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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 – March, 2007

Volume: XIII **Issue No.: 1**

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Arbitration and Conciliation Act

S. 2(1)(e), 16 and 37(2) – Arbitrator holding that it has no jurisdiction to proceed – Appeal would lie to the Court as defined in S. 2(1)(e).

If the Arbitrator opines that he has no jurisdiction to hear the matter, an appeal lies before the court. 'Court' has been defined in Section 2(1)(e) of the 1996 Act in the following terms:

" 'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of "Court" as noticed hereinbefore means the Principal Civil Court of original jurisdiction in a district and includes the High Court, which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a "Court" within the meaning of the said provision.

There exists a distinction between an appeal and an application. Whereas Section 31(4) of the 1940 Act or Section 42 of the 1996 Act provides for an application, Sub-section (2) of Section 37 of the 1996 Act provides for a statutory appeal. A forum of an appellate court must be determined with reference to the definition thereof contained in the 1996 Act. We, therefore, see no reason to differ with the High Court. The appeal is dismissed. **(M/s. Pandey & Co. Builders Pvt. Ltd. V. State of Bihar & Anr.; 2007 (2) Supreme 261).**

S. 34 – Order passed by Arbitral Tribunal is not amenable to writ jurisdiction of High Court.

It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Art. 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an

avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Articles 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible. **(Bharat Sanchal Nigam Limited v. M/s. Darshan Lal & Ors.; 2007 (1) ALJ 552)**

Banking Law

◆ Bank Loan – Role of Recovery Agents – Bank should resort to procedure recognized by law to take possession of vehicle where borrower have committed default in installments of payments – Bank will be vicariously liable for use of abusive language for recovery by Recovery Agent.

First of all, the entrance of the multi national banks into the country has spread the culture of Credit Cards, Loans on an unimaginable level where rather than the rich, it is the middle class, the lower middle class and the lower class who are at the receiving end of the bonanzas promised by the Banks.

Inadequate information on the Credit Card application, Loan Applications, Advertisements or even while meeting the bankers in person in respect of the lending rates and hidden charges, leads to this class of people being lured into the buying of the Credit Cards or taking of the home loan or education loan without knowing the ramifications of non-payment and default.

The first mistake here is most definitely on the part of the bank who does not believe in educating the masses regarding the promises.

Once the credit card or loan is taken and there appears a default, then the witch-hunt begins.

Now the bank is the aggressor and the public is the victim. The first step to recovery of the money due is through the so-called RECOVERY/COLLECTION AGENTS. A very dignified term used for paid recovery agents who are individual and independent contractors hired by the Banks to trace the defaulters and to both physically, mentally and emotionally torture and force them into submitting their dues.

A man's self respect, stature in society are all immaterial to the agent who is only primed at recovery. This is the modernized version of Shylock's pound of flesh. No explanation is given regarding the interest charge and the bank takes cover under the guise of the holder of the card or loan having signed the agreement whose fine print is never read or explained to the owner.

When a harassed man approaches the Court or the police station he is not armed with a recording phone and finds it difficult to give evidence of the abuse he has suffered. Here the bank gets away with everything. Young and Old members of the family threatened on streets, institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank. The stance taken by the bank in any suit alleging such incidents is that no such agent has been appointed by them or their agents do not misbehave in the manner aforesaid and if found guilty the agents have to bear the cross and the bank gets away Scot free.

Using of the abusive language for recovery is the norm of the day for most nationalized or multi national bank or non-nationalized bank. Though some are smart enough to record the abuse and proceed to establish the same through Court of Law, most of them are unfortunate not to have recourse to it. Such people form the majority and such litigations are pending in large volumes before the Civil and Consumer Courts. Again the banks escape liability since these agents are not salaried employees of the bank and hence not directly liable for anything.

Taking it form the angle of the common man the inflow of software money and high salaries has resulted in uncontrolled expenditure. Rather than utility it is a fashion to carry a card for it makes a statement depending on the type of card one carries.

To maintain ones image one pays the price of utilizing the card without realizing that even a single day's delay in payment results in more than 100 to 200 rupees being charged as default and penalty charges, which if accumulates over a month, results in the charges exceeding the actual payment due.

As for loans, when litigation is commenced by the customer against the bank or an institution, then they refuse to divulge the true statement of account stating that it will be produced in court. This gives ample scope for manipulation.

Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the installments instead of taking resort to strong-arm tactics. (Manager, ICICI Bank Ltd. V. Prakash Kaur & Ors.; 2007 (2) Supreme 422)

Civil Procedure Code

◆ Jurisdiction - Determination of jurisdiction of Courts – Voidable documents cannot be ignored by the Revenue or Consolidation Courts.

It is settled position of law that voidable documents cannot be ignored by Revenue or Consolidation Courts. There is some controversy regarding jurisdiction in respect of void documents. However, in case of voidable document there is absolutely no controversy. Suit for cancellation of voidable document (voidable according to the pliant allegations) is maintainable only and only in Civil Court, as such a document requires specific order of setting aside and without that it cannot be ignored by any Court including Revenue

Courts or Consolidation Courts. (Abdul Qayyum v. IInd Addl. Distt. Judge, Meerut and Others; (2007 (102) RD 304)

◆ Jurisdiction – A suit-involving question of declaration of right in agricultural land is maintainable in Revenue Court.

If sale deed executed by a person is challenged by another person on the ground that even though immediately before the sale-deed only the name of vendor/vendors was undisputedly recorded in the revenue records, still plaintiff had a right in the said land, then such suit is not maintainable before Civil Court, as it primarily involves question of declaration of right in the agricultural land. In such situation it is not actually the sale-deed and state of affairs coming in existence by execution of the sale-deed, which is being challenged. The challenge in such situation in real sense is to the position and affairs in existence immediately before the execution of the sale-deed. If a person asserts that apart from the recorded tenure-holder he also got a right in the agricultural land then his only remedy lies in filing a suit for declaration before the Revenue Court. (Jairam Singh and Another v. 1st Addl. District Judge, Bijnor and Others; (2007 (102) RD 332)

◆ Jurisdiction – Objection as to – Not raised before the executing court, cannot be raised for first time in the writ jurisdiction.

In the opinion of the Court, the third submission raised by the learned Counsel for the petitioners is also misconceived and could not be urged in a writ jurisdiction for the first time, in the absence of not raising it before the executing Curt. A point of jurisdiction indicating that the decree is a nullity could be raised for the first time in a writ jurisdiction. The question whether the judgment-debtors had perfected their right during the execution proceedings and, on that basis, the decree became inexecutable would not, in my opinion, make the decree a nullity nor would it give a liberty to the judgment debtors to raise this ground for the first time in a writ jurisdiction. Consideration on this aspect of it is based on certain factual foundation and therefore, such a ground could only be raised, at the initial stage, before the execution Court. This Court therefore holds that since the decree was not a nullity and that there was no inherent lack of jurisdiction, consequently, such a plea could not be raised for the first time in a writ jurisdiction. (Majid and Others v. Rahmat Ullah; (2007 (102) RD 235)

◆ Permanent injunction – Relief of permanent injunction to be granted only to a person who has one or the other vested right and title in the property over which injunction is sought.

A relief of permanent injunction has to be granted only to a person who has one or the other vested right and title in the property over which injunction is sought. Since the plaintiff does not have any settled title in the property, this relief only in view of the aforesaid provisions of section 53-A of the Transfer of Properties Act, could not be recognized by the Court for grant of permanent injunction. In a way the grant of such relief by the Court is recognition of the perfect title of the plaintiff in the property and in case that right is not possessed by, such plaintiff, the relief of the nature would never be granted. No doubt, the plaintiff does not have a perfect title in the property. He just cannot be granted a relief of permanent injunction. Therefore, the Courts below appear to be wholly justified in refusing that relief also to the plaintiff-appellant and this Court in second appeal would be loath to interfere against the same and grant such relief of permanent injunction in favour of the appellant. (Munna Lal v. Kaishav Prasad Dass and Another; (2007 (102) RD 364)

◆ Practice and procedure – Parties should not suffer for default of Advocate.

The Apex Court observed that the disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their Advocates, the obligation of the parties is to select his Advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. It was further observed by the Apex Court that what is the fault of the parties who having done everything in his power and expected of him would suffer because of the default of his Advocate. The Apex Court further observed that the problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate, omission or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented

himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen Advocate defaulted. In that case, the Apex Court awarded cost recoverable from the Advocate. (Smt. Motha v. Harpal Singh and Others; 2007 (102) RD 15)

◆ S. 11 – Applicability of the principle of Res-judicata – Does not apply unless the case is adjudicated on merit.

> Whether judgment and order passed by Hon'ble Apex Court in S.L.P. and contempt petition filed by the petitioner would operate as res-judicata between the parties and subsequent action of the respondent would be barred thereby? In this connection the submission of the learned counsel for the petitioner is that judgment and order passed by Hon'ble Apex Court has attained finality between the parties and same cannot be reopened for further scrutiny as the same is barred by principle of res-judicata between the parties. In support of said submission, he has also placed reliance upon the decision of Hon'ble Apex Court rendered in Supreme Court *Employees Welfare Association v. Union of India and others; AIR 1990 SC 334* and the *Direct Recruitment Class II Engineering Officer's Association and Others v. State of Maharashtra and Others; AIR 1990 SC 1607*.

In this connection it is necessary to examine the tenor of the aforesaid judgment and order passed by the Hon'ble Apex Court on 29.7.1985 incase of the petitioner. A bare perusal of which it is clear that Hon'ble Apex Court did not pronounce its verdict on the issue of actual caste of the petitioner by adjudicating the merit of the same rather only direction has been given to the Collector, Varanasi to determine the actual caste of the petitioner by holding fresh inquiry and by affording opportunity of hearing to the petitioner. Till such inquiry is concluded the petitioner was permitted to continue on the post of Asstt. Engineer from which he was reverted at moment but with regard to further continuance it was left to be dependent on the result of such inquiry to be held by the Collector.

In view of these facts and circumstances of the case, it cannot be held that by this judgment and order the Hon'ble Apex Court has adjudicated the case of petitioner on merit, so far as issue relating to his actual caste is concern, therefore, we are of the considered opinion that in both the decisions Hon'ble Apex Court has never adjudicated the issue of actual caste of petitioner on merit by own self nor any other Court or tribunal has adjudicated such claim of the petitioner on merits nor any such report of any administrative functionary has been made part and parcel of the decision of Hon'ble Apex Court, therefore the question of applicability of principle of res-judicata, on account of attainment of alleged finality of

adjudication by administrative authorities does not arise. **(Shiv Punjan Prasad v. State of U.P.; 2007 (1) ALJ 14 (DB)**

◆ **S. 11 & Consolidation of Holdings Act, Sec. 20 – Chak allotment – General Principles of res-judicata would apply to consolidation proceeding.**

While the general principles of res-judicata apply to consolidation proceedings and a finding given by the competent civil or revenue Court is binding upon the consolidation Courts but it is well settled that the Code of Civil Procedure is not applicable to consolidation proceedings and technical rules of the Code of Civil Procedure do not apply more so in chak allotment. **(Ranvir Singh v. Joint Director of Consolidation, Meerut and others; 2007 (102) RD 42)**

◆ S. 24 – Transfer of Cases – Transferee Court acquires territorial jurisdiction for trial and hearing of transferred case.

Every Court functioning in the State or in the district does not have power to take cognizance of a particular case the cause of action of which does not fall in the extent of its territorial jurisdiction but by virtue of its general power of transfer, the High Court has jurisdiction to withdraw the case and transfer it for disposal to any subordinate Court competent to try or dispose of the same in any other district of the State. The territorial jurisdiction stands virtually conferred upon that Court by the order of transfer passed under S. 24, CPC. It is therefore, clear that in case the High Court or the Court of District Judge makes an order of transfer under S. 24, CPC the transferee Court acquires jurisdiction for the trial of the case notwithstanding the exclusion of jurisdiction by any other provision of an statute. In the same manner, if the High Court under S. 24, CPC makes an order of the transfer of a particular case pending in a Court, which possesses, territorial jurisdiction for its trial to a Court functioning in another district, in that event also the transferee Court acquires territorial jurisdiction for the trial or hearing of the transferred case. **(Smt. Geeta Srivastava v. A.K. Saxena & Ors.; 2007 (1) ALJ 501)**

◆ S. 35-A – Imposition of cost – Cost to be imposed should be deterrent and exemplary.

The ratio laid down in Salem Advocate Bar Association. (AIR 2005 SC 3353) (supra), this Court in Civil Misc. Writ Petition No. 48752 of 2006 Nizamuddin v. Shakoor Ahmad after considering provisions of Rule 9 of Chapter XXII and Rule 11 of Chapter XXI of the High Court Rules, 1951 and provisions of Sections 34, 35-A and 35-B of the Code of Civil Procedure has held that while awarding interest on a party by non-payment of principal amount or any dues should also be considered by the Court and not only interest but penal interest may also be awarded.

Since it is a frivolous petition, the cost is to be deterrent and exemplary. In the facts and circumstances of the case, it is directed that apart from payment of arrears of rent, the petitioner will also pay cost of Rs. 10,000/-, which shall be deposited by her before the District Judge, Banda within two months from today. The arrears of rent as well as the cost so deposited can be withdrawn by the respondent-landlord without furnishing any security within two months from the date of deposit. In case the petitioner fails to make payment of the aforesaid amount, the same shall be recoverable as arrears of land revenue. **(Smt. Kiran Agrawal v. Hari Mohan Gupta; 2007 (1) ALJ 481)**

◆ **S. 47 – Execution of decree – Property in execution already sold – Any compromise in decree thereafter would be meaningless.**

As far as the question of compromise in between petitioners and Sharda Devi is concerned the said order was passed on 7.1.1976 and through the said order it was noticed that compromise decree had been satisfied in full and final satisfaction. Suit had already been decreed and property in execution had already been sold hence the said compromise was meaningless and it was rightly set aside by both the Courts below. Even if decree is set aside in appeal still auction sale, which has already taken place in execution, is not affected unless auction purchaser is decree-holder. **(Smt. Jannat wed/o Sri Alimuddin & Ors. V. VII Additional District Judge, Agra & Ors.; 2007(1) ALJ 707)**

◆ **S. 80 – Suit against Government – Notice can be dispensed with only in urgent matters where immediate relief is to be granted – Before granting the urgent relief government should be given opportunity to show cause.**

Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the Court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the Court. Leave of the Court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A rest5riction on the exercise of power by the Court has been imposed, namely, the Court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit.

Having regard to the legislative intent noticed above, it needs little emphasis that the power conferred in the Court under sub-section (2) is to avoid genuine hardship and is, therefore, coupled with a duty to grant leave to institute a suit without complying with the requirements of sub-section (1) thereof, bearing in mind only the urgency of the relief prayed for and not the merits of the case. More so, when want of notice under sub-section (1) is also made good by providing that even in urgent matters relief under this provision shall not be granted without giving a reasonable opportunity to the Government or a public officer to show cause in respect of the relief prayed for. The provision also mandates that if the Court is of the opinion that no urgent or immediate relief deserves to be granted it should return the plaint for presentation after complying with the requirements contemplated in sub-section (1). **(State of A.P. v. M/s. Pioneer Builders, A.P.; AIR 2007 SC 113)**

◆ S. 80 – Plea of want of notice – Would be deemed to have been waived if not raised in written statement or additional written statement.

