ends of justice. **(Ravi v. Badrinarayan & ors.; AIR 2011 SC 1226)**

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 genera procedure in an inquiry under Section 168 of the Act and moreso, 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)**

S. 171 – Accident compensation – Determination of date of interest

The question in regard to award of interest being discretion of the Tribunal has not found favour by the Court as well as by the Apex Court in catena of decisions. The Court in the case of Durga Prasad Singh and another v. Bhola Singh and Others; (2009 (27) LCD 966: AIR 2009 (NOC) 1941: 2009 (4) ALJ 2681) has held that interest is liable to be awarded from the date of making the claim.

Similar view has been expressed in the case of The New India Assurance Co. Ltd. Lucknow v. Indrapal Dixit and others; (2009) (27) LCD 971: AIR 2009 (NOC) 1940: 2009 (4) ALJ 209, Paragraphs 20, 21 and 22 of the said judgment are reproduced hereunder:-

Wherein the Hon'ble Supreme Court held that the claimant shall be entitled for the payment of interest from the date of filing of the Claim Petition. The contention of the insurance company was rejected by their Lordships of Hon'ble Supreme Court for payment of

interest from the date of filing of the written statement. Therefore, the finding of the Tribunal that the interest could not have been awarded is devoid of merit and baseless and the Tribunal ought to have corrected the omission on its part in failing to award the interest from the date of filing of the claim petition and the interest should have been awarded from the date of filing of the claim petition. **(Sandhya Vaish & Anr. Etc. V. New India Insurance Company Ltd. & ors.; 2011 (1) ALJ 408 (All HC (LB)**

Narcotic Drugs & Psychotropic Substances Act

S. 37 – Entitlement to bail – consideration of

In this case, recovery of one and half kg. Ganja from possession of accused. Considering fact that appellant accused who has already undergone imprisonment of more than 4 years. Therefore, he was entitled to be released on bail. **(Gyanendra Singh alias Dungari v. State, 2011 (3) ALJ (NOC) 269 (ALL)**

S. 50 – Applicability of provision – Consideration of

The provision of Section 50 was clearly construed by the Apex Court in the judgments. The evidence in this case, would depict that the accused was not searched on his "person". Hence, the provision of Section 50 did not and could not have application. Learned Judge was wrong also on this score.

The Court therefore, of the considered view that the learned Trial Judge misconstrued the relevant provisions of law and proceeded on a wrong legal approach which suffers from perversity and as a result, occasioned failure of justice. **(Subhas Chandra Jana v. Ajibar Mirdha; 2011 Cri.L.J. 257 (Cal HC)**

S. 50 – Search and seizure – Compliance with S. 50 – It can be invoked only in cases where drug/narcotic/NDPS substance is recovered as a consequence of body search of accused but not from a container being carried by individual

In this case, it is accepted that the narcotic/opium, i.e. 1 kg. And 750 grams' was recovered from the bag (thaili) which was being carried by the appellant. In such circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. **(Jarnail Singh v. State of Punjab; AIR 2011 SC 964)**

S. 50 – Search and Seizure in presence of Gazetted Officer or Magistrate – Nature of – Whether it mandatory or directory – Held, it is imperative in nature

Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. **(Vijaysinh Chandubha Jadeja v. State of Gujarat; AIR 2011 SC 77)**

S. 50(1) – Search and seizure – Accused not informed of his right of being searched before gazetted officer or Magistrate – Effect of

In this case the record further shows that the illicit contraband articles were hidden by the appellant in a cloth which was stitched and which he had wrapped around his body and concealed under the clothes which he was wearing. Thus, the admitted position which emerges, is that the alleged contraband articles were recovered from the person of the appellant and since the search of the appellant was made by empowered officer on prior information that the appellant was in possession of unauthorized contraband articles, it was all the more imperative for the empowered officer to have intimated the appellant of his right emanating from Section 50(1) of NDPS Act.

A Constitutional Bench of Hon'ble Apex Court in the case of State of Punjab v. Baldev Singh reported in (1999) 6 SCC 172; 1999 SCC (Cri) 1080; AIR 1999 SC 2378, while examining the effect of failure to comply with the procedural safeguards contained in Section 50(1) of NDPS Act held in the following terms:

> "57. On the basis of the reasoning and discussion above, the following conclusions arise:
>
> (1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right

that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazette officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been record only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crime are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain aboveboard. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concepts of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, The court does not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the

prosecution to raise a presumption under Section 54 of the Act."

For the aforesaid reasons and in view of the law laid down by the Apex Court on the issue in the case of Baldev Singh, Court have no hesitation in holding that there was no compliance with the mandatory requirement of Section 50(1) by the officer who has searched the appellant and recovered illicit Charas from him and as such the illicit contraband articles recovered from the person of the appellant during a search conducted in violation of the safeguards provided under Section 50(1) of NDPS Act, could not have been used as evidence of proof of unlawful possession of the contraband articles against the appellant and on the basis of such illegal recovery, appellant could not have been convicted for the offence punishable under Section 20(b)(ii)(c) of NDPS Act. **(Ramjan v. State of U.P.; 2011(1) ALJ 581 (All HC)**

S. 50(5), (6) (as inserted by Act 9 of 2001) – Effect of insertion of sub-s. (5) and (6) on sub sec. (1) of S. 50

As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorized officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In the opinion of the Court, the insertion of these two sub-sections does not obliterates the

mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. **(Vijaysinh Chandubha Jadeja v. State of Gujarat; AIR 2011 SC 77)**

S. 55 – Search and seizure – Non-compliance of S. 55 is amount to creates doubt in prosecution case

Non-compliance of S. 55 creates doubt in prosecution case. Prosecution is obliged to clear all ambiguities to inspire confidence that enquiry, investigation or proceedings were conducted were above board. **(Naveen Sood v. The Narcotic Control Bureau; 2011 Cri.L.J. (NOC) 102 (HP)**

National Security Act

S. 3 – Preventive detention – Validity of

It is valuable and constitutional right of the detenu of making representation. The earliest opportunity has to be given to make the representation against the detention order and there is obligation on the authority to whom the representation has been addressed to consider and dispose of the representation as early as possible without unreasonable delay. However, no time has been provided either in Article 22(5) of the Constitution of India or in the National Security Act. If the representation remains unattended on one table of several days and the explanation is unsatisfactory then the continued detention are liable to be quashed irrespective of the gravity of offence.

However, the time taken for consideration and disposal of the representation cannot be decided merely by counting of days, rather it depends on the facts and circumstances of each case. In view of facts of each case, it has to be decided whether there was callousness, indifferent attitude of the authorities and there was no sense of obligation in considering the representation. The authorities are required to dispose of the representation with utmost promptitude as

there is a curtailment of life and liberty, which is fundamental right of a citizen but in some cases the same period consumed for disposal of the representation might be fatal and in other cases considering the surrounding facts and circumstances it may be found that there was no unreasonable and inordinate delay in dealing with the presentation.

There was delay of only three days, which was explained. If cannot be said that there was any callousness or indifferent approach specially when there was short delay of only three days, which was explained. Hence in view of the facts and circumstances, it cannot be said that there was unreasonable delay in disposal of representation by the Central Government. **(Ramesh Singh v. Union of India; 2011(1) ALJ 781 (All HC)**

Negotiable Instruments Act

S. 138 – Issue of process in dishonour of cheque – Whether Magistrate is obliged to call upon complainant to present before court – Held, "No" affidavit filed by complainant U/s. 145 would be sufficient for purpose

Magistrate is not obliged to call upon complainant to remain present before Court or to examine complainant or his witnesses upon oath before taking decision as to issuance of process – Affidavit filed by complainant under S. 145 would be sufficient and Magistrate may rely upon said affidavit to issue process.

It is true that the trial has not yet commenced at the stage when the Magistrate is to decide whether or not to issue process on the complainant under Section 138 of NI Act, but sub-section (1) of Section 145permits the complainant to give on affidavit not merely the evidence during trial, but also evidence in any enquiry or other proceeding under Cr.P.C. Obviously, the stage at which the Magistrate considers whether or not to issue process on complaint under S. 138 of NI Act is either an enquiry or a proceeding under Cr.P.C. other than trial. Sub-section (1) of Section 145, therefore, is all comprehensive and permits the complainant to submit on affidavit

what he would have otherwise been required to state before the Magistrate in the course of examination upon oath under Section 200 of Cr.P.C. For the purpose of issuing process under Section 200 of the Code of Criminal Procedure (2 of 1974), it is open to the Magistrate to rely on the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the Magistrate is not obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witnesses upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881. It is only if and where the Magistrate after considering the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witnesses is required, that the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witnesses upon oath for taking decision whether or not to issue process on the complaint under S. 138 of the Negotiable Instruments Act, 1881. There is nothing wrong in the complainant under Section 138 of the Negotiable Instruments Act, 1881 filing the affidavit in support of the complaint in a format indicating all the essential facts satisfying the ingredients of Section 138 of the Negotiable Instruments Act, 1881 for the purpose of enabling the Magistrate to decide whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881. **(Rajesh Bhalchandra Chalke v. State of Maharashtra & Anr.; AIR 2011 (NOC) 160 (Bom)**

Prevention of Corruption Act

S. 7 – Conviction for demanding bribe based on evidence of accomplice – Corroboration when necessary

The word accomplice has not been defined under the Evidence Act and therefore presumed to have been used in the ordinary sense.