The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80, CPC the State had not raised such a plea in the written statement or additional written statement filed in the suit, and therefore, deemed to have waived the objection. It goes without saying

that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here. **(State of A.P. v. M/s. Pioneer Builders, A.P.; AIR 2007 SC 113)**

◈ S. 80 – U. P. Panchayat Raj Act S. 106 – Plea of want of notice – Can only be raised by party for whose benefit provision of giving notice is meant and not by a third party.

The purpose behind the mandate to give notice before insisting the suit or legal proceeding is that authority/officer may know claim against him so that to cut short the litigation he may get it solved, it is possible. Thus as this provision is to benefit some body, on the principles that it is for that party who can be beneficiary of any legislation is to raise that objection or not for getting its benefit, no third party can be said to be entitled to take its advantage as the provision of giving notice is never intended for his/their benefit. It is for this reason it can be safely said that party to whom no notice under S. 80 CPC and the notice U/s. 106 of the U.P. Panchayat Raj Act, 1947 is required to be given may not be entitled to take plea of want of notice. Thus, the plea of want of notice can only be raised by party for whose benefit provision of giving notice is meant and not by a third party and thus the election petition is not to be dismissed for want of notice U/s. 80 CPC and S. 106 of the U.P. Panchayat Raj Act. **(Shiv Rani v. District Judge, Mainpuri & Ors.; 2007 (2) ALJ 53)**

◈ S. 100 – Second Appeal – Decision of – Without framing substantial question of law would be contrary to the mandate of S. 100 CPC

The Apex Court in the case of *Gian Dass,* referred to above, have explained the provisions of section 100 and has held that decision of second appeal without framing substantial question of law is clearly contrary to the mandate of section 100. In this view of the matter without going into any other argument, the order of Board of Revenue is set aside and is hereby quashed. (Lakshman and Another v., State of U.P. and Others; 2007 (102) RD 82)

◈ **S. 151 & O. 39 – Court can grant temporary injunction even U/s. 151 in circumstances which are not covered under Order 39 – However, the power must be exercised only in exceptional cases.**

A bare perusal of Section 151 of the Code of Civil Procedure, it cannot be said to be in dispute that Section 151 confers wide powers on the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The power of Section 151 to pass order of injunction in the form of restoration of possession of the code is not res integra now.

At the same time, it is also well settled that when parties violate order of injunction or stay order or act in violation of the said order the Court can, by exercising its inherent power, put back the parties in the same position as they stood prior to issuance of the injunction order or give appropriate direction to the police authority to render aid to the aggrieved parties for the due and proper implementation of the orders passed in the suit and also order police protection for implementation of such order.

It is also well settled that when in the event of utter violation of the injunction order, the party forcibly dispossesses the other, the Court can order restoration of possession to the party wronged. **(Meera Chauhan v. Harsh Bishnoi & Anr.; 2007 (2) Supreme 772)**

Order 1, Rule 1,3A, 4, 5 & 9 and Order 7, Rule 11 – Mis-joinder of parties and causes of action – Decree not to be reversed on these grounds unless there is non-joinder of necessary party. A suit bad for misjoinder of parties or causes of action is not a suit barred by law.

It is well understood that procedure is the handmaid of justice and not its mistress. The Scheme of Order 1 and Order 2 clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. That the Code considers objections regarding the frame of suit or joinder of parties only as procedural, is further clear from Section 99 of the Code which specifically provides that no decree shall be reversed in appeal on account of any misjoinder of parties of causes of action or non-joinder of parties unless a Court finds that the non-joinder is of a necessary party.

Thus, when one considers Order 7 Rule 11 of the Code with particular reference to Clause (d), it is difficult to say that a suit which is bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by any law. A procedural objection to the impleading of parties or to

the joinder of causes of action or the frame of the suit, could be successfully urged only as a procedural objection which may enable the Court either to permit the continuance of the suit as it is or to direct the plaintiff or plaintiffs to elect to proceed with a part of the suit or even to try the causes of action joined in the suit as separate suits. **(Prem Lata Nahata & Anr. V. Chandi Prasad Sikaria; 2007 (2) Supreme 1)**

◆ **Order 6, Rule 17 – Mere vagueness in statements or absence of statements of material facts in pleadings – Cannot justify striking out pleadings.**

Mere vagueness in the statements or absence of statements of material facts in the pleadings cannot justify striking out the pleadings, under this Rule as held by this Court in the case of *Amrish v. Mahabir Singh Rana and others; 1987 ALJ 1137.* **(Radha Raman Pandey v. Jagat Mohan; 2007 (1) ALJ 278)**

◆ **Order 6, Rule 17 – Proviso added to O. 6 R. 17 by Code of Civil Procedure (Amendment) Act, 2002, which came into force on 1.7.2002, would not apply to suits instituted prior to that date.**

The short question, which arises for consideration, is as to whether the proviso appended to Order 6 Rule 17 of the Code is applicable in the instant case.

Order 6 Rule 17 of the Code reads thus:

> "The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The proviso appended thereto was added by the Code of Civil Procedure (Amendment) Act, 2002, which came into force with effect from 1.7.2002. It reads as under:

> "Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Section 16(2) of the amending Act of 2002 reads as under:

> "16. (2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897:-
>
> (a) * * *
>
> (b) the provisions of Rules 5, 15, 17 and 18 of O. 6 of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act."

In view of the said provision there cannot be any doubt whatsoever that the suit having been filed in the year 1998, PROVISO TO order 6 Rule 17 of the Code shall not apply.

The High Court relied upon the said proviso and opined that having regard thereto the plaintiff was obligated to establish that in spite of due diligence it could not have raised the matter before the commencement of the trial of the suit. The High Court evidently committed an illegality in relying upon the said proviso. **(State Bank of Hyderabad v. Town Municipal Council; ((2007) 1 SCC 765)**

◈ O. 7, R. 7 – Appeal is a continuation of suit – Appellate Court, in view of O. 7, R. 7 of CPC, may take into consideration subsequent events and mould the relief accordingly.

An appeal is in continuation of the suit. The Appellate Court in view of Order VII, Rule 7 of the Code of Civil Procedure may take into consideration subsequent events with a view to mould the relief. The High Court, therefore, could not be said to have acted illegally and wholly without jurisdiction in passing the impugned judgment. (M/s. Bay Berry Apartments Pvt. Ltd. And Another v. Shobha and Ors.; 2007 (102) RD 91)

◆ **Order 9, Rule 13 – Terms to be put on defendant for setting aside ex-parte decree should not be unreasonable and harsh.**

In *Vijay Kumar Madan & Ors. V. R.N. Gupta Technical Education Society & Ors. [(2002) 5 SCC 30]***,** this Court deprecated the practice of imposing an undue condition and putting the defendant on onerous terms, stating:

"Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "upon such terms as the court directs as to costs or otherwise". It is settled with the decision of this Court in *Arjun Singh v. Mohindra Kumar* that on an adjourned hearing, in spite of the court having pro-hearing, in spite of the court having proceeded ex-parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex-parte so as to convert the ex-parte hearings into ex-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of *Arjun Singh* the purpose of Rule 7 in its essence is to ensure the orderly, conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation."

However, the interpretation of the expression "payment into Court" did not directly fall for consideration in those cases.

Order IX, Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex-parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when

the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs. 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case. **(Tea Auction Ltd. V. Grace Hill Tea Industry; AIR 2007 SC 67)**

◈ O. 14 – Framing of Issues – Presence of parties is not necessary on the date fixed for.

Order 14 of CPC, pertains to framing of issues. According to the said provision issues arise when material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by other shall form the subject of a distinct issue.

As would appear from the perusal of Order 14 as well as the provision laid down in the aforesaid decision, the issues are framed on the basis of the pleadings of the parties, upon which the parties so suggest. Presence of parties is not necessary on the date fixed for framing of issues. Even if the parties are absent the issues can be framed and nothing precludes the Court from doing so. Mere fact that the parties are not present the Court cannot direct ex parte proceedings. (Smt. Kaushalaya Devi v. Addl. Distt. Judge, Saharanpur and Others; 2007 (102) RD 156)

◈ **Order 17, Rule 1 – Restrictions on grant of adjournment – Provisions of O. 17, Rule 1 are not mandatory in nature.**

The provisions of Order 17, Rule 1 of the CPC is not mandatory in nature. The Court on sufficient cause being shown and for sufficient reasons to be recorded could allow the adjournment on payment of cost. **(Pappu v. State of U.P.; 2007 (1) ALJ 126)**

◆ O. 21 – Execution proceedings – Compromise after sale of the property would be meaningless.

As far as the question of compromise in between petitioners and Sharda Devi is concerned the said order was passed on 7.1.1976 and through the said order it was noticed that through compromise decree had been satisfied in full and final satisfaction. Suit had already been decreed and property in execution had already been sold hence the said compromise was meaningless and it was rightly set-aside by both the Courts below. Even if decree is set-aside in appeal still auction sale which has already taken place in execution is not affected unless auction purchaser is decree holder. (Smt. Jannat and Others v. VIIth Addl. District Judge, Agra and Others; (2007 (102) RD 167)

◆ O. 21 R. 66(2) – Sale consideration – Mere inadequacy not a valid ground to set aside auction sale**.**

The Appellate Court held that the Trial Court itself had held that the market value of the land in dispute at the time of auction was about 7 or 8 times of the value for which it was sold, hence sale was liable to be set aside on this ground alone. With this finding I am unable to agree. Mere inadequacy of sale consideration is not a valid ground to set aside auction sale unless the consideration is so inadequate that it shocks the conscience of the Court. (Viswanath Prasad Bajpai (Dead) and Another; (2007 (102) RD 317)

◆ O. 21, R. 90 – Setting aside of auction sale – If no reliable material brought on record to suggest that price fetched in auction was highly inadequate – Sale not liable to be set aside.

Even if it was assumed that there was irregularity it did not result in any substantial injury to the judgment debtor. The argument that due to irregularity less price was fetched was rejected on the ground that no material was brought before the Court in respect of the said plea (Para

16). In the instant case also no reliable material was brought on record to suggest that the price fetched in the auction was highly inadequate.

Accordingly, in my opinion there was no irregularity or illegality in conducting the sale. Even if it is assumed that there was any illegality it did not result in any substantial injury to the judgment debtor.

Accordingly impugned order is liable to be set aside. **(Smt. Shanti Devi & Ors. V. Munsif, Mahaban Mathura & Ors.; 2007 (1) ALJ 566)**

◈ O. 21 R. 97 – Execution of decree – physical presence of decree holder or his counsel is not necessary.

If the execution application preferred before the Court along with a copy of the decree, is found to be valid and all the steps required for further proceeding in the executing case are complete on the record, the Court has no option but to proceed in accordance with law. It is not necessary that the physical presence of the decree-holder or his Counsel should be there before the Court while passing each and every order in that case. The Court is duty bound to proceed in the execution matter if the decree is valid and the steps required under law are complete. Therefore, to say that the Court is proceedings in the execution case without physical presence of the decree holder or his Counsel, it is not such a circumstance, which can make the Court to draw a presumption of bias or prejudice against the presiding officer of the executing the Court. (Roop Chand Jain v. Smt. Pushpa Devi Jain and Another; (2007 (102) RD 315)

◈ **Order 21, Rule 99 – Setting aside of auction sale – Mere inadequacy of sale consideration is not a valid ground to set aside auction sale unless inadequacy shocks the conscience.**

The Appellate Court held that the trial Court itself had held that the market value of the land in dispute at the time of auction was about 7 or 8 times of the value for which it was sold, hence sale was liable to be set aside on this ground alone. Mere inadequacy of sale consideration is not a valid ground to set aside auction sale unless the consideration is so inadequate that it shocks the conscience of the Court. **(Viswanath Prasad Bajpai v. Vth Additional District Judge, Deoria; 2007 (1) ALJ 295)**

◆ **Order 32, Rule 15 – Suit by person of unsound mind – Petitioner after death of her husband who was of unsound mind cannot be permitted to sign a plaint of suit, which was filed by her husband.**

The Courts below have found from the application of the petitioner that her husband was of unsound mind from about 4 to 5 years prior to the institution of the suit. It is settled law that suit by a person of unsound mind is not maintainable. If the suit itself is not maintainable having been filed by a person of unsound mind, the petitioner, after death of her husband cannot be permitted to sign on the plaint of the suit, which was filed by her husband. If she has any cause of action, she may file fresh suit as directed by the Courts below but cannot be permitted to sign on the plaint which was filed by her late husband who was incapable to file suit. It is wholly incorrect to say that filing of fresh suit, as directed by the Courts below, would result in multiplicity of proceedings. **(Kaneeza Khatoon v. Shobarati; 2007 (1) ALJ 137)**

◆ O. 39 R. 1 & 2 – Temporary Injunction – Can be granted where it appears prima facie that the property is in danger of being damaged or being alienated by any party to the suit.

A temporary injunction could be granted where it appears prima-facie, that the property was in danger of being damaged or being alienated by any party to the suit. In the present case, the plaintiff was being threatened of its possession and if the earth was removed, the land would be wasted and damaged which will cause irreparable loss. Therefore, the plaintiff had not only made out a prima-facie case, but the balance of convenience and irreparable loss was also in their favour. Since, all the three ingredients were present, the Appellate Curt was justified in issuing a temporary injunction in favour of the plaintiffs. The appellate order does not suffer from any error of law. (Mohammed Akram Husain and Another v. Baijnath and Another; (2007 (102) RD 360)

◆ **Order 47, Rule 1(c) – Scope of Review Petition.**

As regards the scope of a review petition the Court can interfere into a judgment and order passed by it only when it is found from discovery of a new and important matter or evidence which, after exercise of due diligence, was not available at the time when the order was passed or on

account of some mistake or error apparent on the face of record. The Court would not be obliged to review any order or decree on the ground as taken by the revisionist in the present case. The simple ground which has been taken by the petitioners and as submitted by them also for grant of the review is that they could not make the deposit as required under Order 15, Rule 5, CPC, because of the fact that the counsel did not advice them for the same. This is no ground which can be said to be coming within the ambit of the grounds as enumerated under Order XLVII, Rule 1(c) of the Code of Civil Procedure. There is absolutely no mistake or error apparent on the face of the record nor there is any discovery of new matter or evidence which can impel the Court to reverse its decision given earlier. Therefore, since the aforesaid ground does not cover the scope of review as enumerated in the aforesaid Order XLVII, the Court below has rejected the review petition. **(Ramesh Kumar v. Addl. Distt. Magistrate (Civil Supplies); 2007 (1) ALJ 370)**

◆ O. 47, R. 27 – Admission of additional evidence – Cannot be challenged in appeal if admitted with consent of counsel of both parties.

> The provision of Order XLI Rule 27 is not intended to allow an unsuccessful litigant to patch up weak parts of his case and fill in lacunae in appellate Court. There is no such situation in the present case. This case law also lays down that under Rule 27(1) (b) additional evidence can be admitted if the appellate Court requires it to enable it to pronounce the judgment. In the present case there was a similar situation and the lower appellate Court has also mentioned about it in the judgment itself. Moreover, this exercise was undertaken on the basis of the consent of both the parties.