A person concerned in the commission of crime, a partner in crime and associate in guilt is an accomplice. He takes part in the crime and is privy to the criminal intent. In opinion of the Court, a witness forced to pay on promise of doing or forbearing to do any official act by a public servant, is not a partner in crime and associate in guilt and therefore cannot be said to be accomplice. It has long been rule of practice, which has become equivalent to rule of law, that the evidence of an accomplice is admissible but to be acted upon, ordinarily requires corroboration. Contractor who gave bribe, therefore, cannot be said to an accomplice as the same was extorted from him.

Further corroboration of evidence of a witness is required when his evidence is not wholly reliable. On appreciation of evidence, witnesses can be broadly categorized in three categories viz., unreliable, partly reliable and wholly reliable. In case of a partly reliable witness, the court seeks corroboration in material particulars from other evidence. However in a case in which a witness is wholly reliable, no corroboration is necessary. Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result. Bribe is not taken in public view and, therefore, there may not be any person who could see the giving and taking of bribe. **(C.M. Sharma v. State of A.P. TH. I.P.; AIR 2011 SC 608)**

Ss. 7 & 13 – Demand of illegal gratification and voluntary acceptance – Meaning of – Mere recovery of currency notes itself does not constitute the offence under the Act, unless it is proved beyond all reasonable doubt that accused voluntarily accepted the moneys knowing it to be bribe

Demand of illegal gratification is sine qua non to constitute the offence under the Act. Mere recovery of currency notes itself does not constitute the offence under the Act, unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be bribe. In instant case from the evidence led on behalf of the prosecution it is evident that the appellant demanded the money

from the contractor as he had passed his bills. There is further evidence that when the contractor went along with the shadow – witness on the date told by the appellant for payment of the bribe, appellant asked the shadow – witness to leave the chamber and thereafter the demand for payment of illegal gratification was made and paid. The positive sodium carbonate test vis-à-vis the fingers and right trousers pocket of the appellant go to show that he voluntarily accented the bribe. Thus there is evidence of demand of illegal gratification and the voluntary acceptance thereof. Ingredients to bring act within mischief of Ss. 7 and 13(i)(d)(ii) are satisfied. **(C.M. Sharma v. State of A.P. TH.I.P.; AIR 2011 SC 608)**

S. 19 (as amended vide U.P. Act of 1991) – Sanction for prosecution – Competent Authority

In the present case, the Chief Engineer while refusing previous sanction, by his order dated 19.4.1980 observed that in view of the legal provisions, the trap case against Sri Naresh Chandra Gupta has not succeeded legally; there are some defects in the case diary, according to the Investigating Officer, which are not likely to be rectified during the trial, and that the accused can take advantage of the defects. In making such opinion, the competent authority travelled beyond the scope of his powers, in examining the legal defects of the trap case for granting previous sanction.

The Court is of the opinion that if the Chief Engineer (Hydel), Lucknow found, that his predecessor has wrongly rejected the sanction he could have referred the matter to the State Government for taking appropriate decision for grant of sanction.

The writ petition is allowed. The order dated 1.3.1982 passed by the Chief Engineer (Hydel), Lucknow granting sanction under Section 6 of the Prevention of Corruption Act, 1947, to prosecute the petitioner, is set aside. It will be open to the competent authority to refer the matter to the State Government for grant of sanction after setting aside the order dated 19.4.1980 on the request of the

Superintendent of Police, Rampur by his letter dated 17.11.1980, to prosecute the petitioner under Section 6 of the Prevent of Corruption Act, 1947. **(Naresh Chandra Gupta v. The Chief Engineer, Hydel & Ors.; 2011 Cri.L.J. 194 (All HC)**

S. 19 – Sanction for prosecution – Necessity of

The Parliament intends to make the law with regard to corruption more stringent, effective and efficacious and accordingly, the provisions contained in S. 19 should be interpreted Section 19 of the Prevention of Corruption Act should be interpreted by applying principle of presumptive interpretation.

All those offences where the public servant is involved in corrupt practice committed intentionally, deliberately and planned manner pocketing and siphoning the public fund shall not make out a case to claim prior sanction under Section 19 of the Act where from the prima facie evidence on record, it appears that the food grains meant for poor and downtrodden have been smuggled outside country. Presumption is sanction shall be necessary only in case a Government servant acted bonafidely while discharging his official duty and while doing so, he commits some wrong resulting in commission of crime.

Under Sections 101, 102 and 103 of the Evidence Act, burden lies on the person/public servant to establish that he had acted in his official discharge of duty and action is bona fide since it is in his or in her knowledge that he has discharged his obligation bona fide as a public servant.

Indulgence in corrupt practice by public servant intentionally, deliberately and in planned manner is his or her private conduct and for that he cannot claim protection of Section 19 of the Act. It is his personal conduct and owing to holding public office, he will be liable to be prosecuted under the Act because of misappropriation of public fund but it shall not require any sanction from the Government under Section 19 of the Act. Holding of public office and a conduct of

personalize nature while holding public office are two different things. A conduct may be of personalized nature or official in nature. A thing done in official nature may attract Section 19 but a conduct of personalized nature shall not attract Section19. Wherever public servants do certain thing, intentionally, deliberately and in planned manner and the root cause or motive is not to serve the people but misappropriate the fund or commit a crime, then for such action no permission shall be required.

In Section 19 of the Act by using word "employed in connection with the affairs of Union of State" means the conduct for which a public servant has been charged under the Act must be with regard to official discharge of duty. Fabrication of records for misappropriation of fund in a planned manner shall not fall in connection to affairs of State.

Thus, in every case sanction for prosecution is not necessary. Cases where investigation is done under the supervision of High Court or Supreme Court and report is prepared and investigating agency records a finding with regard to abuse of public office in a planned, deliberate manner, then sanction under Section 19 of the Prevention of Corruption Act or Section 197 of the Cr.P.C. shall not be required. The courts may proceed with the trial expeditiously in accordance with statutory provisions after receipt of charge-sheet. **(Vishwanath Chaturvedi v. Union of India & ors.; 2011(2) ALJ 370 (All HC, LB)**

Protection of Human Rights Act

S. 2(d) – Human Rights – Definition of – Scope – Broad vision of definition cannot be strait-jacket with narrow confines

The NHRC has been constituted to inquire into cases of violation of and for protection and promotion of human rights. This power is an extensive one, which should not be narrowly viewed.

It must be jurisprudentially accepted that human right is a broad concept and cannot be straitjacketed within narrow confines. Any attempt to do so would truncate its all – embracing scope and reach, and denude it of its vigour and vitality. That is why, in seeking to define human rights, the Legislature has used such a wide expression in section 2(d) of the Act. It is also significant to note that while defining the powers and functions of NHRC under section 12 of the Act, the said broad vision has been envisioned in the residuary clause in Section 12(j).

It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of section 12 of the 1993 Act, for invoking the jurisdiction of the NHRC. One must accept that human rights are not like edicts inscribed on a rock. They are made and unmade on the crucible of experience and through irreversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. That is why the residuary clause in sub-section (j) has been so widely worded to take care of situations not covered by sub-sections (a) to (i) of Section 12 of the 1993 Act. The jurisdiction of NHRC thus stands enlarged by section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution the government or even the Courts of law. **(Ramdeo Chauhan v. Bani Kant Das; AIR 2011 SC 615)**

Protection of Women from Domestic Violence Act

Ss. 2(f), 20 and 26 – Cr.P.C., S. 125 – Women living with man as husband and wife for considerable period, whether entitled to maintenance even without strict proof of valid marriage as per personal law? – Matter referred to larger bench

Man and woman living together for a long time even without a valid marriage as per Personal Law whether raises a presumption of a valid marriage entitling such a woman to maintenance. Question referred to larger Bench. The Court considering the provisions of Protection of Women from Domestic Violence Act, 2005, (2005 Act) and the change in social attitudes and values, however, expressed a view that a broad and expensive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C. so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125.The Court further expressed that in view of wide interpretation given to terms "Domestic relationship" in 2005 Act if monetary relief and compensation can be awarded in cases of live-in relationship under the Act of 2005 that should also be allowed in proceeding under Section 125 of Cr.P.C. **(Chanmuniya v. Virendra Kumar Singh Kushwaha & Anr.; 2011 Cri.L.J. 96 (SC)**

S. 2(f) – 'Domestic Relationship' – Expression 'relationship in the nature of marriage in S. 2(f) not defined in Act and it is akin to common law marriage – Requirements to be fulfilled for common law marriage but all 'live in relationship' will not amount to relationship in nature of marriage

A "relationship in nature of marriage" is akin to a common law marriage. Common law marriage requires that although not being formally married:-

(a) The couple must hold themselves out to society as being akin to spouses.
(b) They must be of legal age to marry.
(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

'Relationship in the nature of marriage' under the 2005 Act must also fulfil the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in S. 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. Not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned as above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a 'relationship in the nature of marriage'. Parliament has used the expression 'relationship in the nature of marriage' and not 'live-in relationship'. **(Velusamy v. D. Patchaiammal; 2010 AIR SCW 6731)**