The appellant could not show that the matter has to be essentially remanded to the trial Court for deciding afresh whenever additional evidence is admitted on record. **(Narsingh Pal Singh v. Smt. Sharda Devi; 2007 (1) ALJ 667)**

Constitution of India

◆ Art. 14 & 226 – Even contractual matters are not beyond the realm of judicial review.

It is trite that if an action on the part of the State is violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the Court's scrutiny would be more intrusive, in the latter the Court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the Government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter. **(Noble Resources Ltd. V. State of Orissa & Anr.; AIR 2007 SC 119)**

◆ **Art. 19(1)(f) and 31 (since omitted by forty-forth Amendment Act, 1978), 300-A and 226 – Deletion of Article 19(1)(f), 31 – Effect of – Person who deprived of his right to property without authority of law can protect his right by approaching High Court U/A 226, notwithstanding deletion of Arts. 19(1)(f) and 31.**

Even though the right to acquire and hold property has ceased to be Fundamental right, it cannot be said that right to hold the property has ceased to be a legal right. In fact, such a right has been recognized as a 'constitutional right' under Art. 300A. If any person's property is taken away by the Executive without authority of law, such person would be entitled to legal relief on the ground that such action is in contravention of Art. 300A. However, since such right has been brought outside the purview of Fundamental Rights, the aggrieved person may not have any right to move the Supreme Court under Art. 32 for violation of Art. 300A and his remedy would be under Article 226 or by a Civil Suit, depending upon the facts and circumstances.

Therefore, notwithstanding the deletion of Art. 19(1)(f) and Art. 31, in case where a person is deprived of his property without authority of law, such person can protect the right recognized under Art. 300-A by approaching High Court under Art. 226, within the known parameters of jurisdiction under Art. 226. (P.P.M. Thangaiah Nadar Firm & Ors. V. Govt. of Tamil Nadu & Ors.; 2007 (1) ALJ 527)

◈ Article 21 & 22 – National Securities Act, S. 16 – Illegal detention under preventive detention law – Claim for compensation or damages not maintainable.

The case of police atrocities and illegal police custody cannot be equated with the preventive detention under Special Act. Broadly speaking, if any atrocity is committed on the person of the accused while he is in police custody. Articles 21 and 22 of the Constitution of India would be applicable, but that analogy cannot be imported when a person is detained under preventive Act and no atrocity is shown to have been heaped upon the detenu. So far as the National Security Act is concerned, reference should also be profitably made to Section 16 which provides that no suit or other legal proceedings shall lie against Central Government or State Government and no suit, prosecution or illegal proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

While dealing with the question of compensation, that Courts may award compensation under Articles 32 and 226 in cases where violation of Article 21 involving custodial death/torture is established or is incontrovertible. But it may not award the same where there is no evidence of custodial torture. The Apex Court held that cases where violation of

Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to those cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, now any mark/scar it may not be prudent to accept claims of human right's violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims. The Courts should, therefore, while zealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable the police to discharge their duties fearlessly and effectively. **(Dharam Pal Yadav v. Superintendent, District Jail, Budaun & Ors.; 2007 (1) ALJ 269 (DB)**

◆ Art. 31(b) & 9th Schedule – After 24.4.1973 (the date when basic feature doctrine was propounded by Supreme Court in Keshvananda Bhati's case) the law included in 9th Schedule would not enjoy absolute immunity from judicial review – Article 31(b) cannot go beyond the limits of amending power as contained in Article 368.

Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be

excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure – rule of law, separation of power – the fact that limited exceptions are made for limited not mean that it is not part of the basic structure.

Every amendment to the Constitution whether it be in the form of amendment of any Article or amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15 etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by the Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of the Parliament.

The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic feature of the Constitution as indicated by the synoptic view of the rights in Part III.

The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will,

with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

In conclusion, we hold that:

(i) **A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.**

(ii) **The majority judgment in *Kesavananda Bharati's* case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.**

(iii) **All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.**

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in *Indira Gandhi's* case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule. This is our answer to the question referred to us vide Order dated 14th September, 1999 in *L.R. Coelho v. State of Tamil Nadu; [(1999) 7 SCC 580]*.

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transaction finalized as a result of the impugned Acts shall not be open to challenge.

(I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu; 2007 (1) Supreme 137)

◆ Art. 105, 122 & 194 – Parliament's power to expel a Member is to be found in Article 105(3) – Scope of judicial review in Parliamentary proceedings is very limited and restricted.

Conscious of the high status of these bodies, the Constitution accorded certain powers, privileges and immunities to the Parliament and State Legislatures and their respective members. For this purpose, specific provisions were included in the Constitution in Articles 105. For the present, it may only be noticed that sub-Article (1) of Article 105 and Article 194 respectively confers on the Members of Parliament and the State Legislatures respectively "freedom of speech" in the Legislature, though "subject to the provisions" of the Constitution and "subject to the rules and orders regulating the procedure" of Parliament or of the Legislatures, as the case may be.

There was virtually a consensus amongst the learned counsel that it lies within the powers and jurisdiction of this Court to examine and determine the extent of power and privileges to find out whether actually power of expulsion is available under Article 105(3) or not.

Whenever Parliament, or for the matter any State legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3) as the case may be, it is the court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions or, to put it simply, if it was such a power or privilege as can be said to have been vested in the House of Commons of the Parliament of United Kingdom as on the date of commencement of the Constitution of India so as to become available to the Indian legislatures. (Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Ors.; 2007 (1) Supreme 245)

◆ Art. 141 – Precedent – Mere direction by Supreme Court without laying down any principle is not precedent.

It is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian considerations, but this

will not operate as a precedent binding on the High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service, this does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. **(Indian Drugs & Pharmaceuticals Ltd. V. Workman, Indian Drugs & Pharmaceuticals Ltd.; 2007 (1) ALJ 505)**

◈ Art. 311 – Civil Services Regulation (1920), Regn. 371-A – Departmental enquiry against retired government servants under CCA Rules – Cannot be conducted.

Departmental enquiry under the CCA rule cannot be conducted against a retired Government servant. Action can be taken against a retired Government servant only in accordance with the relevant rules, which are applicable. In the instant case petitioner was not been dealt with by the relevant rules i.e. Civil Service Regulations (CSR). In this case, no departmental enquiry could have proceeded against the petitioner under the CCA rules as he had already retired on attaining the age of superannuation. The petitioner had ceased to be an active Government servant. The whole exercise by the opposite parties in conducting the enquiry under CCA Rules was illegal, unjust and improper and the consequential order ought not have been passed. **(Prabhat Narain Srivastava v. State of U.P. & Ors.; 2007 (1) ALJ 758)**

◈ Article 311 – Civil Services (Classification, Control & Appeal) Rules, R. 55 – Penalty of withholding one or two or more increments on permanent basis – Is major punishment and it can't be imposed without full-fledged disciplinary enquiry.

Penalty of withholding of one or two or three or more increments of Government employee on permanent basis tantamounts to reduction in rank, as reduction to a lower stage in time scale and as one of the major penalties, therefore, such penalties could not be imposed upon the Government servants governed by Rules of 1930 without holding full-fledged disciplinary inquiry as contemplated by R. 55 of 1930 Rules against such Government servants. Since in the instant case, the petitioner's three increments have been stopped permanently without holding full-fledged disciplinary inquiry against him as contemplated under R. 55 of 1930 Rules rather admittedly aforesaid punishments have been awarded to him merely by following

the procedure prescribed under R. 55-B of 1930 Rules, therefore, the impugned order is per se illegal and cannot be sustained. (Shravan Kumar Purwar v. Inspector General (Registration), U.P., Allahabad & Ors.; 2007 (2) ALJ 119 (DB))

◆ Art. 324 – Powers of returning officer – Returning officer shall not have power to review or recall the said order to disqualifying convict for future period since he becomes functus officio after declaration of result of elections.

Disqualification is by operation of law. In case the appeal of the petitioner is allowed and conviction is set aside, the Returning Officer shall not have a power to review or recall the order impugned herein disqualifying the petitioner for a further period, for the simple reason that the Returning Officer becomes functus officio, after declaration of the result of the election. The statute has not conferred any power of review upon him. **(Angad Yadava v. Election Commission of India & Ors.; 2007 (1) ALJ 562)**

Contempt of Courts Act

◆ **S. 19 – Order merely calling upon a party to show cause as to why matter be not referred for initiation of criminal contempt – An appeal would not be maintainable against such order.**

In the case in hand, the very opening line of the order under appeal says that show cause is to be filed as to why reference be not made for initiation of criminal contempt and thus, it cannot be said to be an order of decision of the Court issued in exercise of its jurisdiction to punish the appellant for contempt.

In the case in hand, it is not the case of the appellant that he has been punished in exercise of the jurisdiction under the Contempt of Courts Act. Therefore, appeal under S. 19 of the Act is not maintainable. **(Smt. Kamal Kumari Singh v. State of U.P. through the Secretary, Secondary Education& Ors.; 2007 (1) ALJ 389 (DB)**

Contract Act

◆ **S. 11 – Competences of party to enter into contract of marriage – Parties were Muslim governed by Shariat Law – Under Muslim Law**

she had no right to enter into contract of marriage on her own free will.

On the basis of the two medical reports produced by respondents it cannot be said that Shabnoor is a major and at the time of her marriage she had attained the age of majority. Contrary to it the case of the father is consistent and more probable. Hence I am of the view that Km. Shabnoor is not major and she had no right to enter into wedlock with Rizwan, respondent No. 4. Her marriage is against the mandate of Muslim law as is spelt out herein before. It is the moral duty of every Muslim to follow the teachings of Islam. She being minor would have been given in marriage only by her father or guardian and she had no right to contract the same on her own free will. She is declared to be a minor. **(Kumari Shabnoor Mohammad Tahseen v. State of U.P. through Chief Secretary (Home), Lucknow & Ors.; 2007 (1) ALJ 183)**

◈ Ss. 17 and 18 – Cancellation of sale-deed – Failure on the part of the plaintiff to rebut the presumption of correctness of registered document by not calling either of the two attesting witnesses of the sale deed – Cancellation of sale deed would still be proper if the allegations of plaintiff is not controverted by the defendant.

It would be in fitness of the things, to mention that the proviso requires the attendance of attesting witnesses in the Court to give his evidence in the cases when the disputed instrument is alleged to be a valid document duly and properly executed between the parties. It does, not impose any burden upon the parties, which dispute the correctness and validity of such document. The plaintiff respondent in the present case actually challenges the validity of the impugned sale deed and he was not obliged under the aforesaid proviso of Section 68 of Indian Evidence Act to produce the attesting witnesses to rebut the correctness of this document in as much as the challenge made by the plaintiff in the pleadings against the sale deed in question, has been left uncontroverted by not filing some counter pleading. Actually law is very clear on this point that if there is certain pleadings made by one party and the same is not controverted or disputed in the pleadings of the other party, the fact asserted in that pleadings should be taken to be correct and no proof for the same is required to be produced in the Court. In the present case the plaintiff in-spite of the fact that his pleadings had been left unchallenged from the side

of the defendant, did also file the evidence through an affidavit in support of his case and that has been rightly found to be sufficient by the lower appellate Court to prove his case. **(Markande v. Sudama Chaubey; 2007 (1) ALJ 556)**

Co-operative Societies Act

◆ S. 117 – Issuance of notice in writing to Registrar of Cooperative Society is mandatory in order bringing suit against cooperative society.

A perusal of Section 117 of the Cooperative Societies Act makes it more than obvious that its requirements are mandatory for the plaintiff and notice to the defendant Society through the Registrar of Co-operative Society is a must before a suit against it is filed.

The aforesaid provision requires the plaintiff that before he goes in a suit and present his claim in a Court in respect of a dispute relating to an act involving constitution management or business of the society, prior notice of two months must be given by the plaintiff by delivering it to the Registrar which should specifically state the cause of action, name, description of place of residence of the plaintiff and the relief which he claims and the plaint shall also contain statement that such notice has been so delivered or left with the Registrar. Admittedly, in the present case no such notice has been given. There is also no statement of such fact contained in the pleadings of the plaint. The requirement of such notice as per the aforesaid language of the Section, appears to be mandatory and it cannot be said that it is just directory in the nature as has been submitted by the learned counsel for the appellant. Therefore, if for want of such notice the Courts below have found the suit as barred for cognizance. (Ram Shanker v. State of U.P. & Ors.; 2007 (2)ALJ 35)

Court Fee Act

◆ **S. 12, 6-A, 7 (iv-A) and Sch. 2 Art. 17(iii) – Decision on question**

relating to valuation – Is not a decision on question relating to

valuation but on question relating to basis or mode of computation of Court-fees.

A decision on the question whether the suit falls under Section 7(iv-A) or Article 17(iii) of Schedule II of the Court-fees Act is not a decision on a question relating to the valuation but on a question relating to the basis or the mode of computation of the Court-fee. Keeping this in mind, the Supreme Court in Nemi Chand case (AIR 1953 SC 28) (supra) held that the finality declared by Section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls.

The order of the Civil Judge is an order which is appealable under Section 6-A of the Act. The question as to whether the Court-fee payable should be under Section 7(iv-A) or under Article 17(iii) of Schedule II of the Court-fees Act can be questioned by the plaintiff by filing an appeal under Section 6-A of the Court-fees Act. **(Smt. Shail Agrawal v. State of U.P. & Ors.; AIR 2007 All 55)**

◆ S. 12 – S. 12 of Court Fee Act only attaches finality to the question of valuation and not to the category under which the suit falls.

It is clear that section 12 of the Court Fees Act is not applicable in the present case. In the present case, the Civil Judge held that the Court fee is payable under section 7 (iv-A) of the Court Fees Act and that Article 17 (iii) of Schedule-II of the Court Fees Act has no application. A decision on the question whether the suit falls under section 7(iv-A) or Article 17(iii) of Schedule-II of the Court Fees Act is not a decision on a question relating to the valuation but on a question relating to the basis or the mode of computation of the Court fee.

Keeping this in mind, the Supreme Court in *Nemi Chand* case (supra) held that the finality declared by section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls. (Smt. Shail Agarwal v. State of U.P.; 2007 (102) RD 9)

Criminal Procedure Code

◈ S. 31 – Sentence in cases of conviction for several offences at one trial – Accused can't be sentenced to imprisonment for period longer than 14 years.

We, although, appreciate the anxiety on the part of the learned Sessions Judge as also the learned Judge of the High Court not to deal with such a matter leniently, but, unfortunately, it appears that the attention of the learned Judges was not drawn to the provision contained in Section 31 of the Criminal Procedure Code. The said provision reads thus:

"31. Sentence in cases of conviction of several offences at one trial. – (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:"

Provisos appended the said Section clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years.

Learned Sessions Judge as also the High Court, in our opinion, thus, committed a serious illegality in passing the impugned judgment.

In *Kamalanantha & Ors. v. State of T.N. [(2005) 5 SCC 194],* this Court, although, held that even the life imprisonment can be subject to consecutive sentence, but it was observed:

"Regarding the sentence, the trial court resorted to Section 31 Cr.P.C. and ordered the sentence to run consecutively, subject to proviso (a) of the said section."