S. 3 – Expression Domestic Violence – What includes

The expression "domestic violence" has a very wide amplitude, as defined under Section 3 of the Act, and it includes, physical abuse, sexual abuse, verbal and emotional abuse, economic abuse which in turn, inter alia, includes deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an Order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, the property jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance. **(Mrs. Jovita Olga Ignesia Mascarenhas Coutinho v. Rajan Maria Coutinho & Anr.; 2011 Cri.L.J. 754 (Bom HC (Goa Bench)**

Registration Act

S. 17 – Gift by Mahommadan – Necessity of registration – Gift or Hiba made in writing need not be registered

The three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession, the rules of Mohammadan law do not make writing essential to the validity of gift; and oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and not in conformity with the rule of gifts in Mohammadan law. **(Hafeeza Bibi & Ors. V. Shaikh Farid (dead) by LRs. & Ors.; AIR 2011 SC 1695)**

S. 17(1)(c) – Document compulsorily registration – Consideration of

Any non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest also require registration. The acknowledgment in the instant case clearly showed that it was with regard to acknowledgment of the receipt of Rs. 1,00,000/- consideration amount and on account of such acknowledgment a right in

immovable property has been created and right to receive remaining balance of consideration amount by the petitioner was extinguished. When earlier conditions are drastically altered creating or extinguishing any rights in receipt or payment of any consideration such acknowledgment or endorsement would require registration because by this acknowledgment the seller uses his right to receive the balance of sale consideration though he is entitled for balance of sale consideration as per the terms of the original agreement of sale. When the acknowledgment or endorsement completely changes the tenor of the original agreement and terms and conditions of the agreement that itself would become a document within the meaning of Section 17(1) of the Registration Act and the same would require registration. Therefore, the acknowledgment also can be treated as a separate document and it creates right in respect of the immovable property on the respondent. **(Kedarisetti Atmaram v. N. Seetharamaraju; AIR 2011 (NOC) 65 (AP)**

S. 32-A (As inserted by Amendment Act of 2001) – Registration of document – Requirements of

Section 32-A of the Act was inserted in the Registration Act by Amendment Act 48/2001. By the said provision, affixing of passport size finger prints has been made compulsory. Once more amendment brought in by the said Act is by inserting Section 34-A, which provides that person claiming under the document for sale of the property, shall also have to sign the document. From a reading of S. 32 together with the amended provision, it is manifest that the purpose of amendment is to restrict or at least minimize the forgery and fraud committed by the parties to the document, and to give legal sanctity once the document is registered according to the provisions of the Registration Act. **(M/s. Latif Estate Lime India Ltd. V. Hadeeja Ammal & Ors.; AIR 2011 Madras 66 (FB)**

Revenue Recovery Act

S. 3 – When recovery certificate issued by collector for recovery of dues as arrears of land revenue would be without jurisdiction?

For the purpose of recovery of dues as arrears of land revenue, there must be an agreement relating to a loan, advance or grant and if there is a default of payment of any installment thereof, then said amount defaulted can be recovered as arrears of land revenue. In the instant case, respondent has not given any loan, advance or grant to the petitioner, nor is related to credit in respect of, or relating to hire-purchase of goods sold by a Banking Company or a Government Company under the State-sponsored scheme. Recovery certificate issued by respondent for recovery of the arrears of telephone bills in terms of the Act, 1890 was clearly without jurisdiction and without authority of law and consequently the Collector cannot have acted on the same. Therefore, the recovery citation, therefore, issued by Collector was without jurisdiction. **(Manoj Agarwal v. Collector, Lucknow & Ors.; AIR 2011 (NOC) 180 (All)**

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act

S. 3(1)(10) – Offence under – Use of words "pallan", "pallapayal", "parayan" or "paraparayan" with intent to insult is an offence under Act

The word 'pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word 'chamar' denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a 'pallan', if used with intent to insult a member of the Scheduled Caste, is, in opinion of the Court, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 (hereinafter referred to as the 'SC/ST Act'). To call a person as a 'pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence.

Similarly, in Tamilnadu there is a caste called 'parayan' but the word 'parayan' is also used in a derogatory sense. The word 'paraparayan' is even more derogatory.

In opinion of the court uses of the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. **(Arumugam Servai v. State of Tamil Nadu; AIR 2011 SC 1859)**

S. 3(1)(x) – Offence of atrocities – Expression "in any place within public view" – Meaning of

The words used are "in any place but within public view", which means that the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted if the person is not present. **(Asmathunnisa v. State of A.P.; AIR 2011 SC 1905)**

S. 3(2)(v) – Applicability of

In the instant case also there is no evidence on record to show that the incident was caused by the appellant on the ground that the victim belonged to scheduled caste. The fact that the victim belongs to a scheduled caste, by itself it's not a sufficient ground to bring the case within the purview of Section 3(2)(v) of the SC/ST Act. Thus in considered opinion of the court, conviction of the appellant under Section 3(2)(v) of the SC/ST Act cannot be sustained and is liable to be set aside. **(Dharmendra v. State of Uttar Pradesh; 2011 Cri.L.J. 204 (All HC)**

Service Laws

Art. 16 – Family – Definition of - Family should include widowed daughter-in-law, hence, she is also entitled for compassionate appointment

The definition of 'family' in 1975 Rules includes wife or husband, sons, unmarried and widowed daughters, and if the deceased was an unmarried Government servant, the brother unmarried sister and widowed mother dependent on the deceased government servant. It is, therefore, clear that a widowed daughter in the house of her of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married is not entitled for compassionate appointment as she is not included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law in the death of her husband does not cease to be a part of the family. The concept that such daughter in law must go back and stay with her parents is abhorrent to our civilized society. Such daughter in law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, arbitrariness, as

presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, prima facie, would be irrational and arbitrary. The State, therefore, would consider this aspect and take appropriate steps so that a widowed daughter in law like a widowed daughter is also entitled for consideration by way of compassionate appointment, if other criteria are satisfied. **(U.P. Power Corporation Urban Electricity Transmission Division III, Allahabad v. Smt. Urmila Devi, 2011 (3) ALJ 1, (All HC, FB)**

Constitution of India – Art. 233, 309 – U.P. Higher Judicial Services Rules, 1975; R. 22(2) – Promotion on post of Additional District & Sessions Judge – Quota of promotees and Direct Recruits – Determination of

In service jurisprudence, the provisions with regard to quota of promotees and direct recruits are meant to extend due right to promotees and direct recruits with aim only to strengthen the efficiency of service but also to balance the old and new incumbents to serve the people with their experience and knowledge to meet out exigency of service.

The government for needs of public service and efficient administration promotes person in the higher cadre by making temporary and ad hoc promotions. In case the promotees are not given due benefit of their service rendered on ad hoc or temporary basis subject to promotion done within their quota, it may have demoralising effect. A promote discharging duty against the vacancy, acquires certain rights and experience and the society should not be deprived such experience and knowledge. On the other hand, direct recruits acquire experience only from the date of resumption of duty of a post. Accordingly, direct recruits cannot secure a march over and above the promotees anterior to their date of resumption of duty.

While preparing roster, the promotees and direct recruits shall be entitled for placement against the vacancy of respective year. In

case no direct recruitment is done in particular year and promotees are available, then they shall be entitled to be placed en block within their quota. Subsequently appointed direct recruits may not be entitled to form roster with earlier appointed promotees since they have not born in service in the year concerned.

In the instant case admittedly the regular vacancies of promotees with regard to the year 1992-94 was filled up in the year 1996 in pursuance to which the promotes resumed duty in the same year. Regular appointment of promotes and the direct recruits were done in the year 1998. Accordingly, there appears to be breakage of principle of "Quota and Rota". In the case the appointments is not done within the same year, then roster of 1:1 basis shall make direct recruit senior to promotes appointed against the vacancy of earlier year (1992-94), which does not seems to be intention of legislature while providing roster system. The roster can very well apply in case the promotes and direct recruits are appointed in the same recruitment year against their respective vacancies. In case promotes are officiating on temporary post against their promotional post within their quota and join earlier to direct recruits, then seniority may not be prepared by applying the roster.

In the event of conflict between quota and rota, the quota shall prevail. Meaning thereby, under the grab of roster, subsequent appointees appointed within their quota against the vacancy of earlier year. The candidates selected and appointed against the vacancies of direct recruit may be for earlier vacancy year, the seniority shall be reckoned from the date of resumption of duty. Principle of quota and rota should be made applicable only in case the promotes and direct recruit are appointed in same recruitment year with their respective quota. **(Prabhuji & anr. v. State of U.P. and ors., 2011 (3) ALJ 268 (All HC, LB)**

Constitution of India – Article 311 – Dismissal from the service without giving no reason to why it was not reasonably practicable to hold inquiry – Order would liable to be set aside

In the instant case, nothing had been brought on record nor produced before Court to establish that any reason making the holding of enquiry impracticable has been mentioned in the record. On the examination of the order of dismissal from service of petitioner, it revealed that the concerned authority while passing the dismissal order observed that in the criminal matter charge-sheet had been filed in the Court. The petitioner who was absconding was fully guilty and was not suitable for the post.

As such, concerned authority did not find any justification for holding the departmental proceedings and by invoking the power of proviso to Rule 8(2)(b) of U.P. Police officer of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 dismissed the petitioner from service.