Although, the power of the Court to impose consecutive sentence under Section 31 of the Criminal Procedure Code was also noticed by a Constitution Bench of this Court in *K. Prabhakaran vs. P. Jayarajan [(2005) 1 SCC 754],* but, therein the question of construing proviso appended thereto did not and could not have fallen for consideration.

The question, however, came up for consideration in *Zulfiwar Ali & Anr. vs. State of U.P. [)1986) All L.J. 1177],* wherein it was held:

"The opening words "In the case of consecutive sentences" in sub-s. 31(2) make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. After providing that in such a case if an aggregate of punishment for several offences is found to be in excess of punishment which the court is competent to inflict on a conviction of single offence, it shall not be necessary for the court to send the offender for trial before a higher court. After making such a provision, proviso (a) is added to this sub-section to limit the aggregate of sentences which such a court pass while making the sentences consecutive. That is this proviso has provided that in no case the aggregate of consecutive sentences passed against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above proviso. It is accordingly not liable to be sustained."

In view of the proviso appended to Section 31of the Criminal Procedure Code, we are of the opinion that the High Court committed a manifest error in sentencing the appellant for 20 years' Rigorous imprisonment. The maximum sentence imposable being 14 years and having regard to the fact that the appellant is in custody for more than 12 years. Now, we are of the opinion that interest of justice would be sub served if the appellant is directed to be sentenced to the period already undergone. (Chatar Singh v. State of M.P.; 2007 Cri.L.J. 796(SC))

◈ S. 36 – Role of Public Prosecutors in filing charge sheet – Public Prosecutor is not involved in investigation – It is not the scheme of Cr.P.C. for supporting any combined operation between IO and Public Prosecutor for filing the report in Court.

There is a clear-cut and well-demarcated sphere of activities in the field of crime detection and crime punishment. Investigation of an offence is the field reserved for the executive through the Police Department, the superintendence over which vests in the State Government. The executive is charged with a duty to maintain vigilance over the law and order situation. It is obliged to prevent crime. If an offence is committed allegedly, it is the State's duty to investigate into the offence and bring the offender to book. Once it investigates through the Police Department and finds an offence having been committed, it is its duty to collect evidence for the purposes of proving the offence. Once that is completed, the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 Cr.P.C. and his duty comes to an end.

Under Cr.P.C., investigation consists of proceeding to the spot, ascertainment of the facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence and formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of Cr.P.C. shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for each one of the above steps is that of the officer in charge of the Police Station. The final step in the investigation, namely, the formation of the opinion as to whether or not there is a case to place the accused on trial is to be of the officer in charge of the police station and this function cannot be delegated and can be performed by no other authority. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer in charge of the police station. There is no provision for delegation of the above function regarding formation of the opinion but only a provision

entitling the superior officers to supervise or participate under Section 36 Cr.P.C.

The importance of the opinion formed by the officer in charge of the police station is seen from the fact that the opinion of the officer in charge of the police station is the basis of the report based on which the competent Magistrate must determine whether to take cognizance or not. Even a competent Magistrate cannot compel the police officer concerned to form a particular opinion. Although the Magistrate may have certain supervisory powers under Cr.P.C., it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet.

There is no stage during which the investigating officer is legally obliged to take the opinion of a Public Prosecutor or any authority, except the superior police officer in the rank as envisaged in Section 36 Cr.P.C. A Public Prosecutor is appointed, as indicated in Section 24 Cr.P.C., for conducting any prosecution, appeal or other proceedings in the court. He has also the power to withdraw any case from the prosecution with the consent of the court. He is the officer of the court. Thus the Public Prosecutor is to deal with a different field in the administration of justice and he is not involved in investigation. It is not the scheme of Cr.P.C. for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing the report in the court.

The term "investigation" under Section 173(2) of the Criminal Procedure Code includes the opinion of the officer in charge of the police station as to whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding for the case to the court concerned or not. This opinion is not legal evidence. At the stage of Section 173(2) the question of interpretation of legal evidence does not arise. In any event, that function is that of the courts. (M.C. Mehta v. Union of India; (2007) 1 SCC (Cri) 264)

◈ S. 156(3) – Order U/s. 156(3) Cr.P.C. is a judicial order but administrative in nature – Accused has no right to challenge an order passed U/s. 156(3) in revision.

"**Thus at the stage of section 156(3) Cr.P.C. a person against whom an application under the said section is filed does not come into the picture at all to participate in the proceedings. It is preposterous even to cogitate that a person has a right to appear before the Magistrate to oppose an application seeking a direction from him for registration and investigation of the offence when he has got no right to participate in the said ex parte proceeding. If permitted this will amount to killing of foetus of investigation in the womb when it was not there at all. Such a power has not been conferred under the law on the prospective accused".**

"Let me point out here that under section 156(3) Cr.P.C. there was no proceeding between the litigating parties and no such proceeding was finalized. No inquiry or trial was held between two parties. Under that section it is only an administrative power which is being exercised by the Magistrate ex parte being superior authority to direct the police to register and investigate the offence. Such an order is pure and simple interlocutory order barred under section 397(2) Cr.P.C. from being revised. Thirdly, the said Division Bench also failed to notice that the word "Proceeding" mentioned under section 397(1) Cr.P.C. does not embraces within it's purview all proceedings even ex parte proceeding in which the other side even does not have the right to participate and to be heard. At the stage of section 156(3) Cr.P.C. the prospective accused cannot be heard at all and once he cannot be heard how can he challenge the said order. The word "Proceeding" under section 397(1) Cr.P.C. means the "Proceedings" which is final in nature and in which both the sides had got a right to be heard whether they have in fact been heard or not. It is because of this reason that recently the Apex Court in the case of *Subarmanivam Sethuraman v. State of Maharastra (2005 (51) ACC 684 (SC)*, has held that even an order of summoning of an accused is not amenable to revisional jurisdiction. The same view was expressed by this Court in the case of *Atul Kumar Mathur and Others v. State of U.P. and Others; 1994 ACC 535.* Thus the accused who does not have a legal right to participate in the proceeding under section 156(3) Cr.P.C. certainly cannot be conferred with the right to challenge the order passed under that section. The Apex Court has held that the accused has got such a right of challenge only after he

has been summoned as an accused in the case by the Trial Court to face the charge after the charge sheet is submitted against him".

"To sum up the discussions made above it is clear that the alleged accused has no right to challenge an order passed under section 156(3) Cr.P.C. at pre-cognizance stage by a Magistrate and no revision lay against such an order at the instance of the alleged accused under section 397(1) Cr.P.C. being barred by section 397(2) Cr.P.C. nor at his instance an application under section 482 Cr.P.C. is maintainable for the simple reason that to secure the ends of justice it is a must that if congnizable offence is disclosed in an application filed by the aggrieved person then his such an application must be investigated to bring culprits to books and not to thwart his attempt to get the FIR registered by rejecting such an application which will not amount to securing the ends of justice but will amount to travesty of it. It is out side the purview of scope of section 397(1) Cr.P.C. to embrace any proceeding which is not final in nature and in which the other side has no right to be heard. Proceeding under section 156(3) Cr.P.C. is not such a proceeding and it is conducted only for a limited purpose of ordering for an investigation by the police, ex-parte, if cognizable offence is disclosed through such an application. The Magistrate under that section is required to scan the application or the complaint only to find out as to whether any congnizable offence is disclosed or not and no further. No doubt, as has been held by me herein before, that the order under section 156(3) Cr.P.C. is a judicial order but it is administrative in nature because of it's placement under chapter XII Cr.P.C. relating to power of the police to investigate a matter" (Chandan v. State of U.P. and Another; (2007 (57) ACC 508)

◆ S. 164 – Judicial Confession – Procedural safeguards contained in S. 164 are not exhaustive – The Court must further probe as to satisfy itself that the confession is truly voluntarily and has not been obtained by inducement or torture.

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession

before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law.

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

Judicial confession must be recorded in strict compliance of the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary (made) and had not been (obtained) by reason of any inducement, threat or torture. (Alok Nath Dutta & Ors. V. State of West Bengal; 2007 (2) Supreme 664)

◈ S. 164 – Judicial Confession – Should not be recorded in routine or mechanical manner – Safeguards provided for accused must be complied with in letter and spirit.

The appellant-accused in rape and murder case had made judicial confession. Cr.P.C. He was convicted on that basis. The appellant was produced from judicial custody at time of recording of confession but he had been in police custody for a period of 16 days. The first confession was recorded in 15 minutes time which included the questions which were

required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat; coercion or undue influence. The Magistrate started recording the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The learned magistrate, therefore, should have allowed some more time to the appellant to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the appellant. The accused was not provided any legal aid. Moreover two inconsistencies appeared in the prosecution case vis-à-vis the confession. The evidence of the brother of the deceased categorically shows that the offence was committed in between 2 a.m. and 4 a.m. The purported confession shows that the offence was committed around 12 O' Clock in the night. The prosecution case proved that not only the complainant but also other family members were sleeping in the same shed, the purport of the confession goes to show that the deceased was sleeping alone in the shed. Apart from the judicial confession there was no other material which can be said to be sufficient to establish the guilt of the accused. The conviction of accused

appellant was therefore liable to be set aside. **(Babubhai Udesinh Parmar v. State of Gujarat; 2007 Cri. L. J. 786)**

◆ **Ss. 178(c) and 406 – Place of inquiry and trial – Continuing offence – Offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed – Wife leaving matrimonial home due to ill-treatment and harassment by in-laws and living with parents – The place of trial and enquiry would be the place where ill-treatment and harassment was done.**

Appellant 1 was married with Respondent 2 and living in matrimonial home at Jabalpur (MP). Appellant 1's father-in-law lodged a complaint with police at Jabalpur alleging ill treatment to Respondent 2 and demand of dowry from her by Appellant 1 and his family members (appellants). Respondent 2 also lodged FIR alleging that her husband and in-laws ill-treated her so much that she had to leave the matrimonial home and to live with her parents at Datia (MP). The question was whether the offence was a continuing one such that CJM at Datia had jurisdiction to take cognizance of the offence. It was held that the offence cannot be said to be continuing one only because complainant Respondent 2 was forced to leave her matrimonial home and stayed with her parents at Datia. High Court erred in taking the view that Respondent 2 having been forced to leave her matrimonial home on account of torture by her in-laws, it amounted to mental cruelty and harassment which continued even at the place of her father at Datia and therefore, the offence may be inquired into and tried also at Datia court. In view of S. 177, which ordains that offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed, the offence in question must be inquired into and tried by court at Jabalpur and not by court at Datia where no part of cause of action arose. **(Manish Ratan v. State of M.P.; (2007) 1 SCC 262)**

S. 190 – Magistrate not bound to take cognizance of offences indicated in Police Report – Application by informant that offences U/s. 406 and 307 IPC also made out – The proper stage to consider such application is the stage of framing of charge.

On the basis of the information given by respondent no. 2 case of alleged commission of offence punishable under Sections 498-A, 323, 504 of the Indian Penal Code, 1860 (in short the 'IPC') read with Sections 3 and 4 of the Dowry Prohibition Act, 1961 (in short 'Dowry Act') was registered. After investigation charge sheet was filed against the appellants. The magistrate took cognizance of the offences and issued summons to the accused persons. The offences are triable by Magistrate, First Class. The informant filed an application before the concerned Magistrate to the effect that on the basis of evidence collected by the investigating officer, cognizance ought to have been taken for offence punishable under Sections 406 and 307 IPC. The magistrate was of the view that after evidence is adduced, commission of the offence punishable under Sections 406 and 307 IPC is made out, then the prayer of the informant could be considered. Respondent no. 2 filed a petition before the High Court stating that the

materials collected by the investigating officer and contained in the case diary itself justified trial under Sections 307 and 406 IPC.

We find that the High Court has unnecessary made certain observations, which lead to contrary conclusions. Having held that the proper stage for consideration is stage of framing charge, there was no necessity for further observations and/or directions. It rightly held that the Magistrate is not bound to take cognizance of the offences indicated in the police report. That being so, the ultimate directions of the High Court materially differ from its earlier conclusions.

The Magistrate has to consider material at the time of framing charge. Needless to say he will pass necessary orders if according to him the case is triable by the Court of Sessions. **(Anuran Rastogi & Ors. V. State of U.P. & Anr.; 2007 (2) Supreme 54)**

Ss. 221, 251 & 364 – Charge framed U/s. 364 IPC – Conviction U/s. 364A not permissible in absence of specific charge.

The propositions of law which can be culled out from the aforementioned judgments are:

(i) The appellant should not suffer any prejudice by reason of misjoinder of charges.

(ii) A conviction for lesser offence is permissible

(iii) It should not result in failure of justice.

(iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges.

The ingredients for commission of offence under Section 364 and 364-A are different. Whereas the intention to kidnap in order that he may be murdered or may be so disposed of as to be put in danger as murder satisfies the requirements of Section 364 of the Indian Penal Code, for obtaining a conviction for commission of an offence under Section 364-A thereof it is necessary to prove that not only such kidnapping or abetment has taken place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel the government of any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom. It was, thus, obligatory on the part of the learned Sessions Judge, Daman to frame a charge, which would answer the description of the offence, envisaged under Section 364-A of the Indian Penal Code. It may be true that the kidnapping was done

with a view to get ransom but the same should have been put to the appellant while framing a charge. The prejudice to the appellant is apparent, as the ingredients of a higher offence had not been put to him while framing any charge. **(Anil @ Raju Namdev Patil v. Administration of Daman & Diu, Daman & Anr.; 2007 (2) Supreme 220)**

◆ Ss. 227, 228 & 240 – No reason need be recorded for framing of charge – However, in case of discharge order it is imperative to record reasons.

The question relating to forming of an opinion at the time of framing of charge is different from a case of recording of reasons on the basis of which an order of discharge of the accused may be passed. The moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge the court is required to form an opinion that there is ground for presuming that the accused has committed the offence. In case of discharge of the accused the use of the expression "reasons" has been inserted in Sections 227, 239 and 245 Cr.P.C. At the stage of framing of charge the expression used is "opinion". The reason is obvious. If the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial. The Judge is required to record reasons only if he decides to discharge the accused. But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge. But where the question of jurisdiction is raised and the trial court is required to adjudicate that issue, it cannot be said that reasons are not to be recorded. In such a case reasons relate to question of jurisdiction and not necessarily to the issue relating to framing of charge. In such a case reasons dealing with a plea relating to jurisdiction have to be recorded. (Lalu Prasad v. State of Bihar; (2007) 1 SCC 49)

◆ **S. 340 – Enquiry for offence U/s. 195**

Section 195(3) broadly divides the Courts into Civil, Revenue or Criminal as also a Tribunal constituted by or under a Central, Provincial or State Act. If a statute constitutes such Tribunal and declares it, to be a Court for the purport of the said Section, Section 195 of the Criminal Procedure Code shall apply. It is, thus, the presiding officers of those forums only, which are specified under sub-section (3) of Section 195 of the Criminal procedure Code, may file a complaint petition in the relation to the offences punishable under the Sections specified in Clause (b) of Sub-section (1) of Section 195 of the Criminal Procedure Code. It is only for that purpose a legal fiction has been created, stating that the Court shall be deemed to be Subordinate to the Court to which appeals ordinarily lie. If an appeal exclusively lies to the High Court, the Court of Land Acquisition Judge shall be subordinate to the High Court and not the Principal Civil Court, although appeal may lie before the latter from the judgments and decrees passed by it in the suits which may be filed before it.