The authority in fact, has not recorded any reason as to why it was not reasonably practicable to hold an inquiry in the case. The necessary mandatory requirement under sub clause (b) had been apparently complied with by making a mere recital in the order that it was no reasonably practicable to hold an inquiry against the petitioner.

Therefore, order of dismissal of petitioner from service was liable to be set aside. **(Alok Sharma v. State of U.P. & others, 2001 (3) ALJ 100 (All HC, LB)**

U.P. Recruitment of dependents of Govt. Servants Dying in Harness Rules, 1974 - R. 5 – Compassionate appointment – Claim for, made after lapse of stipulated period of 5 years – Effect of

In the instant case, save and except the ground that the appellant writ petitioner was not in a position to make the application in time since he was minor, no other ground is available from the order of the authority. Though there is a format/proforma for making application beyond the period giving details of landed properties, bank account/s and other relevant materials and though the appellant-writ petitioner has said that he has made the application but from the

annexure the Court finds that proforma is totally unfilled. No cause of any continuance of suffering or hardship has been indicated. In such circumstances, the rejection as made by the authority seems to be valid. **(Om Prakash Pandey v. State of U.P. & Ors.; 2011(1) ALJ 644 (All HC)**

Constitution of India – Part-time employee who continued for years cannot be allowed for regularisation of service when his appointment was not in accordance with law

A person, if not appointed/absorbed after following the procedure prescribed in Rules, which gives equal opportunity of employment to all eligible persons and thereby complying with Article 16 of Constitution, in absence of any statutory provision entitling such person to claim regularization validity whereof though is doubtful, since the Apex Court has said that Article 16 constitute basic feature of Constitution and nothing can be validated which may violate Article 16, can be directed to be regularized or absorbed irrespective of length of time one has continued to work. Any other view will give a licence to some of the mischievous authorities and resourceful individuals to defeat the scheme of constitution under Article 16 as also the process of recruitment under the Rules and thereby enter the service and grasp it for all times to come through backdoor. The earlier sympathy, which used to generate merely on the fact that somebody has worked for a long time has been overruled by concept that rule of law should not be allowed to be breached since only those who have some extra resources can dare to violate the law, and, therefore, any consideration in their favour shall confer upon them a premium of their act of committing breach of law. **(Ram Pravesh v. Chief Medical Officer, Ghazipur & anr., 2011 (3) ALJ 143 (All HC)**

Specific Relief Act

S. 16(c) – Suit for specific performance – Averment as to readiness and willingness in suit is mandatory

In a suit for specific performance it is absolutely necessary for the plaintiff to assert that he/she was always ready and willing to perform the essential terms of the contract sought to be enforced against the defendant. Section 16(c) of the Specific Relief Act, 1963 makes that requirement mandatory. There is, in the present case, no averment as to the readiness and willingness of the plaintiff to perform his part of the contract. In the absence of such an averment, amendment of the plaint to incorporate a prayer for specific performance of the agreement for re-conveyance would not have advanced the case of the plaintiff or the appellants who have succeeded him. **(Raj Kishore v. Prem Singh; AIR 2011 SC 382)**

S. 16(c) – Suit for specific performance – Use of word 'ready' alone in pleadings is not sufficient compliance of mandatory requirement of S. 16(c)

Section 16(c) of the Specific Relief Act postulates that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been 'ready and willing' to perform the essential terms of the contract which are to be performed by him. The said provision provides for making a categorical averment both the party's readiness and willingness to perform his part of the terms and condition and also to prove it. The expression used is "ready and willing" which is of great significance. It is a combination of two words 'ready' and 'willing' which may appear to carry the same meaning but are not synonyms.

The simple dictionary meaning of the word 'ready' is preparedness for the moment or to be equipped with what is needed; whereas 'willing' denotes inclination to do a thing voluntarily or without reluctance. So a readiness connotes physical state of affairs and willingness on the other hand is linked with the mental state of things. If implies capacity to act as well as inclination to do a thing. In view of above difference in the meaning of two words, the use of the word 'ready' alone may not sufficient compliance of the mandatory requirement of S. 16(c) of the Act which postulates

specific averment both with regard to readiness and willingness. Further the format of plaint for suits for specific performance as provided in Appendix A to the CPC clearly demonstrate that the averment must be to the effect that the plaintiff is always and is still 'ready and willing" to perform his part of the agreement, which is also a mandatory requirement of S. 16(c) of the Act failing which no contract of specific performance is enforceable.

Thus, for the absence of specific averment as contemplated by S. 16(c) of the Act and as prescribed by Forms 47 and 48 of Appendix-A to the CPC in the plaint coupled with the fact that no such intention of the requisite pleadings was otherwise can be gathered even from the attending circumstances, the suit has to fail for non-compliance of pleadings as per S. 16(c) of the Act. **(Ram Singh & Ors. V. Sughar Singh; 2011(1) ALJ 23 (All HC)**

S. 20 – Exercise of discretion

The exercise of power under section 20 of the Specific Relief Act is statutory which obliges the Court to consider the various factors necessary for granting a decree for specific performance, at least those enumerated in provision itself though the same may not exhaustive. Therefore, the fact that no issue with regard to exercise of discretion under S. 20 of Act was formulated would be immaterial since exercise of discretion under S. 20 of the Specific Relief Act is ordinarily covered in the general issue as to what relief the plaintiff is entitled to in the suit and accordingly, it cannot be said that there was no issue on the point and the Courts were not obliged to record any finding in that connection. **(Ram Singh & Ors. V. Sughar Singh; 2011(1) ALJ 23 (All HC)**

S. 31 – Cancellation of instrument – Cancellation of sale deed can be ordered only U/s. 31 of above said Act

There is no provision in the Transfer of Property Act or in the Registration Act, which deals with the cancellation of deed of sale. The reason is that the execution of a deed of cancellation by the

vendor does not create, assign, limit or extinguish any right, title or interest in the immovable property and the same has no effect in the eye of law. A provision relating to the cancellation of a document is provided in Section 31 of the Specific Relief Act, 1963. **(M/s. Latif Estate Lime India Ltd. V. Hadeeja Ammal & Ors.; AIR 2011 Madras 66 (FB)**

S. 38 – Relief of injunction – Entitlement

Every co-sharer has a right to the property and to develop the property in accordance with the law, subject to the condition that such use of the property will not render the partition impossible. Either the plaintiff may file a suit for partition and injunction, or may bring such facts and circumstances to the notice of the Court that the activities carried out by the defendants will make the partition impossible. In either case the delay in filing the suit will not entitle the plaintiff to seek the relief of injunction. **(Sheoraj v. M/s. Accord Infrastructure Pvt. Ltd. & Ors.; AIR 2011 All 83)**

Stamp Act

S. 2(10) – 'Conveyance' – What constitutes

It was very clear that the contract of sale read with the letter of acceptance was to 'conveyance' within the meaning of Section 2(10) and was chargeable to stamp duty under Art. 23.

Since there was no exemption from payment of stamp duty in respect of such conveyance under Article 62. **(State of Uttaranchal (now known as State of Uttarakhand) & Ors. V. M/s. Khurana Brothers; AIR 2011 SC 224)**

S. 2(14) – Instrument – What Constitutes?

It is to be noted that an instrument need not be one which creates right or liability in the present but also in future. This is implicit from the use of the words "purports to be created" used in Section 2(14) of the Act. Thus, where a document has been executed purporting to be creating right or liability in future in anticipation of some rights to be acquired, it would also be an instrument under Section 2(14) of the Act. **(Aegis BPO Service Ltd. V. State of U.P. & Ors.; AIR 2011 All 30)**

Ss. 3, Sch. 1B, Arts. 23 & 62 – "Conveyance" – Chargeability to stamp duty – Determination of

Where State Govt. entered into contract for sale of crude resin with writ petitioner (purchaser) and as per the terms of the contract the property in auctioned lot of crude resin vested in the purchaser, such a contract would amount to transfer of movable property since in the contract all the essential conditions of transfer of movable property were satisfied. By the document right in auctioned lot of crude resin was created in favour of the writ petitioner. Correspondingly, the State Government was under obligation to deliver the quantity of crude specified in the document. The clause in contract provided that resin sold would remain at purchaser's risk

from the date of acceptance of its bid and seller will not be responsible for any loss and damage which may occur thereto from any cause whatsoever. The document read as a whole undoubtedly showed that property in the auctioned lot of crude resin vested in the purchaser as a result of the subject contract and, thus there was transfer of movable property. Even if the document was treated as an agreement to sell, in view of the acceptance letter whereby the writ petitioner had been informed that public auction was accepted in its name and that it must arrange for lifting of the auctioned resin within 60 days from the issuance of the letter.

It was very clear that the contract of sale read with the letter of acceptance was to 'conveyance' within the meaning of Section 2(10) and was chargeable to stamp duty under Art. 23 since there was no exemption from payment of stamp duty in respect of such conveyance under Art. 62. **(State of Uttaranchal (now known as State of Uttarakhand) & Ors. V. M/s. Khurana Brothers; AIR 2011 SC 224)**

S. 47-A (U.P. Prior to 1998 Amendment) – Procedure for reference to Collector

Regarding with reference to Collector for determination of market value, instrument in question has to be registered first by Registering Authority and thereafter reference under Ss. 47-A/33 of Act was required to be made. In this case, since instrument was not registered hence, reference under Ss. 47-A/33 would be improper. **(Dr. Rajendra Prasad Memorial Girls Degree College, Lucknow & Anr. V. State of U.P. & Ors.; AIR 2011 (NOC) 182 (All)**

(i) S. 47-A (1) (U.P. Amendment) – Under Valuation of Instrument – Reference to collector for determination of market value can be done by sub-Registrar

The Stamp Act in its applicability to State of U.P. provides, that a reference to the Collector can be made by the Sub-Registrar even before registration of instrument, if he is satisfied that the

market value of the property or the consideration set out in the instrument is less than even the market value notified by the Collector under the Rules and the party has failed to make good the deficient stamp duty despite opportunity. **(M/s. Saya Traders v. State of U.P. & Ors.; AIR 2011 All 11)**

(ii) S. 47-A(1) (U.P. Amendment) – Under valuation of instrument – Who is competent for determination of market value? – Collector is competent for it

The upset price or the reserve price of any property fixed by the Court may not be the true market value of the property. The market value of the property is generally higher and at times lesser than the reserve price so fixed and as such it can always be subject to determination.

From the angle of protecting the revenue it is necessary that the market value of any property which is subject matter of transfer under an instrument chargeable to stamp duty ought to be determined in accordance with the provisions of the Act.

Accordingly, for the purposes of levying the stamp duty, it is all the more necessary to determine the market value of the property in accordance with the provisions of the Act as on the date of execution of the conveyance deed instead of relying upon the value of the property on which permission to sell was granted by the Court.

Thus, the Collector is competent to determine the market value of the property under transfer by the instrument in question for the purpose of levy of stamp duty irrespective of the upset/reserve or minimum price fixed by the Court while granting permission for the sale of the same. **(M/s. Saya Traders v. State of U.P. & Ors.; AIR 2011 All 11)**

Succession Act

S. 63 – Execution of Will – Proof of

For the purpose of proving the Will, one of the attesting witnesses of the Will, namely, Umar Datta (PW-4) had been examined. In his deposition, he had stated that he was present when the said Will was being written by Kalyanasundaram (Pw-5). The scribe of the Will had also been examined. The High Court had appreciated the evidence and the court has also gone through the relevant record which clearly reveals that execution of the Will dated 11th October, 1984, was duly proved. **(Saroja v. Santhilkumar and others; AIR 2011 SC 642)**

S. 82 – Intention of testatrix in interpretation of will – Determination of

Where the intention of the testatrix to make an absolute bequest in favour of her daughters in earlier part of Will was unequivocal, use of expression "after demise of my daughters the retained and remaining properties shall devolve on their female children only", in subsequent part of Will would not stricto sensu amount to a bequest contrary to the one made earlier in favour of the daughters of the testatrix. The expression does not detract from the absolute nature of the bequest in favour of the daughters. All that the testatrix intended to achieve by the latter part was the devolution upon their female offsprings all such property as remained available in the hands of the legatees at the time of their demise. There would obviously be no devolution of any such property upon the female offsprings in terms of the said clause if the legatees decided to sell or gift the property bequeathed to them as indeed they had every right to do under the terms of the bequest. Seen thus, there was no real conflict between the absolute bequest which the first part of the Will made and the second part which dealt with devolution of what and if at all anything that remains in the hands of the legatees. The two parts operate in different spheres, namely, one vesting absolute title upon the legatees with rights to sell, gift, mortgage etc. and the other regulating devolution of what may escape such sale, gift or transfer by them. The latter part was redundant by reason of the fact that the same was

repugnant to the clear intention of the testatrix in making an absolute bequest in favour of her daughters. It could be redundant also because the legatees exercised their rights of absolute ownership and sale thereby leaving nothing that could fall to the lot of the next generation females or otherwise. The stipulation made in the latter part did not in the least affect the legatees being the absolute owners of the property bequeathed to them. Corollary would be that upon their demise estate owned by them would devolve by the ordinary law of succession on their heirs and not in terms of the Will executed by the testatrix. **(Sadaram Suryanarayana & Anr. V. Kalla Surya Kantham & Anr.; AIR 2011 SC 294)**

Terrorist & Disruptive Activities Prevention Act

S. 3 – Terrorist act – What constitutes

Section 3 of the TADA Act gives due importance to the aspect of 'intent'. The person who is alleged to be involved in a terrorist act can be charged under Section 3(1) only when the prosecution has been successful in establishing that the same was committed with the intent to awe the Government or to achieve one or the other ends mentioned under Section 3(1). The Designated Court, while dismissing the charges under the TADA Act, cited with approval the decision of the Court in Hitendra Vishnu Thakur v. State of Maharashtra; AIR 1994 SC 2623. The Court made a distinction between the incidence of terror as a consequence of a particular act and causing terror being the sole intent of the same act. It is only in case of the latter that the provisions of Section 3(1) are attracted.

The prosecution in this case has argued that charge under section 3 is maintainable in the light of the Bombay bomb blasts and the fact that L.D. Arora would have been pivotal in providing information regarding the smuggling of arms and explosives. The case before court concerns the murder of L.D. Arora. The prosecution has not been successful in proving that this particular murder was committed with the intention to cause terror. As mentioned earlier,

terror could have been caused as a consequence of the act. The prosecution has stated that the main intention behind the murder of L.D. Arora was to prevent the names of Mohd. Dosa, Tahir Shah and Others involved in smuggling of arms and explosives would not come to light during the investigations that followed the Bombay blast. It is therefore evident that the intention of the accused in the present case was not to cause terror but to prevent information regarding another crime from being divulged. In the light of these facts, the Court is of the opinion that the TADA Court was justified in dismissing the charges framed under the TADA Act. Therefore, appeals filed by the State for enhancement of sentence require to be dismissed. **(Manjit Singh v. CBI; AIR 2011 SC 806)**

S. 3 – Conviction U/s. 3 on ground that mere membership of a banned organization – Validity of

Mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence. Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. Mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. **(Arup Bhuyan v. State of Assam; AIR 2011 SC 957)**

Ss. 15 & 12 – (as amended by Act 43 of 1993) – Confession of accused is admissible in trial of co-accused for offence U/ss. 302, 120 IPC committed and tried in the same case together with accused who makes confession

Where all the three accused were being tried in the same case by the Designated Court (TADA), the confession of the accused charged for the offence under the TADA Act, could be used against co-accused who was charged for the offence under S. 302 read with

S. 120B of the IPC and not under TADA. It is also relevant to notice that co-accused was arrested in Singapore in response to look out notice issued by Interpol, India. On the request of Govt. of India, he was extradited by the Govt. of Singapore. The Extradition Treaty signed between the two countries provided that the person being extradited could only be tried for criminal acts recognized as offences in both the countries. Since, there was no law in Singapore which corresponds to the TADA Act, though co-accused was extradited, he could only be tried under Sections 120B and 302 of the IPC and, therefore, no charge under Section 3 of the TADA Act was framed against co-accused. **(Manjit Singh v. CBI; AIR 2011 SC 806)**

Transfer of Property Act

S. 41 – Transfer by ostensible owner – 'Ostensible owner' would include transferee from State Government or Union Government

The "person" would include Union or the State Government, as the "person" has not been defined in the statute, therefore, would need liberal interpretation. In support of this finding, reference can be made to the judgment of the Hon'ble Supreme Court in Samatha v. State of Andhra Pradesh and Others; AIR 1997 Supreme Court 3297, wherein it has been held as under:-

> "there is no reason to consider the word 'person' in a narrow sense. It must be construed in a broader perspectivity, unless the statute, both expressly or by necessary implication, exempts the State from the operation of the Act as against the State and would include "State Government".

(Smt. Niranjan Kaur & Ors. V. The Financial Commissioner, Revenue and Secretary to Government, Punjab & ors.; AIR 2011 Punjab & Haryana 1 (FB)

S. 54 – Transfer of property by way of sale – Once vendor is divested himself of his ownership of property he retains no control or right over said property

Section 54 of the Transfer of Property Act defined the word "Sale", which means transfer of ownership by one person to another. In other words, sale is transfer of all rights, title and interest in the properties which are possessed by the transferor to another person namely, the purchaser. In case of transfer by way of sale, the transferor cannot retain any part of his interest or right in that property. Such transfer of ownership must be for a price paid or promised or part-paid and part-promised. Even if the whole price is not paid, but the document is executed and registered, the sale would be complete. The transfer is complete and effective upon the completion of the registration of the sale deed. Once the vendor is divested himself of his ownership of the property, then he retains no control or right over the said property. **(M/s. Latif Estate Lime India Ltd. V. Hadeeja Ammal & Ors.; AIR 2011 Madras 66 (FB)**

S. 54 – Sale deed – Transferring immovable property of less than Rs. 100/- is not required to be registered – Sale of such property would be complete as soon as delivery of possession is proved

Hon'ble High Court has held that a sale deed transferring immovable property of less than Rs. 100/- in value is not required to be registered and the sale of such a property would be complete as soon as soon as delivery of possession is proved either on the basis of an unregistered instrument of sale or otherwise and that where delivery of possession is established, the unregistered instrument of sale though executed would not be material. **(Raj Bahadur & Ors. V. Babu Lal (since deceased); 2011 (2) ALJ 77 (All HC)**

S. 58(c) Proviso – Mortgage by conditional sale – Pre-requisite

> "58(c) Mortgage by conditional sale – Where, the mortgagor ostensibly sells the mortgaged property –
>
> On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

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

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

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

A bare reading of the above would show that for a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale. That requirement is stipulated by the proviso which admits of no exceptions.