The expression “ordinarily” may mean “normally”. But, the said expression must be understood in the context in which it has been used. “Ordinarily” may not mean “solely” or “in the name”, and thus, if under no circumstance an appeal would lie to the Principal District Judge, the Court

would not be subordinate to it. When in a common parlance the expression "ordinarily" is used, there may be an option. There may be cases where an exception can be made out. It is never used in reference to a case where there is no exception. It never means "primarily".

A Court of Subordinate Judge maybe subordinate to District Judge for administrative purpose. He may be a Court subordinate to it under the Code of Civil procedure. But in relation to a proceeding under the Land Acquisition Act, it would not be. In terms of Section 53 of the Land Acquisition Act, the procedures laid down under the Civil Procedure Code would apply but the same is subject to the exceptions specified therein, viz., save in so far as they may be inconsistent with anything contained therein. Land Acquisition Act is a special statute. The subordination of Courts as specified in S. 3 of Civil Procedure Code, is only for the purpose of the said Code and not for the purpose of a special Act, although the provisions thereof may be applicable to a case arising there under. It is one thing to say that an appeal, depending upon the valuation, would lie before different forums, but if under the provisions of a special statute an appeal shall lie only before the High Court and to no other, the District Court would not be a Court where an appeal would ordinarily lie from a judgment of the Land

Acquisition Judge. Land Acquisition Act being self contained Code; in relation to the matters falling within the purview of the Land Acquisition Act, the civil Court would have no jurisdiction.

The Civil Courts exercise their jurisdiction not only in respect of a suit filed before it, they do so under various special statutes. The hierarchy of the Courts for the purpose of Sec. 195 of the Criminal Procedure Code, therefore, will have to be determined, having regard to the nature of the proceedings and the statutes under which the same is required to be determined. Further, the Act makes a distinction between filing a complaint by a public servant and a Court. Whereas Clause (a) of sub-section (1) of Sec. 195 contemplates administrative subordination, Clause (b) contemplates judicial subordination. Each expression used in the Code, therefore, must be understood upon reading the provisions thereof in their entirety and not in isolation. **(State of A.P. v. V. Sarma Rao; AIR 2007 SC 137)**

◈ **S. 389 – Suspension of execution of sentence in Appeal against conviction – Does not amount to staying the conviction.**

A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against under Section 389 of the Code of Criminal Procedure, 1973. But that again would be of no consequence. A court of appeal is empowered under Section 389 to order that pending an appeal by a convicted person the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond. What is suspended is not the conviction or sentence; it is only the execution of the sentence or order which is suspended. It is suspended and not obliterated.

That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. We see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albelt even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilty. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and

therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction.

Recently this Court in the case of *Ravikant S. Patil v. Sarvabhouma S. Bagali* reported in *[2006 (12) SCALE 295]* has clearly held that the Court has enough power to stay the conviction. It was held as under:-

"It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may, insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special areas on, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to

operate even after stay of conviction. **(Lalsai Khunte v. Nirmal Sinha & Ors.; 2007 (2) Supreme 862)**

Criminal Trial

◆ **Appreciation of Evidence – Falsus in uno falsus in omnibus rule does not apply in India.**

The maxim "falsus in uno falsus in omnibus" has no application in India and the witness or witnesses cannot be branded as liar(s). The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of the rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence, which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of the court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to

be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end.

In a given case, it is always open to a court to differentiate the accused who had been acquitted from those who were convicted where there are a number of accused persons.

The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. An attempt has to be made to separate grain from the chaff, truth from falsehood. Where it

is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. **(Syed Ibrahim v. State of A.P.; (2007) 1 SCC (Cri) 34)**

◈ **Judicial Discipline – Harsh observations and strong language should be avoided against prosecution witness.**

We may, however, advert to one aspect before parting with the matter. While allowing the appeals filed by the accused and in extending benefit of doubt, the High Court was rather harsh in making certain observations and in using strong language against the prosecution witnesses. For instance, the prosecution evidence was not consistent as regards availability of electric light at the place of offence. One may appreciate that in such circumstances, the Court may be on its guard and consider the evidence carefully. The High Court, however, observed that the statements of prosecution witnesses were ‘completely false and incorrect ones’.

In our considered view, the above comment was neither called for nor justified. In view of conflicting statements, the Court may not believe a version against the accused. But it does not necessarily mean that the other version was ‘false’ or ‘incorrect’.

Again, some of the witnesses stated that they heard that the accused were arrested after few days. But the evidence of investigating Officer was that the accused were arrested on December 21/22, 1987. The Court, in the light of the above facts, may not rely on such evidence but to hold that the accused were arrested and were detained but such detention was not shown was not at all justified.

Similarly, the High Court has passed strictures against PW 21 Barkatullah Khan, Additional Munsif and Judicial Magistrate, II. According to the High Court, though the Magistrate had stated that he had taken all steps after the recovery of ornaments and had sent one of the clerks of the Court with a direction to bring similar ornaments from the market without showing those ornaments to prosecution witnesses, the statement of the Magistrate could not be believed. The High Court stated; “How did the Magistrate know that the clerk who had gone with those

ornaments, to fetch similar type of ornaments, did not show those ornaments to either the witnesses or other persons?

In our considered opinion, the above remark was uncalled for, to say the least. There is nothing on record to show that the ornaments were shown to prosecution witnesses or to any other person. Moreover, it will be too much to impute motive either in the Magistrate or in the clerk of the Court without there being anything on record.

It cannot be gainsaid that while dealing with a case on hand, a Court of Law may comment on the conduct of parties or witnesses and may also make necessary observations keeping in view the evidence adduced by them. It is also true that the Judges are flesh and blood mortals with likes and dislikes and normal human traits.

Thomas Reed Powell once said; “Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, and passions. They are warmed by the same winter and summer and by the same ideas as a layman is.”

Justice John Clarke has also stated; “I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, un-adulterated reason. Alas! We are ‘all the common growth of the Mother Earth’ – even those of us who wear the long robe”. (emphasis supplied)

At the same time, however, it cannot be overlooked that judicial restraints and discipline are necessary to orderly administration of justice. One must always keep in view golden advice given by *S.K. Das, J in State of U.P. v. Mohd, Naim, (1964) 2 SCR 363: AIR 1964 SC 703;*

“If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-play and restraint. It is not infrequent that sweeping generalizations defeat the very purpose for which they are made. It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into

consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve." (emphasis supplied)

In the facts and circumstances of the present case, in our considered view, neither the remarks made by the High Court against prosecution witnesses were justified nor the language used was called for. The observations were also not necessary for determining the question in controversy. They are, therefore, ordered to be deleted. **(State of Rajasthan v. Netrapal & Others; 2007 (2) Supreme 654)**

◈ **Re-tracted judicial confession – Court while relying on re-tracted confession must satisfy itself that the same is truthful and trustworthy.**

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the

learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be referable in nature. Such corroboration must be independent and conclusive in nature.

Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to be reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised.

It is now a well-settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession, which stood retracted, should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon.

The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act. **(Aloke Nath Dutta & Ors.; v. State of West Bengal; 2007 (2) Supreme 664)**

Essential Commodities Act

◈ S. 3 – Allotment of dealership of high speed diesel and petrol – Applicant was required to be resident of concerned district – Applicant was

permanent resident of another district hence not entitled to allotment of dealership.

> The advertisement and the eligibility criteria published by the respondent-Corporation clearly mentions that the applicant should be a resident of concerned district and the Residence Certificate that has to be submitted by the applicants should be in the required format. The format clearly shows that the term "ordinarily resident" should have been the same meaning as in Section 20 of Representation of the People Act, 1950.
>
> In the instant case the undisputed fact remains that on the date of interview i.e. 4.11.2003, the respondent No. 5 was Block Pramukh in District Jaunpur. Under the provisions of Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, it is mandatory for a Block Pramukh to be a permanent resident of the territorial area of that block, otherwise he would stand disqualified by virtue of the provisions of Section 13(O) of the Act, 1961. The defence taken by the said respondent that on the date he filled application he was not the Block Pramukh would not tilt the balance in his favour for the reason that mere pendency of an application does not create any legal right in favour of the applicant and the application is to be decided as per the law applicable on the date of decision.

In this view of the matter, and as has also been contained by the Corporation, the application form of Shri Shukla for allotment of dealership was liable to be rejected as he did not satisfy the requirement mentioned in the advertisement and the eligibility criteria published by the Corporation. **(Rashmi Pandey v. Chairman/Managing Director, Hindustan Petroleum Corporation ltd. & ors.; 2007 (1) ALJ 779 (DB))**

◈ S. 6A – Cr. P. C., S. 451 – Confiscation of tanker containing diesel – Confiscation proceedings U/s. 6A of Act were uncalled for – If Diesel not found to be adulterated by Public Analyst and no charge sheet filed under Act for violation of central order – Tanker directed to be released in favour of petitioner/owner.

Admittedly the diesel has not been found to be adulterated by the public analyst. It is also not a case, where charge sheet has been filed under the provisions of E.C. Act for violation of the control order.

The question of applicability of Kerosene Control Order does not arise, as it is a case of diesel and not kerosene. Therefore, finding of the Courts below in respect of Kerosene Control Order is frivolous and useless. It is also noteworthy that no violation of control order could be established, as a consequence no proceedings could be initiated under the provisions of Essential Commodities Act. The proceedings under the provisions of E.C. Act, such as confiscation proceedings under Section 6A of the Act is uncalled for. (Avnish Kumar & Anr. V. State of Uttar Pradesh & Ors.; 2007 (2) 211)

Evidence Act

S. 106 – Evidence of last scene – The burden is on accused to prove what happened thereafter since these facts are especially within the knowledge of accused.

There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provide3s the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

In the instant case the accused was not on cordial terms with his wife. On the evening of February 2, 1998 he was seen in his house with his

wife 9deceased). The house of the respondent was found locked on the 4th, 5th and 6th February, 1998. On February 6, 1998 when his house was opened the dead bodies of his wife and daughters were found, and the medical evidence established that they had been strangulated to death, the cause of death being asphyxia. Since the respondent was not traceable the mother of the deceased became anxious to know about their whereabouts and requested prosecution witnesses to search for them. In the course of investigation the respondent never appeared at any stage, and for the first time he appeared on the scene when he was arrested on February 17, 1998. Even after his arrest he did not offer any explanation as to when he parted company with his wife nor did he offer any exculpatory explanation to discharge the burden under S. 106 of the Evidence Act. These above said incriminating circumstances form a complete chain and are consistent with no other hypothesis except the guilt of the accused respondent. If he was with his wife on the evening of February 3, 1998, he should have explained how and when he parted company and/or offered some plausible explanation exculpating him. The respondent has not pleaded alibi, nor has be given an explanation which may support his innocence. The High Court has ignored important clinching evidence which proved the case of the

prosecution. Therefore the order of acquittal of accused passed by the High Court would be liable to be set aside. **(State of Rajasthan v. Kashi Ram; AIR 2007 SC 144)**

Family Law

◆ Transfer of Property by way of will – Muslim Law does not prohibit a will by Muslim in favour of non-Muslim.

A Mahomedan may appoint a Christian, a Hindu, or any non-Mahomedan to be his executor. Mahomedan law does not prohibit a Will by Mahomedan in favour of non-Mahomedan and that Mahomedan may appoint a person of any other religion to be his executor. The issue No. 8 is decided accordingly. However, it does not help Shri Bhai Lal Shukla, the plaintiff, as the Will is not proved. **(In the matter of: Estate of Late Sri Muslim Siddiqui, Bhai Lal Shukla; 2007 (1) ALJ 567)**

Guardians and Wards Act

◆ S. 30 – Transfer of immovable property of Ward by Guardian – Transfer would be voidable if previous permission of court has not taken.

In the plaint, allegations were that mother of the plaintiff was appointed as guardian by the District Judge. Under S. 29 of Guardians and Wards Act, 1890, a guardian appointed or declared by the Court shall not without the previous permission of the Court, transfer immovable property of his ward. However, under S. 30 of the said Act, it is provided as under:

> **"A disposal of immovable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby."**

Accordingly, if the plaint allegations are proved then sale deeds will be voidable.

In view of the above, it is only the Civil Court, which has got the jurisdiction to try the suits. (Abdul Qayyum v. IInd Additional District Judge, Meerut & Ors.; 2007 (2) ALJ 332)

Hindu Marriage Act

◆ **S. 5 & 11 – Void marriage – Husband had living spouse at time of his marriage with respondent and not sought divorce from her – His marriage with respondent would be null and void.**

In view of Sections 5, 11 and 17 of the Hindu Marriage Act it is abundantly clear that the marriage between the petitioner Manoj Kumar Gupta and Smt. Asha Gupta was null and void because petitioner Manoj Kumar Gupta had a living spouse Teena Gurang to whom he had married just three months prior to the solemnization of marriage with respondent No. 6 Asha Gupta and he had not sought any divorce from her. This was in the breach of condition (i) of Section 5 of Hindu Marriage Act. Once the marriage of Manoj Kumar Gupta, the petitioner, with respondent No. 6 Asha Gupta is null and void, he cannot be considered to be a legally wedded husband of respondent No. 6. A marriage, which is null and void, does not confer any right on any of the spouses as husband and wife. The term 'null and void' means and in essence have got the effect of no marriage at all. The word Avoid literary means 'state of non-existence'. Thus, the marriage of the petitioner with respondent No. 6 never existed in the eyes of law. **(Manoj Kumar Gupta v. State of U.P. & Ors.; 2007 (1) ALJ 339)**

◆ **S. 13 – Dissolution of marriage – Settlement between parties to end their marriage cannot be accepted as a decree or a valid dissolution.**

The present petitioner Shri Vishnu Kumar could not claim the status of a husband because as per the admitted facts, there was no valid divorce between Smt. Geeta Tewari and her first husband. It could not be said by any stretch of imagination that a valid Hindu Marriage can be brought to an end by way of a settlement or compromise between the parties until it has the due sanction of law. Under the Hindu Marriage Act the settlement dated 25.1.2000 cannot be accepted as a decree or a valid dissolution that took place between Geeta Tewari and her husband Shri Ashok Kumar.

The entire claim of the petitioner rests on the document-dated 25.1.2000, which cannot be held to be a valid dissolution of a marriage. **(Vishnu Kumar v. State of U.P. & Ors.; 2007 (1) ALJ 152)**

◆ S. 24, 12 – Application for maintenance pendent lite and litigation expenses – filed during pendency of petition for declaration of marriage as void would be maintainable.