That is not so in the instant case. The sale-deed executed by the plaintiff in the instant case does not embody any condition like the one referred to in clause (c) of Section 58 extracted above. The broad statement of law made by the High Court to the effect that every sale accompanied by an agreement for re-conveyance of the property will constitute a mortgage by conditional sale is not, therefore, correct. **(Raj Kishore v. Prem Singh; AIR 2011 SC 382)**

S. 58(e) – English mortgage – What is not

English Mortgage as defined under Section 58(e) of the Transfer of Property Act, 1882 which reads as under:

"58(e) – English Mortgage:- Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

A plain reading of the above would show that for a transaction to constitute an English mortgage the following essential conditions must be satisfied:

(1) The Mortgagor must bind himself to re-pay the mortgage money on a certain date.
(2) The property mortgaged should be transferred absolutely to the Mortgagee.
(3) Such absolute transfer should be made subject to proviso that the Mortgagee shall re-convey the property to the Mortgagor upon payment by him of the mortgage money on the date the Mortgagor binds himself to pay the same.

It is only in cases where all the three requirements indicated above are satisfied that the transaction constitutes an English mortgage and not otherwise. **(Raj Kishore v. Prem Singh; AIR 2011 SC 382)**

S. 105 – Lease – What amounts to

Section 105 of the Transfer of Property Act, 1882 reads:-

> "105 - Lease Defined:- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Lease on the other hand, would amount to transfer of property. In Associated Hotels of India Ltd. V. R.N. Kapoor; (1960) 1 SCR 368: AIR 1959 SC 1262, the well established propositions were laid down by a Constitution Bench for ascertaining whether a transaction amounts to a lease or a license. **(Pradeep Oil Corporation v. Municipal Corporation of Delhi and Anr.; AIR 2011 SC 1869)**

S. 105 – Lease and license – Distinction between – By license no estate or interest created on said land whereas lease would amounts to transfer of property

A license may be created on deal or parole and it would be revocable. However, when it is accompanied with grant it becomes irrevocable. A mere license does not create interest in the property to which it relates. License may be personal or contractual. A licensee without the grant creates a right in the licensor to enter into a land and enjoy it. Lease on the other hand, would amount to transfer of property.

The distinction between lease and license is marked by the last clause of S. 52 of the Easements Act as by reason of a license, no estate or interest in the property is created.

A license, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) It is revocable and (d) it is determined when the grantor makes subsequent assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement. **(Pradeep Oil Corporation v. Municipal Corporation of Delhi and Anr.; AIR 2011 SC 1869)**

S. 130 – Transfer of actionable claim – Determination of

The petitioner in the instant case was a banking company. The transfer of right to recover the debt from the secured assets by way of assignment was a transfer of property. The assignee bank purchased the debts with rights of its sale. By such assignment the assignee bank, as a banking company, has simply stepped into the shoes of the assignor bank to realise the security interest in the asset. The transaction does not suffer from any restriction in law, nor is the contract against public policy.

Further there is no statutory or contractual right of the debtor to be given a notice before assignment of the debt. The security interest in the mortgaged property can always be transferred under the Transfer of Property Act by the mortgagor, and thus assignment of debt along with a right to recover the debt from the mortgaged assets is by way to transfer of debt, to be realized from the mortgaged property. The Transfer of Property Act does not place any restriction on such contract.

Thus, assignment of debt/NPA with right to recover debt of State Bank of India to Banking Company is a valid transaction. **(M/s. Kotak Mahindra Bank Ltd. V. M/s. Chopra Fabricator and Manufacturers (P) Ltd.; AIR 2011 All 19)**

U.P. Consolidation of Holdings Act

Sec. 8-A – Allotment of land – Consolidation Officer would have no jurisdiction to allot land which is earmarked for public purpose and in gaon sabha, it has to be done by gaon sabha

To state that the land so vested in Gaon Sabha was subject matter of allotment by the consolidation officer to private institution, would be against the very provision of vesting such land in the Gaon Sabha by the State Government. Clearly the Consolidation Officer could only earmark the land for public purpose, but is could not pass order with respect to specific use of such land. It is only the Gaon Sabha which can allot the land vested in it by the State Government under Section 117(1) of the U.P. Zamindar Abolition & Land Reforms Act, 1950. The consolidation authorities can only earmark such land of the Gaon Sabha for public purpose in consolidation proceedings.

Therefore, the Consolidation Officer had acted beyond his jurisdiction in directing entry in the revenue record to be made of a land earmarked for the public purpose in the name of the institution of which the appellant claims to be the manager. Such function of use

of public land vested in Gaon Sabha could have been performed only by the Gaon Sabha.

Further, when the appellant was not a tenure holder and has no title over the land is question his possession can, at the most, be by virtue of an allotment of public land. Since the order of the Consolidation Officer in allotting public land belonging to and earmarked for the Gaon Sabha was not within his power, clearly the consolidation officer had no jurisdiction to allot the land earmarked for public purpose to a private body or person. Consequently the bar of civil suit against allotment under Section 49 of the U.P. Consolidation of Holdings Act would not apply. **(Palakdhari v Gaon Sabha, Devara Tripurarpur, Pargana Gopalpur, 2011 (3) ALJ 113 (All HC)**

U.P. Control of Goondas Act

S. 2(1)(b) – Goonda – Definition of

In this case, the accused has not been treated s 'goonda' on the grounds mentioned in clause 2(b)(ii) to (vii) of the Act as referred above. He has been treated as goonda under clause 2(b)(i) of the Act. As per definition of goonda as contained in clause 2(b)(i) of the Act, a person can be treated as goonda only when he is habitually involved in commission of offence as mentioned therein. The word 'goonda' carries on the meaning that a person who by habit is involved to commit repeated offences as mentioned above will be treated as 'goonda'. One or two criminal cases against a person will not be sufficient to hold him that he is habitually involved in commission of such offences and he is a 'goonda'.

In this case, only two criminal cases have been shown against the accused which too were registered by the police in pursuant to the order passed by the Judicial Magistrate on the applications moved by the respective complainants under Section 156(3) of the Code. The petitioner on the basis of these two cases cannot be said to be habitually involved in commission of offences as defined under

Section 2(1)(b) of the Act. He, therefore, cannot be held to be goonda. **(Lalani Pandey v. State of U.P.; 2011(1) ALJ 613 (All HC)**

S. 3 – Externment of Goonda – Validity of

From a perusal of the impugned order passed by the learned Additional District Magistrate, Raebareli, it appears that he had issued notice to the accused on 30.11.2009 under Section 3 of the Act to show cause as to why an externment order be not passed against him and he be not treated as 'goonda'. The notice was served to the petitioner who appeared on 08.12.2009 before the learned District Magistrate through his counsel. His counsel instead of filing any written reply sought time for filing written reply on behalf of the accused. The accused appeared before the learned District Magistrate on 13.1.2010 and filed bail bonds to appear on future dates. From a perusal of the impugned order, it appears that the accused sought as many as 10 adjournments for filing written reply even then he did not file any written reply. At last he was allowed last opportunity to file his written reply by 07.7.2010 even then he did not file any written reply. In the circumstances, t he learned District Magistrate had no option but to proceed with the case in the absence of written reply of the accused. Now it is not open to the petitioner to argue that he was not allowed proper opportunity to file his written reply as well as for hearing. In fact, the learned District Magistrate had allowed sufficient opportunity to the petitioner to file his written reply. When he did not file his written reply, the learned District Magistrate had no option except to proceed with the case on the basis of materials available on record. He, therefore, finally disposed of the case against the petitioner by the impugned order of externment. The impugned order, therefore, cannot be said to bad in the eye of law on the ground that the accused was not given proper opportunity of hearing. **(Lalani Pandey v. State of U.P.; 2011(1) ALJ 613 (All HC)**

U.P. Muslim Wakf Property Act

Ss. 29(8), 33(2), S. 49-B(4) – Person aggrieved includes person who claim title over that property, including tenant of that property and his remedy of filing an application lies either S. 29(8) or S. 33(2)

Section 29 sub-clause (8) and Section 33 sub-clause (2) open with the words 'any person aggrieved'. In the opinion of the Court, the words 'any person aggrieved' will include a person who claims a title over the property which is being registered as waqf. In the facts of this, a person who alleges that the property is not exclusive property of the person executing the waqf deed and that the complainant had a share in the property which share cannot be converted into the waqf property. Similarly, the Court may record that person who claims to be a tenant of a premises which is being so recorded as waqf property would also answer the description of 'any person aggrieved' if he feels that he was a tenant of some other landlord owner or that the property is not a waqf property. Such tenant can seek his remedy under Section 29(8) or under Section 33(2).

Court holds that any person aggrieved in respect of registration of a property as waqf property or it being a waqf property or not has the remedy of either filing an application under Section 29(8) or under Section 33(2). Such issues cannot be raised in an appeal under Section 49(4). **(Rahat Jan & Ors. V. U.P. Sunni Central Board of Waqf & Ors.; 2011(1) ALJ 524 (All HC)**

U.P. Public Money Recovery of Dues Act

S. 3 – Recovery of Dues as arrears of land revenue – When invalid

For the purpose of recovery of dues as arrears of land revenue, there must be an agreement relating to a loan, advance or grant and if there is a default of payment of any installment thereof, then said amount defaulted can be recovered as arrears of land revenue. In the instant case, respondent has not given any loan, advance or grant to

the petitioner, nor is related to credit in respect of, or relating to hire-purchase of goods sold by a Banking Company or a Government Company under the State-sponsored scheme. Recovery certificate issued by respondent for recovery of the arrears of telephone bills in terms of the Act, 1890 was clearly without jurisdiction and without authority of law and consequently the Collector cannot have acted on the same. Therefore, the recovery citation, therefore, issued by Collector was without jurisdiction. **(Manoj Agarwal v. Collector, Lucknow & Ors.; 2011(1) ALJ 779 (All HC)**

U.P. Urban Buildings (Regulations of Letting Rent & Eviction) Act

S. 2(1)(d) – Applicability of Act

Tenanted building used for manufacturing purpose by tenant but no evidence to show that plant or apparatus were also leased out along with building, so provisions of S. 29 of Act would not be applicable. Hence, tenant not entitled to claim exemption from applicability of Act. **(Anurag Agrawal & Anr. V. Upendra Nath Bansal; 2011(1) ALJ (NOC) 81 (All)**

Sec. 3(g) – Tenant – Definition and scope of

The courts below have recorded a concurrent finding of fact on the basis of evidence to the effect that the petitioner was not the niece of Ram Sewak Singh or a male lineal descendant to fall within the meaning of the definition of family in Section 3(g) of the Act No. 13 of 1972. Though Niece has been mentioned in schedule 2 of Section 14 of the Hindu Succession Act which is a Special Act for the purpose of succession where as Act No. 13 of 1972 is a Special Act governing procedure of letting, rent and eviction and relationship of landlord and tenant is defining with regard to devolvement of a tenancy under this Act. The provision of U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 being Special Act, in this regard, will prevail over the provisions of Hindu Succession Act.

For all these reasons, the writ petition is dismissed with direction to the tenant to vacate the premises in dispute and to hand over its peaceful possession to the landlord within a period of three months from today subject to condition that he continues to pay the landlord Rs. @ 2000/- per month. **(Smt. Ram Pyari v. Additional District Judge, Court No. 2, Kanpur Nagar & ors., 2011 (3) ALJ 18 (All HC)**

S. 12 - Release of premises – Validity of

Section 12 of the Act is provision for declaration of deemed vacancy of buildings in certain cases. One of the conditions is that building shall be deemed to be vacant if it is allowed to be occupied by any person who is not a member of family of the landlord. Section 13 of the Act provides restrictions on occupation of building without allotment order in favour of tenant or a release order in favour of landlord. Thus, a combined reading of section 12 and 13, makes it clear that allotment or release order is a must before the building can be occupied by a person as tenant if he is not a member of the family of the landlord or the landlord himself respectively. In the instant case, the petitioner has not claimed himself to be a member of family of the landlord. His claim is that he has occupied go-down No. 1 – a commercial building since 1990 as tenant i.e. after enforcement of the Act, therefore, in view of the provisions of section 12 read with section 13 of the Act, even though the petitioner occupied the building, but it would be deemed to be vacant under the aforesaid provision.

The petitioner claims that no notice was served upon him under Rule 8(2). The whole object of Rule 8 appears that so far as possible parties may be served with notice so that they may appear before the prescribed authority, have their say and file their objection if so desire in the matter. This opportunity has later been granted to the petitioner on his application under section 34(1)(g) of the Act read with rule 22(b) of the Rules framed under the Act and section 151,

C.P.C., therefore, substantial compliance of the principles of natural justice has been made in this case.

The purpose and object of the Act cannot be defeated by anyone who otherwise occupies the building in sheep's clothing in utter violation of the provisions of the Act, on the ground of limitation which is permissible only to a tenant occupying the building in accordance with the provisions of the Act. If the Courts allow such unauthorised occupant to continue in the building who has occupied it against the provisions of the Act and the intent of the legislature, then such interference will defeat the very purpose and object this beneficial piece of legislation. Therefore, this Court is of the opinion that limitation of 12 years, if it is to be read, is only in respect of a tenant who is occupying the building in terms of the Act whose occupation can be regularised either under section 2-A, or section 12 or section 13 of the Act and not otherwise.

For the reasons stated above, no illegality or infirmity in the orders impugned have been shown. The petition fails and is accordingly dismissed. **(Arun Kumar Gupta v. Prescribed Authority, Rent Control/Additional City Magistrate, 2nd Kanpur Nagar & Ors., 2011 (3) ALJ 128 (All HC)**

S. 20(2) (c) – Eviction – Ground of material alteration in tenanted building – When not be considered

In the admitted facts and circumstances of the case that the petitioners have not taken any written permission from the landlord to lay down pucca roof construction and being damaged the accommodation in dispute by removal of kari or wooden beams, removal of mud roof from beneath and making or cupboard in the wall by removing of bricks and thereafter filling it up. Hence, his case squarely falls under section 16(c)(d) of the U.P. Act No. XIII of 1972. The constructions have become week by the conduct of the petitioners therefore it would be apparent that there has been not only

material alteration in the disputed shop but it has been damaged and lowered its utility.

For the reasons stated above, no interference is called for in the findings recorded by the court below. **(Ram Manohar Tomar & Ors. V. Harcharan Lal Mehrotra & ors.; 2011(1) ALJ 447 (All HC)**

S. 20(2) (o) – Suit for eviction – Material alterations in tenanted building – Effect of

The stand of the landlord is that the tenant did not pay the rent from 1.9.92 to 31.10.99 and has also raised unauthorized constructions and dug the floor three feet deep which has adversely affected the foundation of the building and has decreased its utility. The tenant is also said to have erected a wall and converted the front portion of the tenancy in two shops by which the value of the building has further diminished on account of material alterations. This compelled the landlord to sent a notice dated 15.11.1999 which was served upon, the tenant on 16.11.1999.

The suit was contested by the tenant by filing written statement denying the entire allegations made in the plaint of the landlord. It has been asserted therein that that he is depositing rent under Section 30 of U.P. Act No. 13 of 1972 in case No. 700/70 of 1994 between Bachchu Lal v. Basso Begum as the landlord has refused to accept the rent and he has neither made any alteration in the building by digging the building in question nor has raised constructions diminishing the value of the building. **(Bachchu Lal v. Smt. Basso Begum (deceased by L.Rs.); 2011(1) ALJ 279 (All HC)**

S. 20(4) – Date of first hearing – What constitutes

Eviction suit for non-payment of rent was filed and suit was decreed ex parte. Decree recalled for non-service of summons on tenant. The Date for appearance of tenant mentioned in summons and plea that it cannot be regarded as first date of hearing and that tenant

need not have deposited arrears along with petition for recall and cannot be said to be without substance. The Court however left the plea for consideration in another case. The court in view of cavalier manner in which tenant conducted proceedings in High Court and Supreme Court is also refused to exercise its discretion in favour of tenant. **(Ram Krishna Singh & ors. V. Thakurji Shivji; AIR 2011 SC 872)**

S. 21(1) (a) – Release of premises – Comparative hardship – Determination of

It is settled proposition of law that the equity follows law and so does sympathy. If the factors mentioned in Rule 16 are considered, taking into consideration the facts of this case, no doubt it is an old tenancy but there is nothing to show any real efforts were made by the tenant to find another accommodation despite the fact that even the application for release has been moved in the year 1986.

In view of the law as stated above, the judgment passed by the court below is contrary to law and perverse in nature cannot sustain. **(Rahmat Ullah & Anr. V. Aziz Ahmad & Ors.; 2011(1) ALJ 354 (All HC, LB)**

S. 21(1)(a) – Release of accommodation – Bonafide need and comparative hardship – Determination of

In this case, Landlord requiring shop for expanding business of his son and to augment his income. Tenant had shop/manufacturing unit in locality situated nearby and was using shop in question as godown and no effort was made by tenant to search for alternative accommodation. Hence, comparative hardship was in favour of landlord and also bona fide need of landlord was greater than tenant if shop was not released in his favour. So, shop held liable to be released in favour of landlord. **(Kamal Raj Patpatiya v. Smt. Har Bai Sahu & Anr.; 2011(1) ALJ 587 (All HC)**

S. 21(1)(a) – Application for release of premises – Bar of res judicata – When not applicable

The principles of res judicata apply only to the situations which are static and not to changing situation. The bona fide need of the landlady must be considered with reference to the time when a suit for eviction was filed and it cannot be assumed that once the question of necessity is decided against the plaintiff, it has to be assumed that he will not have a bona fide and genuine necessity even in future.