The principle on which S. 24 has been enacted is to provide necessary finances to the needy spouse so that she may be able to maintain herself and contest the case during their pendency of the proceedings. Grant of maintenance U/s. 24 of the Act is not connected with the main proceeding U/s. 12 for declaration of marriage as null and void. The scope of proceedings under S. 12 and 24 of the Act are different. Unless the marriage is held to be void by a competent Court of law the relationship of husband and wife would continue and the spouse who does not have sufficient source of income would, normally, be entitled for interim maintenance as well as litigation expenses. Thus application filed by the appellant wife U/s. 24 of the Act during pendency of the petition U/s. 12 of the Act filed by the respondent husband would be maintainable and would be liable to be decided by the Family Court on merit. (Subhas Gupta v. Smt. Kabita Gupta; 2007 (2) ALJ 83 (DB))

Hindu Minority and Guardianship Act

◆ S. 6 – Custody of child – If father is unable to promote welfare of minor child then custody of child to mother should be allowed.

This Court is of the opinion that four years' girl child should not be given in the custody of her father, Dr. Dilshad. This would adversely affect the welfare of the child. In the present case, it is clear from the pleadings that the respondent-wife is now employed in a Post Graduate Degree College at Barabanki and presently she is drawing Rs. 7,000/- p.m. Moreover, she is M.Sc. 1st Division and a Gold Medalist. She has also qualified NET examination conducted by the University Grants Commission. The qualification may certainly entitle her to seek another better employment in a Degree or Post Graduate Degree College. After qualifying the NET examination, a person becomes entitled to get a good teaching job in a Degree College in an appropriate lectureship scale. This

Court has also taken note that the minor girl child will get proper family atmosphere in the company of a retired Engineer who is drawing adequate pension, amounting to Rs. 10,000/- p.m. and respondent's mother is also a post graduate, a M.A. degree holder. The parents of respondent are living in Chinhat, Lucknow while the petitioner is posted at Primary Health Centre, Paraspur, District Gonda. The girl child may get proper education in the company of her educated mother and maternal grant-parents.

This Court is of the opinion that the mother should not be deprived of the exclusive custody of a growing female child in the present set of circumstances. In the present case, the balance of convenience is certainly in favour of mother for exclusive custody of the child, as this will safeguard the interest of her daughter. **(Kumari Sidra v. Smt. Farha Shiba; 2007 (1) ALJ 729)**

◆ S. 8 and 13 – Grant of permission to sell the property of minor would not be improper if permission is given by guardian in interest of minor.

Guardian who was real mother of minors decided to sell vacant plots to enable her to buy readymade, constructed flat in established residential colony buying readymade, constructed apartment in place of leaving two unguarded plots vacant was a wise decision. It was found to be in interest of minors that close relatives were also living in vicinity of flat. Grant of permission is not improper. **(Ram Krishna Gupta v. Smt. Nootan Agarwal & Anr.; 2007 (1) ALJ 772)**

Indian Penal Code

◆ **S. 71 & 220 Cr.P.C. and S. 7, 13(1)(d) of Prevention of Corruption Act – Demanding and receiving illegal gratification – Constitutes offence both under S. 7 and under S. 13(1)(d) of P.C. Act – Offence being single transaction, but falling under two different Sections, the offender cannot be liable for double penalty.**

Learned counsel for the respondent submitted that though Section 7 and Section 13(2) read with Section 13(1)(d) of the Act operate in different fields, in a given case where there is a single offence, the conviction cannot be both under Section 7 and Section 13(2) read with Section 13(1)(d) of the Act. It was further submitted that Section 18 of Probation of Offenders Act, 1958 (in short 'Probation Act') made the provisions of that inapplicable to

only Section 5(2) of the Act and corresponding to Section 13(2) of the Act; and Section 18 of the Probation Act did not bar the application of the provisions of that Act to Section 7 of the Act which is analogous to Section 161 of Indian Penal Code, 1860 (in short 'IPC') and, therefore, where the conviction is only under Section 7 of the Act, Section 360 Cr.P.C., was clearly applicable. Learned counsel for the respondent-accused submitted that the High Court having invoked powers under a beneficial provision i.e. Section 360 of the Code no interference is called for while exercising jurisdiction under Article 136 of the Constitution of India, 1950 (In short the 'Constitution').

The stand that respondent could not have been simultaneously convicted for offences relatable to Section 7 and Section 13(2) read with Section 13(1)(d) of the Act, as held by the High Court is clearly unacceptable. Section 71 IPC provides the complete answer. The same reads as follows:

"71. Limit of punishment of offence made up of several offences.- Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate

definitions of any law in force for the time being by which offences are

defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

The positions further crystallized in Section 220 of the Cr.P.C. Same reads as follows:

"220. Trial for more than one offence.-(1) If, in one series of acts so connected together as to form the same transaction, more offences than one

are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of section 212 or in sub-section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more of fences of falsification of accounts, he may be charged with, and tried at one trial for every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute where combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, or such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).”

The crucial question is whether the alleged act is an offence and if the answer is in the affirmative, whether it is capable of being construed as offence under one or more provisions. That is the essence of Section 71 IPC, in the backdrop of Section 220 Cr.P.C.

Every acceptance of illegal gratification whether preceded by a demand or not, would be covered by Section 7 of the Act. But if the acceptance of an illegal gratification is in pursuance of a demand by the public servant, then it would also fall under section 13(1)(d) of the Act. The act alleged against the respondent, of demanding and receiving illegal gratification constitutes an offence both under Section 7 and under Section 13(1)(d) of the Act. The offence being a single transaction, but falling under two different Sections, the offender cannot be liable for double penalty. But the High Court committed an error in holding that a single act of receiving an illegal gratification, where there was demand and

acceptance, cannot be an offence both under Section 7 and under Section 13(1)(d) of the Act. As the offence is one which falls under two different sections providing different punishments, the offender should not be punished with a more severe punishment than the court could award to the person for any one of the two offences. In this case, minimum punishment under Section 7 is six months and the minimum punishment under Section 13(1)(d) is one year. If an offence falls under both Sections 7 and 13(1)(d) and the court wants to award only the minimum punishment, then the punishment would be one year. (**State v. A. Parthiban; AIR 2007 SC 51)**

◆ **S. 304(B) – Burden of proof is lighter in character where offence is committed in secrecy inside a house – In view of S. 106 of Evidence Act there is also a corresponding burden on the inmates of the house to give explanation as to how the death was caused – They can't get away by keeping quite.**

The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it would be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is

punished. A judge also presides to see that a guilty man does not escape. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision.

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an

explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

The appellant was plying a tempo in order to earn his livelihood. The deceased was being ill-treated and harassed on account of non-fulfillment of demand of Rs. 25,000 which the appellant wanted for purchasing a tempo. The deceased was often beaten and was sometimes not given food. After the deceased had been murdered, information was sent to her parents that she had died on account of snakebite, which was reiterated when they reached the house of the appellant. Everyone in the village had been told that the deceased had died on account of snakebite and the Police Patil, believing the said information to be true, had lodged an accidental death report at the police station. The medical evidence, however, showed that she had died on account of asphyxia due to strangulation. The body of the deceased was purposely placed in a sitting posture with her back taking support of the wall so that no one may suspect that she had actually been killed as a result of strangulation and may believe the version of snakebite given by the appellant and his parents. The appellant in his statement under Section 313 Cr.P.C. did not offer any explanation as to how she received the injuries which were found on her body. Recovery of some articles of the deceased was made at the pointing out of the appellant. The circumstances unerringly point to the guilt of the accused and they are inconsistent with his innocence.

The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human

probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.

The High Court was, therefore, perfectly right in allowing the appeal filed by the State and in convicting the appellant under Section 302 IPC and sentencing him to life imprisonment thereunder. **(Trimukh Maroti Kirkan v. State of Maharashtra; (2007) 1 SCC (Cri) 80)**

◆ S. 304(B) & S. 113(B) of Evidence Act – "Soon before" can't be limited by fixing time limit.

No presumption under Sec. 113-B of the Evidence Act would be drawn against the accused if it shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is "soon before". The expression is a relative term, which is required to be considered under specific circumstances of each case, and no straitjacket formula can be laid down by fixing any time limit. The expression is pregnant with the idea of proximity test. It can't be said that the term "soon before" is synonymous with the term "immediately before". The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link. **(Kailash v. State of M.P.; AIR 2007 SC 107)**

Indian Succession Act

◆ **S. 214 – Compensation awarded under Land Acquisition Act is not a debt – Heirs of the deceased claimant not required to file succession certificate.**

From a perusal of the aforesaid, it is clear that a succession certificate is required in a suit for the recovery of a debt filed by the representatives of a deceased person. In the present proceedings, the amount claimed is a compensation awarded under the Land Acquisition Act. This compensation awarded under Section 18 of the Land Acquisition Act is not a recovery of a debt as contemplated under Section 214 of the Indian succession Act.

In *Smt. Rukhsana v.Smt. Nazrunnisha; 2001 (92) RD 386,* the Supreme Court held that the Succession Certificate as "envisaged under the Indian Succession Act was only granted in respect of "debts" or "securities" to which the deceased was entitled. The compensation awarded under the Motor Vehicles Act was not a debt nor a succession certificate was required to be obtained in order to claim the compensation awarded under the Motor Vehicles Act.

In *Resilikutty Chacko v. State of Kerala; AIR 1999 Ker 56,* the Court held that a succession certificate was not required to be filed by the heirs of the claimant towards compensation under the Land Acquisition Act. In view of the aforesaid, it can clearly be held that the compensation awarded under the Land Acquisition Act is not a debt as contemplated under Section

214 of the Indian Succession Act and therefore, the claimants are not required to furnish a succession certificate. Consequently, the direction of the Court by its order-dated 17.5.2006 cannot be sustained and is quashed. The writ petition is allowed. **(Ramkali v. State of U.P.; AIR 2007 All 8)**

♦ Ss. 273 & 278 – Will – Proof of – Propounder of the Will has to prove the due and valid execution of will.

The law relating to proof of due execution of the Will by the propounder, where the will is attacked on the ground that the testator did not possess free and disposing mind, is fairly well settled. In H. Venkatachala Iyengar v. B.N. Thimmajamma, the Supreme Court laid down the principles of onus of proof of the will as follows:

"It may, however, be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties."

It is no doubt true that on the proof of the signature of the deceased or his acknowledgement that he has signed the Will he will be presumed to have known the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. (Estate of Late Ambika Prasad Singh As Bequathed to Smt. Lalti Devi; 2007 (102) Rd 33)

Industrial Disputes Act

◆ S. 2(oo) – Retrenchment – Order in terms of clause in appointment letter is not bad for want of prior notice to retrenched employee.

With regard to the contention of the respondents that in the present fact scenario retrenchment is bad under law as conditions under section 6-N, which talks about a reasonable notice to be served on an employee before his/her retrenchment, is not complied with; we are of the view that an even under Section 6-N, proviso states that 'no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service." In the present case on the perusal of the appointment letter it is clear that no such notice needs to be issued to respondent No. 1. **(Muir Mills Unit of N.T.C. (U.P.) Ltd. V. Swayam Prakash Srivastava & Anr.; 2007 (1) ALJ 708)**

Interpretation of Statutes

◆ Rule of Interpretation of constitutional entries – To give them widest meaning that is reasonably possible.

The well-settled rule of interpretation of constitutional entries is to give them the widest meaning that is reasonably possible. It is clear that the U.P. Agricultural Credit Act is a legislation on the subject of 'agriculture' included in Entry 14, 'agricultural loan' included in Entry 18 and 'money lending' included in Entry 30 of List – II. Counsel for the respondents submitted that the subject of agricultural loan included in Entry 18 of List – II would include the recovery of agricultural loans and therefore this area of legislation falls within the exclusive domain of the State legislature and Entry 45 of List – I 'Banking' should be reconciled to give effect to Entry 18. It is true that in case reconciliation is possible both the legislations will operate in their respective field within the State. If the subject of Banking under Entry 45 can be reconciled to carve out a territory, which is wholly different from the territory carved out by Entries 14, 18 and 30 of the State List the reconciliation would be possible and the State Act would prevail. That a constitutional entry has to be given the widest meaning is the normal rule of interpretation but when competing entries have to be interpreted the normal rule does not apply if there would be a clash. In such a case the two entries have to be read together and if necessary

in the process of interpretation the language of one may be modified by the other so that effect can be given to both. Moreover a general power cannot be interpreted in a manner to make a nullity of a particular power conferred by the same Act and operating in the same field and that in such a case the Rule of interpretation is to restrict the meaning of the general power so as to give effect to the particular power in its plain meaning. (Jujhar Singh v. State of U.P. Through Secretary Revenue, Lucknow and Others; 2007 (102) RD 324)

◆ Use of punctuation in Statute – When Statute is carefully punctuated and there is doubt about its meaning – Weight should be given to punctuation.

There is a coma before the words 'of places for the manufacture' in S. 239(2)(D)(d) and there is also a coma after the aforesaid words. It means that whatever the industry it manufactures some items, the Zila Parishad can levy the licence fees on these industries. When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to punctuation. The punctuation may have its uses in some cases but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plaint meaning of a text. (M/s. Shriram Honda Equipment Ltd. V. State of Uttar Pradesh & Ors.; 2007 (2) ALJ 323 (DB))

Land Acquisition Act

◆ **S. 22, 23, 24 & 18 – Purpose for which the land is acquired must also be taken into consideration for fixing the market value and deduction of development charges.**

Both the Special Land Acquisition Officer, the District Judge and of the High Court have failed to notice that the purpose of acquisition is for Railways and that the purpose is a relevant factor to be taken into consideration for fixing the compensation. This Court held that the purpose for which the land is acquired must also be taken into consideration in fixing the market value and the deduction of development charges.

We are not, however, oblivious of the fact that normally 1/3 deduction of further amount of compensation has been directed in some cases. However, the purpose for which the land acquired must also be taken into consideration. In the instant case, the land was acquired for the construction of new BG line for the Konkan Railways. Where lands are

acquired for specific purposes deduction by way of development charges is permissible. In the instant case, acquisition is for laying a railway line. Therefore, the question of development thereof would not arise. Therefore, the order passed by the High Court is liable to be set aside and in view of the availability of basic civic amenities such as school, bank, police station, water supply, electricity, high way, transport, post, petrol pump, industry, telecommunication and other businesses, the claim of compensation should reasonably be fixed @ Rs. 250/- per sq. mtr. With the deduction of 20%. The appellant shall be entitled to all other statutory benefits such as solatium, interest etc. etc. The appellants also will be entitled to compensation for the trees standing on the said land in a sum of Rs. 59, 192 as fixed. **(Nelson Fernandes and Ors. V. Spl. L.A.O. South Goa & Ors.; 2007 (2) Supreme 800)**

Limitation Act

◆ S. 5 – Condonation of delay in case relating to civil right or property – Court should be liberal while considering application for condonation of delay so that person may not be deprived from his property for all time to come.

Whenever an application for condonation of delay is moved in the Courts then it shall be incumbent upon the Courts to discuss the pleadings on record raised by the parties for the purposes of condonation of delay. Moreover, in case the controversy relates to civil right or property then the Courts should be liberal while considering the application for condonation of delay so that a person may not be deprived from his property for all time to come. Otherwise also in case on merit it appears that substantial ground exists from interference and the finding recorded by the trial Court seems to suffer from substantial illegality or in case judgment or order appears to be outcome of fraud then also liberal approach should be adopted by the Courts while considering the application for condonation of delay. **(Anwar v. Distt. D.D.C. Officer, Hardoi & Ors.; 2007 (1) ALJ 744)**

◆ S. 5 – Condonation of Delay – An appeal filed beyond time by 18 days and Medical Certificate has also submitted in proof of illness – Refusal to condone delay – Order impugned is unsustainable and liable to be set aside.

Perusal of the impugned order indicates that the Court below has recorded that there was no occasion for the petitioner to wait up to

the last date for filing the appeal and that the medical certificate is not very satisfactory. It also found that since no affidavit was filed by the petitioner in support of his application at the very first instance, therefore, filing of an affidavit in support of the application at a later date was not acceptable.

A medical certificate is the only best evidence, which a party can produce before the Court with respect to his illness. A certificate issued by registered medical practitioner is sufficient proof unless the certificate is proved to be forged or otherwise. Such an objection was not taken by the respondents before the Court below. There is nothing mentioned in the impugned order as to why the medical certificate was not believed by the Court. The only reason appears to be is that the certificate is not very authentic because no affidavit was filed initially. This cannot be a ground to disbelieve a medical certificate. The impugned order therefore, cannot be sustain in the eyes of law. It is accordingly set aside. (Iqbal Bahadur Saksena v. District Judge, Pilibhit and Others; (2007 (102) RD 345)

Motor Vehicles Act, 1988

S. 147 & 149 – Statute is beneficial for third party – Any condition in the policy whereby the right of third party is taken away would be void but this principle would not apply to owner of offending vehicle.

In each of the impugned judgments the concerned High Court held that the principles laid down by this Court in *National Insurance Co. Ltd. V. Swaran Singh; (2004) (3) SCC 297)* is applicable even to claims other than third party claims.

Section 149 of the Act relates to duty of insurers to satisfy judgments and awards against persons insured in respect of third party

risks. The language of the provision is clear that it only relates to third party risk. The corresponding provision in the Old Act is Section 96. Section 166 of the Act relates to application for compensation. The same corresponds to Section 110-A of the Old Act. Section 168 of the Act relates to award of the Claims Tribunal, which corresponds to Section 110-B of the Old Act. Section 170 deals with impleadment of the insurer in certain cases.

Swaran Singh's case (supra) on which learned counsel for the parties have placed reliance undisputedly related to a case under Section 149 of the Act. This Court elaborately dealt with the scope and ambit of Sections 147 and 149 of the Act and after tracing the history of compulsory insurance and the rights of the third parties, held that the concerned cases were mainly concerned with third party rights under the policy. It was held in that context that any condition in the policy whereby the right of the third party is taken away would be void, as noted in para 23 of the judgment.

More often than not, literal interpretation of a statute or a provision of a statute results in absurdity. Therefore, while interpreting statutory provisions, the Courts should keep in mind the objectives or purpose for which statute has been enacted. Justice Frankfurter of U.S. Supreme Court in an article titled as Some Reflections on the Reading of Statutes (47

Columbia Law Reports 527), observed that, "legislation has an aim, it seeks to obviate some mischief, to supply an adequacy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statutes, as read in the light of other external manifestations of purpose."

The inevitable conclusion therefore is that the decision in *Swaran Singh's* case (supra) has no application to own damage cases. The effect of fake license has to be considered in the light of what has been stated by this Court in *New India Assurance Co., Shimla v. Kamla and Ors.; (2001) (4) SCC 342).* Once the license is a fake one the renewal cannot take away the effect of fake license. It was observed in *Kamla's case* (supra) as follows:

"12. As a point of law we have no manner of doubt that a fake licence cannot get its forgery outfit stripped off merely on account of some officer renewing the same with or without knowing it to be forged. Section 15 of the Act only empowers any Licensing Authority to "renew a driving licence issued under the provisions of this Act with effect from the date of its expiry". No Licensing Authority has the power to renew a fake licence and, therefore, a renewal if at all, made cannot transform a fake licence as genuine. Any counterfeit document showing that it contains a purported

order of a statutory authority would ever remain counterfeit albeit the fact that other persons including some statutory authorities would have acted on the document unwittingly on the assumption that it is genuine".

As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:

1. The decision in *Swaran Singh's case* (supra) has no application to cases other than third party risks.
2. Where originally the license was a fake one, renewal cannot cure the inherent fatality.
3. In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.
4. The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

(National Insurance Co. Ltd. V. Laxmi Narain Dhut; 2007 (2) Supreme 721)

S. 166 – Ascertainment of compensation and choice of multiplier – Multiplier is determined by the age of deceased or that of claimant

whichever is higher and by the calculation as to what capital sum if invested at a rate of interest appropriate to a establish economy would yield the multiplicand by way of annual interest.

The multiplier method involves the ascertainment of the loss of depe4ndency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.

In both *G.M., Kerala SRTC v. Susamma Thomas (1994 (2) SCC 176)* and *U.P. State Road Transport Corpn v.Trilok Chandra (199 (4) SCC 362)* the multiplier appears to have been adopted taking note of the prevalent banking rate of interest. In *Susamma Thomas's* case (supra) it was noted that the normal rate of interest was about 10% and accordingly the multiplier was worked out. As the interest rate is on the decline, the multiplier has to consequentially be raised. Therefore, instead of 16 the

multiplier of 18 as was adopted in *Trilok Chandra's* case (supra) appears to be appropriate. In fact in *Trilok Chand's* case (supra), after reference to Second Schedule to the Act, it was noticed that the same suffers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to be invariable ready reckoner. However, the appropriate higher multiplier was held to be 18. The highest multiplier has to be for the age group of 21 years to 25 years when an ordinary Indian citizen starts independently earning and the lowest would be in respect of a person in the age group of 60 to 70, as the former is the normal retirement age. *(See: New India Assurance Co. Ltd. V. Charlie and Another [2005 (10) SCC 720]*. Considering the age of the deceased it would be appropriate to fix the multiplier at 13. The MACT itself found that the income was not established. At some point of time it was stated that the income of the deceased was Rs. 6,000/- per month. In the absence of any definite material about the income, monthly contribution to the family, after deduction for personal expenses is fixed at Rs. 3,000/- per month i.e. annually Rs. 36,000/-. Applying the multiplier of 13, the compensation works out to Rs. 4,68,000/-. The same shall carry interest @ 6% p.a. from the date of claim till the date of actual payment. It is stated that a sum of rupees four lakhs

has been deposited pursuant to the order-dated 4.4.2005. Balance shall be deposited along with interest within two months from today. Out of the total amount, 80% shall be kept infixed deposit in a nationalized bank initially for a period of five years. But no withdrawal shall be permitted before the expiry of period. However, monthly interest shall be paid to the claimants. **(The New India Assurance Company Limited v. Smt. Kalpana & Ors.; 2007 (1) Supreme 514)**

S. 168 – Grounds for enhancement of compensation – Expenses occurred on relatives who came to see the victim of accident is no ground to enhance compensation.

A sum of Rs. 15,000/- was claimed allegedly spent over his relatives and friends who came to see him during the treatment. On the facts as found by the Tribunal, I find that it was legally justified to disallow the aforesaid claims as these expenses were remotely connected with the accident. The Tribunal is right in observing that in Indian life style it is normal feature to visit relatives and friends who had suffered accident. Therefore, no fault can be found on the above score in the order of the Tribunal. **(Gauri Shanker Paliwal v. J.N. Nigam & Ors.; 2007 (1) ALJ 774)**

Municipalities

◆ S. 173-A – Direction to recover amount from President of Nagar Panchayat as arrears of land revenue cannot be made unless and until a responsibilities to that effect was fixed against President of Nagar Parishad.

There is no dispute to this effect that the petitioner being a President for certain period, if any appointment was made and the salary has been paid unless and until a responsibility to that effect was fixed, no recovery can be made against the petitioner. Even in view of the well settled principle of law if it is presumed that there is any responsibility of the petitioner the same cannot be recovered as arrears of land revenue as held by the two judgments of the Division Benches of this Court. **(Samsussalam Quddusi v. State of U.P. and Ors.; 2007 (1) ALJ 601)**

NDPS Act

◆ **S. 50 – The accused must be told of his right to be searched in the presence of a Gazetted Officer or a Magistrate – Mere asking for his preference whether he would prefer to be searched in presence of a Gazetted Officer or a Magistrate is not sufficient.**

From the aforesaid decision in *Baldev Singh case [(1999) 6 SCC 172]* it is clear that it is not enough that the accused be told that whether he would prefer to be searched in the presence of a gazetted officer or a Magistrate, but he must be told of his right to be searched in the presence of a gazetted officer or a Magistrate. It may be noticed that clause (1) of Section 50 of the NDPS Act only indicates that only in cases where the accused suspect requires to be searched in the presence of a gazetted officer

or a Magistrate, he need be taken to such place. It is also important to note that the option is for the searching officer to take him either to the gazetted officer or to the Magistrate. In *Baldev Singh* case the Constitution Bench also observed that it is not necessary that in the search memo or in the contemporaneous document it should be specifically mentioned that the accused suspect was apprised of his right under Section 50(1) of the NDPS Act. It has been so held that it is enough that the officer, who conducts the search, gives oral evidence to the effect that the accused was informed of his right under Section 50(1) of the NDPS Act.

Thus, in a way, it all depends on the oral evidence of the officer who conducts search, in case nothing is mentioned in the search mahazar or any other contemporaneous document prepared at the time of search. In view of the large number of cases coming up under the provisions of the NDPS Act the interpretation of Section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the Constitution bench in Baldev Singh case we have noticed that conflicting decisions have been rendered by this Court. We feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this

regard. **(Vijay Singh Chandubhai Jadeja v. State of Gujarat; (2007) 1 SCC (Cri) 370)**

Negotiable Instruments Act

- **S. 138 – Sentence on conviction – Inappropriate case compensation can be awarded.**

Section 138 of the Act is a special statute. It provides inter alia for imposition of fine, which may extend to twice the amount of the cheque. We, as at present advised, need not go into the question as to whether having regard to the provisions contained in Sub-section (2) of Section 29 of the Code of Criminal Procedure, the jurisdiction of the Magistrate would be to impose a fine for a sum of Rs. 5,000/- or not in view of the decisions of this Court.

Although the power of the court to impose a fine may or may not be limited, it is not in dispute that the power to award compensation is not. The purpose for which such compensation is to be granted to the complainant whether in terms of clause (b) of Sub section 1 of Section 357 of the Code of Criminal Procedure or Sub-section (3) of Section 357 is not of much significance for our purpose, although there cannot be any doubt whatsoever that consideration for payment of compensation is, somewhat different from payment of fine.

The basic question, however, which arises for consideration before us is as to whether we, in the peculiar facts and circumstances of this case, can delve deep into the matter so as to find out the culpability of the respondent herein and pass a judgment of acquittal in his favour. We do not think that we should do so. Section 377 of the Code of Criminal Procedure has no application in the instant case. Respondent has not preferred any appeal. Even otherwise the complainant had categorically stated in his complaint petition that although his claim was for a sum of Rs. 12 lakhs which amount the respondent is said to have been withdrawn from the bank in contravention of the terms and conditions of the deed of partnership, he accepted his liability at least to the extent of Rs. 7,00,000/- it appears from a plain reading of the complaint petition that the respondent had admitted his liability to the extend of Rs. 7,00,000/-. It was found as of fact to be so

by the courts below. The said findings do not warrant any interference. The defence raised by the respondent to the effect that the parties had entered into a compromise in the police station and he had to sign a cheque under some threat or coercion had not been accepted by the courts below. There cannot be any doubt whatsoever that had the respondent been able to show that the cheque had been issued not in discharge of a debt but by way of a security pending determination of his liability by an auditor, the matter would have been different. In such an event, the court could have arrived at a finding that the cheque having been issued on the basis of an anticipated profit which by itself did not create any liability in present and the result of the audit might have gone either way, no case under Section 138 of the Act was made out. But, the same is not the case here. **(P. Suresh Kumar v. R. Shankar; 2007 (2) Supreme 815)**

S. 138, 139 & 142 – Rebuttal of presumption – The burden of proof on accused is not as high as that of prosecution – Preponderance of probability is the rule and the accused can discharge burden by referring to the circumstances proved in the case.

The Act contains provisions raising presumption as regards the negotiable instruments under Section 118(a) of the Act as also under Section 139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case.

The nature and extent of such presumption came up for consideration before this Court in *M.S. Narayana Menon Alias Mani v. State of Kerala and Anr. [(2006) 6 SCC 39]* wherein it was held:

> "30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held,

> "33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

It was further observed that:

> "38. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a "fortiori" even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution, case in its entirety as has been held by the High Court.
>
> 39. A presumption is a legal or factual assumption drawn from the existence of certain facts."

(Kamala S. v. Vidyadharan M.J. & Another; 2007 (2) Supreme 611)

- **S. 138 & 141 – Liability of Director of the Company – Only such person would be liable who at the time when the offence was committed was incharge and was responsible to the company for the conduct of business – There must be specific allegation in the complaint as to the part played by the Director.**

To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and

the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company.

The only averment made so far as the respondents are concerned, reads as under:

> "Preliminary evidence had been recorded and at that time also no specific evidence on assertion was forthcoming. Shri Wahi who appeared at that time only stated that accused 2 to 12 are directors and responsible officers of the company. They are liable for the acts of the company. In other words, there was no averment or evidence that the present petitioners were incharge of or responsible to the company for the conduct of the business of the company as well as the company.
>
> The accused Nos. 2 to 12 are the Directors/persons responsible for carrying out the business of the company and the liability of the accused persons in the present complaint is joint and several."

In view of the legal position set out above, the inevitable result is that the appeals are without merit, deserve dismissal, which we direct. **(N.K. Wahi v. Shekhar Singh & Ors.; 2007 (2) Supreme 811)**

◈ S. 138 & 141 – Liability of Director of the Company – Director is not automatically vicariously liable for the offence – Averments must be there to show that the Director was incharge and responsible to the Company for the conduct of its business.

Section 141 of the Act does not say that a Director of a Company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be incharge and shall also be responsible to the Company for the conduct of its business.

The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No. 1 herein was a party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.

If the complaint petition is read in its entirety, the same would show that the only person who was actively associated in the matter of obtaining loan, signing cheques and other affairs of the company which would lead to commission of the alleged offence was the accused No. 2. By reason of the purported resolution dated 15.02.1995, whereupon strong reliance has been placed by Mr. Mishra, only the accused No. 2 was authorized to do certain acts on behalf of the Company. The cheques were issued on 15.08.1996, i.e., after a period of 17 months from the date of the said resolution. As is evident from the averments made in the complaint petition, the cheques represented the amount of interest payable for a total period of 15 days only calculated at the rate of 25% per annum on the amount of deposit, viz. rupees two crores. **(S.M.S. Pharmaceutical Ltd. V. Neeta Bhalla & Anr.; 2007 (2) Supreme 459)**

Panchayats and Zila Parishads

◆ **S. 12-(C) 6) – Maintainability of revision – Revision against order for recounting of ballot papers is not maintainable.**

Under Section 12(c) 6) "any party aggrieved by an order, of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order apply to the District Judge for revision of such order on any one more of the following grounds, namely, (a) that the prescribed authority has exercised a jurisdiction vested in it by law; (b)

that the prescribed authority has failed to exercise a jurisdiction so vested; (c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity." "an order", upon an application filed under sub-section (1) of Section 12(c) of U.P. Panchayat Raj Act, 1947 revisable. Thus, the reference to phrase "upon an application under sub-section (1)" clearly indicates that an order upon an application under sub-section (1) is revisable under sub-section 12(c)(6) as it does not say any order other that passed on any other application in connection with application under sub-section (1); instead of using phrases "an application under sub-section (1)" Legislature could have used expression "in the proceeding". The very use of expression as laid down in sub-section clearly indicates the intention of Legislature only to the order passed in application under sub-section (1), means the final order.