In a case where no new facts have come into existence and there have been no intervening change or circumstances the second application may not be maintainable on the principles of res-judicata but where the landlord establishes a change of situation since the first application, the said case would require the court trying second application to re-investigate not only the question of bona fide requirement but also of the greater hardship and to find out the basis of intervening changed circumstances as to whether the landlord is entitled to a release to be made in his favour under Section 21 of the Act.

In the instant case both the release application has been moved on different cause of action and that too after expiry of nearly 19 years. Rule 18 of the Rules does not apply to the facts of the present case.

If a first release application on ground of bona fide need of husband of landlady wad dismissed under Section 21(1)(a) of the then the second release application on subsequent need of settling her son can be moved after a period of one year and there would be no legal impediment in moving the same as per the provisions as provided under Rule 18(2). **(Mahesh Chandra Agarwal & ors v. Addl. District Judge, Court No. 6 Faizabad & ors., 2011 (3) ALJ 334 (All HC, LB)**

U.P.Z.A. & L.R. Act

S. 229-B – Suit for declaration as sole owner – Maintainability of

In this case tenancy rights in respect of land in question were in name of Karta of family. His two brothers had 1/3rd right in land in question so all the three brothers thereby held 1/3rd share. After death of brothers the son of one brother cannot claim to be sole tenant of property as there were other co-sharers. Hence, he would hold only 1/3rd share and cannot be declared as exclusive owner of land in question. **(Ramdeo v. Board of Revenue, U.P., 2011 (3) ALJ 199 (SC)**

S. 331 – U.P. Reorganization Act, S. 591 – Transfer of pending proceedings – Whether Board of revenue can pass order on revision after enforcement of U.P. Reorganization Act – Held, "No" but it can transfer the proceedings which pending before it

A reading of the plain language, the provision makes it clear that every proceeding pending before a Court, Tribunal, Authority or Officer in any area which fell within the State of U.P. on 09.11.2000 stood automatically transferred to the corresponding Court, Tribunal, Authority or Officer of the State of Uttaranchal (now Uttarakhand). Therefore, the revisions which were pending before the Board of Revenue, U.P. on 9.11.2000 stood transferred to the State of Uttaranchal and, as such, the same could not have been decided by the Board of Revenue, U.P. Unfortunately, the learned Single Judge over looked the fatal flaw in the order of the Board of Revenue, U.P. and pronounced upon the legality of the purchases made in the names of the respondents. **(State of Uttaranchal v. M/s. Golden Forest Co. (P) Ltd.; AIR 2011 SC 1723)**

United Provinces Municipalities Act

Sec. 298(2) – No fee can be charged under by-laws of Municipality on advertisement shown on cable T.V. network

Bye-laws framed by the municipality provided that the fee would be chargeable on the advertisements pasted on the public

notice board but not the advertisements shown by the cable operator. In fact, normally the cable operators show the different channels. The advertisements are shown in the channels. The cable operators have nothing to do with the same. They pay fees to show the channel. There was nothing in the Bye-laws to show that any kind of fee or money can be charged for the advertisements shown on the cable TV network.

Thus no fee can be charged under the Bye-laws on the advertisements shown on cable TV network. **(Sanjai Gupta v. State of U.P. & ors., 2011 (3) ALJ 12 (All HC)**

United Provinces Panchayat Raj Act

S. 95(1) (g) Proviso – Removal of Pradhan – Procedure of

The proceeding for removal has to be conducted in accordance with rule 6 onwards of the Enquiry Rules, irrespective of the fact whether right to exercise financial and administrative power was ceased or not. However, where right to exercise financial and administrative power is also to be ceased then procedure in rules 3 to 5 has to be followed otherwise there is no necessity to follow them. **(Vivekanand Yadav v. State of U.P. & Anr.; 2011(1) ALJ 694 (All HC, FB)**

S. 95(1) (g) Proviso – Cessation of financial and administrative powers of pradhan – Consideration of

In opinion of the court, the word 'otherwise' in rule 5 includes, and the DM can rely upon, the following reports only to cease financial and administrative powers and direct for the final enquiry.

A report of a person, who is also defined as an enquiry officer under rule 2(c) of the Enquiry Rules irrespective whether he was directed by the DM to conduct the preliminary inquiry or not;

A preliminary enquiry report conducted by the DM himself.

However, a report by any other officer or any other information cannot be relied upon by the DM to constitute a three member committee ceasing financial and administrative powers. In such a situation, it should be treated as a report under rule 3(6) or would come under word 'otherwise' in rule 4(1) and at the most only a preliminary enquiry can be ordered.

Conclusions by the Court are as follows:-

(a) The DM may ask the preliminary enquiry to be conducted by any officer defined under rule 2(c) of the Enquiry Rules on a complaint or a report under rule 3 or any other material or information. He has suo motu powers as well to order a preliminary enquiry;

(b) A pradhan has no right to object that complaint or report is not in accordance with rule 3 of the Enquiry Rules;

(c) A pradhan is neither entitled to be associated in the preliminary enquiry nor is entitled to the copy of the preliminary report. However, before an order ceasing the financial and administrative power is passed, his explanation or point of view or the version to the charges should be obtained and considered;

(d) In the first and the third WPs, the impugned orders have been passed on the basis of preliminary report after obtaining and considering the explanation of the pradhan. The impugned orders in these WPs cannot be faulted on this ground;

(e) In court's opinion the word "otherwise' in rule 5 includes and the DM can rely upon the following reports only to cease financial and administrative power and direct the final enquiry;

(f) A report of a person who is also defined as an enquiry officer under rule 2(c) of the Enquiry Rules irrespective of whether he was directed by the DM to conduct the preliminary inquiry or not;

(g) A preliminary enquiry report conducted by the DM himself.

(Vivekanand Yadav v. State of U.P. & Anr.; 2011(1) ALJ 694 (All HC, FB)

Urban Land Ceiling & Regulation Act

S. 6 – Land Acquisition Act, S. 18 – Land initially covered under Act, 1976 and requisite notification U/s. 10(3) of the Act was not published and land was not vested in State Govt. – State Govt. cannot impose condition on expropriated land holder for not to seek enhancement of compensation

In this case, the legality of the demand made by the State for an undertaking from the expropriated land-holder that he would not seek enhancement of the compensation by way of reference under Section 18 of the Land Acquisition Act for lands covered under Urban Land Ceiling Act (1976) was challenged. The Government having chosen to acquire the land under the provisions of Land Acquisition Act and having applied the said law for the said purpose, it is not open for them to immunize themselves from a claim for enhanced compensation by imposing a condition on the expropriated land-holder that he will not seek enhancement of the compensation. The compensation had been awarded to the expropriated land-holder in respect of his lands under the provisions of the Land Acquisition Act by passing an award thereunder. Notwithstanding the fact that the award described payment of such compensation as ex gratia, the land-holder has right to seek its enhancement by following the procedure under Section 18 of Land Acquisition Act. By Section 18, the Parliament has conferred a right on an expropriated land-holder to seek an enhancement of compensation. It is not within the power of the Government to defeat or attempt to defeat the exercise of such right conferred on the land-holder by that section, by demanding an undertaking that he will not seek such enhancement. **(Baliram v. State of Maharashtra & Ors.; AIR 2011 Bom 1 (FB)**

Words and Phrases

Word 'consent' in context of sexual offences would comprehend act of reason accompanies by deliberation

The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause First and Second have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanies by deliberation. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

"Sufficient cause" – Meaning

The meaning of the word 'sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion it has to be exercised judiciously. **(Parimal v. Veena; AIR 2011 SC 1150)**

"Trespass and Trespasser"

Definition of 'occupier' in S. 2(e) of the Act, is not exhaustive but inclusive. Clauses (i) to (iv) of S. 2(e) definitely do not embrace within itself a trespasser but Clause (v) that reads, 'occupier' includes

‘any person who is liable to pay to the owner damages for the use and occupation of any land or building’ would surely take within its fold and sweep a ‘trespasser’ since such person is not only liable for damages for an act of trespass but also liable to pay to owner damages for the use and occupation of any land or building trespassed by him. It is immaterial whether damages for the use and occupation are in fact claimed or not by the owner in an action against the trespasser. By no stretch of imagination, a trespasser could be taken out of the definition of ‘occupier’ in S. 2(e)(v) of Act. Clause (v), includes a person who enters the land or building in possession of another with permission or consent but remains upon such land or building after such permission or consent has been revoked since after such permission or consent has been revoked, he is liable to pay damages for unauthorized use of land or building.

Once, it is held that a trespasser is included in the definition of ‘occupier’ in S. 2(e)(v) of the 1971 Act, what necessarily follows is that before initiation of any suit or proceeding for eviction of such trespasser, the previous written permission of the Competent Authority is required as mandated by S. 22(1). The use of words ‘no’ and ‘shall’ in sub-section (1) of S. 22 makes it abundantly clear that prior written permission of the Competent Authority for an action under clause (a) thereof is a must. Provisions contained in S. 22 are salutary in light of the scheme of 1971 Act and have to be followed. It has to be held, therefore, that for eviction of a trespasser who is ‘occupier’ within the meaning of S. 2(e)(v) of 1971 Act from the land or building or any part thereof in a declared slum area, the written permission of the Competent Authority under S. 22(1)(a) is mandatorily required. **(Laxmi Ram Pawar v. Sitabai Balu Dhotre & Anr.; AIR 2011 SC 450)**

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