The purpose of providing for relief by means of an election petition would be completely defeated if against every petty order that is passed during the course of proceedings by the Sub-Divisional Officer (Prescribed Authority), a revision is taken to the District Judge. An interlocutory order, which is something intervening between the commencement and the end of the proceeding and which decides some point of matter, being not a final decision of the whole controversy, could not be challenged by means of an revision under sub-section (6) which contemplates of a revision against an order of the Prescribed Authority upon an application and clearly refers to the final order that may be passed on the election petition. **(Smt. Chandra Kala v. State of U.P. & Ors.; 2007 (1) ALJ 331)**

Prevention of Corruption Act

S. 19 – Sanction for prosecution – Not needed if the person ceases to hold the office in question though he may continue to be a public servant in any other capacity at the time of taking cognizance.

Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the

other which is neither alleged to have been used (sic misused) nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used (sic misused) or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that

office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd end product which of necessity must be avoided.

Legislation must at all costs be interpreted in such a way that it would not operate as a rogue's charter. **(Prakash Singh Badal v. State of Pubjab; (2007) 1 SCC (Cri) 193)**

Provincial Small Cause Courts Act

◆ S. 10 – Suit for ejectment and arrears of rent – tenant not denying service of summon and also did not file written statement within 90 days thereof – Order passed to proceed ex-parte and rejection of application for filing written statement would be proper.

Admittedly, the suit for ejectment and arrears of rent against the petitioner has been filed in November, 2003. The order to proceed the case ex parte was passed on 28.8.2006. The petitioner has not denied service of summons fixing first date of hearing in the suit. He neither deposited the arrears of rent on the first date of hearing nor any application for recall of order dated 28.8.2006 after he came to know about the pendency of the suit admittedly before 5.11.2005 and received the copy of the plaint on the aforesaid date i.e. 5.11.2005 but did not file written statement within 90 days thereof. The petitioner is himself to blame for his callous attitude. There is no illegality or infirmity in the impugned order. The Court below has rightly passed the orders rejecting his application. **(Siya Ram Sharma v. Smt. Kumari Devi; 2007 (1) ALJ 555)**

◆ Ss. 10, 15 (U.P. Amendment) Sch. 2, Article 4 – Jurisdiction of Small Cause Court – Suit for eviction of tenant is subject matter covered under exclusive jurisdiction of court of Small Causes only and not lie before any regular Civil Courts.

The U.P. State amendments in Section 15 of the Provincial Small Cause Courts Act specifically provides that a suit in relation to a relief for eviction by the lessor against the lessee from a building after determination of the lease shall be cognizable by the Court of Judge Small Causes only. Section 16 of the said Act makes it an exclusive jurisdiction of that Court. Therefore, this suit being a suit for relief of eviction of the tenant from the leased premises is a subject matter covered under the exclusive jurisdiction of the Court of Small Causes

only and it would not lie before any regular civil Court. (M/s. Bindal Logistics Pvt. Ltd. V. M/s. Ashoka Handloom Factory & Ors.; 2007 (1) ALJ 148)

◆ **S. 17 – Decretal amount deposited after delay of more than 10 months and application for condonation of delay filed after 4 years without giving sufficient cause – Rejection of application would be valid.**

Contention of the counsel for the petitioner is that application under Section 5 of the Limitation Act for condonation of delay has not been considered. This appears to be incorrect on the face of record. The Revisional Court has considered this aspect of the matter and has held that the application under Section 5 of the Limitation Act was filed by the petitioner after much delay. The Court below has found that the cause shown by the petitioner in application under Section 5 of the Limitation Act does not reveal sufficient cause. The condonation of delay is discretionary and where there is discretion of a Court it has to be exercised judiciously. I find from the impugned order that the petitioner submitted the application after delay of about 4 years. The approach of the Court below is judicious and it has rightly held that sufficient cause has not been shown for the delay in filing application under Section 5 of the Limitation Act. **(Smt. Girja Devi v. Additional District Judge, Banda & Ors.; 2007 (1) ALJ 151)**

◆ **S. 17(1) – Requirements of S. 17(1) is mandatory in nature –Non-deposit of half of the decretal as per the order of the Court – Held application U/O. 9, R. 13 was rightly rejected.**

In the case of *Kedar Nath* (supra), Hon'ble Supreme Court has laid down in paras 8 and 9 as under:

"8. A bare reading of the provision shows that the legislature have chosen to couch the language of the proviso in a

mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory. An application seek to set aside an ex parte decree passed by a court of small cause or for a review of its judgment must be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the Court in its discretion subject to a previous application by the applicant seeking security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time upon the time of presentation of application for setting aside ex parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The delay on the part of the Court in passing an appropriate order would not be held against the applicant

because none can be made to suffer for the fault of the Court."

This Court finds that there was non-compliance of the mandatory provisions of Section 17(1) of the Provincial Small Cause Courts Act, where the applicant praying for setting aside a decree passed ex parte is required to satisfy the requirement of deposit of the decretal amount at the time of presenting his application of as the Court may have directed. There has not been compliance by the petitioners even upon a direction issued by the Court. Rejection of the application under Order IX, Rule 13, Civil Procedure Code by the court below therefore, does not suffer from any error whatsoever. The jurisdiction of the revisional court under Section 25 of the Provincial Small Cause Courts Act, is quite limited and since the order of the trial court was in accordance with law, the revision of the petitioners was liable to be dismissed. **(Lalji Gupta v. A.D.J./Special Judge, Allahabad; 2007(1) AWC 176)**

Societies Registration Act

◆ S. 24 (U.P. Amendment) – Investigation of affairs of Society – Powers of Registrar are quasi-judicial and not administrative.

The powers under S. 24 given to the Registrar are very wide. He can act either on information called for by him, under S. 22, or

otherwise, may be spurred on by complaints by some members. He can act if there is apprehension that the affairs of the society are being conducted in such a manner as to defeat the objects of the society. Once that apprehension is felt either the Registrar or a person appointed by him, can inspect or investigate into the affairs of the society. The process of Investigation is aided by the sub-sections and it is seen there from those that the Registrar is to be assisted with all documents and information so that he can conduct the enquiry properly. After the enquiry is complete, the Registrar has power under S. 24 of sub-sec. (5) to give such direction as would remove the defect or irregularities found to be present in the affairs of the society. Thus Registrar's power of investigation in this regard cannot be said to be administrative, in any view of the matter. There are in most cases, two groups or factions of the society or perhaps even more, and one of the groups will be interested in maintaining that the affairs of the society are being conducted in a perfectly regular and above-board manner and the other groups will be interested in assailing these assertions. The writ Courts are not supposed to enter into these facts. The Registrar has thought it fit to initiate the process of investigation in regard to controversies of this nature. All these investigations cannot be termed as administrative investigations. The eligibility of members would be decided on facts and submissions put forward before the Registrar by the side assailing and also by the side affirming, monetary matter will be put forward by the two sides exactly like two rivals in a Court of litigation. The Registrar must exercise quasi-judicial functions and must held the balance of fairness even so as to reach a proper and fair quasi-judicial conclusion. It is not a question of expediency, it is not a question of enforcing a policy it is simply a question of ordering and doing what is right. (Literacy House Staff Welfare Association, Lucknow & Ors. V. Registrar, Firms, Societies & Chits, U.P., Lucknow & Ors.; 2007 (2) ALJ 366 (DB))

◈ S. 168-A – Attractability of fragmentation.

The restriction on transfer of fragments is based on the area qua the transferee and not the transferor. A fragment is defined in section 2 (8-A) of the Act to mean land of less extent than (1) 1.89 hectare (4.6845) in areas of the State described in clauses (i) to (vi), and (b) 3.125 acres in rest of U.P. excluding Kumaon Division. It by sale of

such fragment the transferee gets the fragmented area contiguous to his plot or the transfer is by a tenure holder who sells the whole of his Bhumidhari rights in the plot, the transfer is not hit by section 168-A of the Act. A fortiori, if a person sells the same area which he had purchased, back to the wife of the vendor, and the wife has no other land, and she regains the same area which was held by her husband, the transfer will not attract the vice of fragmentation. (Smt. Jahani v. Smt. Shashi Bala; (2007 (102) RD 176)

Specific Relief Act

S. 20 – Exercise of discretion – Rise in price of immovable property by itself is not a ground for refusal to exercise discretion in favour of plaintiff.

Original relationship of the parties as landlord and tenant is not in dispute. The fact that the appellant intended to convey his right, title and interest in respect of the said property is also not in dispute. As noticed hereinbefore, he entered into more than one agreement in respect of the self-same property and took advances in respect thereof from more than one person.

The agreement in question has been described as an agreement for sale. Appellant admittedly was owner of the property. The agreement shows that there had been negotiations between the parties as a result whereof the respondent herein had offered to buy and the appellant had

agreed to sell the said property for a sum of Rs. 45,000/-. The terms and conditions stipulated therein were arrived at as a result of the negotiations between the parties.

We have noticed hereinbefore that the appellant had entered into an agreement for sale with others also. He had, even after 11.5.1979, received a sum of Rs. 5,000/- from the respondent. He with a view to defeat the lawful claim of Respondent No. 1 had raised a plea of having executed a prior agreement for sale in respect of self-same property in favour of his son-in-law who had never claimed any right there under or filed a suit for specific performance of contract. The Courts below have categorically arrived at a finding that the said contention of the appellant was not acceptable. Rise in the price of an immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale. **(P.S. Ramakrishna Reddy v. M.K. Bhagyalakshmi & Another; 2007 (2) Supreme 641)**

◈ **S. 22 – Executing Court can deliver possession where contesting party is in exclusive possession even though no relief for possession is claimed in the suit for specific performance of the Contract for sale.**

The Supreme Court in *Babu Lal v. Hazari Lal Kishori Lal; AIR 1982 SC 818* has explained the provisions of S. 22 of the Specific Relief Act, and in particular the words "in an appropriate case" the Supreme Court held –

> "13. The expression in sub-section (2) of S. 22 'in an appropriate case' is very significant. The plaintiff may ask for the relief of possession or partition or separate possession 'in an appropriate case'. As pointed out earlier, in view of O. 2, R. 2 of Civil Procedure Code some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. Similarly, a case may be visualized where after the contract between the plaintiff and the defendant the property passed in possession of a third

person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed for such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of S. 55(1) of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits.

There may be circumstances, in which a relief for possession cannot be effectively granted to the decree-holder

> without specifically claiming relief for possession, viz., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant. It is in such cases that a relief for possession must be specifically pleaded."

The Supreme Court further held "that the expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immovable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only in the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-section (2) of S. 22 provides for amendment of the plaint on such

terms as may be just for including a claim for such relief ‘at any stage of the proceedings.’

In view of the aforesaid, in a suit for specific performance of the contract for sale, even though no relief for possession is claimed and subsequently, a decree is passed, the Court executing the decree is, nonetheless, competent to deliver possession where it is found that the contesting party was in exclusive possession of the property. Further, the order directing the delivery of the possession is incidental to the execution of the sale deed in view of S. 55 of the Transfer of Property Act, which entitles a transferee to get the possession in pursuance of the sale deed. **(Jafar Mian S/o Sadaq Mian v. Smt. Qaiser Jahan Begum & Ors.; AIR 2007 All 5)**

◆ S. 31 – Power of Court U/s. 31.

Under section 31 of the Specific Relief Act the Court may, in its discretion, so adjudge it and order a document to be delivered up and cancel and have it declared void and voidable against any person, who has reasonable apprehension that such instrument if left outstanding may cause him serious injury and in such case the Court has a discretion to declare the status of right of such person. (Smt. Kailasho and Another v. Smt. Anandi Devi and Others; (2007 (102) RD 370)

Stamp Act

◆ **S. 47-A (as existed in State of U.P. prior to 1991 Amended) – U.P. Stamp Rules, Rule 341 – Stamp duty is chargeable on basis of market value of property conveyed by instrument and not on basis of amount mentioned in Civil Court's decree.**

Section 47-A of Stamp Act uses the words – "minimum value determined in accordance with any rules made under the Act". Rule 341 for the purpose of payment of stamp duty prescribes the mode to determine the minimum market value of immovable property forming subject of instrument of conveyance, exchange, gift etc. The emphasis in the case of deed of conveyance is on the market value of any property covered under the instrument of conveyance etc. Section 47-A confers ample power on registering authority to refer the instrument to the Collector for determination of market value of the property covered by the deed of conveyance, if market value has not been correctly disclosed and is less than even the minimum value determined in accordance with Act. The Stamp Act thus, operates in exclusion of the area, not occupied by the Court-fees Act or Suits Valuation Act. Therefore, the stamp duty is chargeable on the basis of market value of the property conveyed by the instrument of conveyance and the fact that in the instrument executed by Civil Court is of no relevance for the purposes of invoking power under Section 67-A of the Act. **(Ramesh Chandra Srivastava v. State of U.P. and Ors.; 2007 (1) ALJ 90)**

Transfer of Property Act

- S. 53(A) – Conditions for application of S. 53-A.

Section 53-A postulates certain conditions for its application in favour of a transferee which are: (i) existence of a contract for the transfer of immovable property, (ii) which should be in writing signed by the other party and the terms thereof should be ascertainable with reasonable certainty, (iii) the transferee in part performance of the contract should have either taken possession or continued in possession or have done some other act in furtherance of the contract, (iv) the transferee should perform or be willing to perform his part of the bargain act down in the writing, though, (v) the doctrine would not be attracted against another transferee without notice of the contract or its part performance. (Munna Lal v. Kaishav Prasad Dass and Another; (2007 (102) RD 364)

- S. 106 – Necessity of notice of determination of Lease – No material available on record to indicate that petitioner sought consent of landlady for continuance of tenancy after expiry of prescribed period – Lease would expire - Service of notice U/s. 106 not necessary for determination of such lease.

A bare perusal of agreement dated 1.7.1999 shows that the lease was for a fixed term of five years, which was to expire on 30.6.2004. Clause 14 of the agreement clearly stipulated that the extension of lease could be granted by mutual agreement between the parties. There is no material available on record indicating that the petitioners sought consent of the landlady for continuance of tenancy after expiry of period of five years. Hon'ble the Apex Court in Smt. Shanti Devi v. Amal Kumar Banerjee, AIR 1981 SC 1550 has held that where a lease is for a definite term, it expires by efflux of time by reason of Section 111(a) of the Transfer of Property Act, as such, service of a notice under Section 106 of the said Act is not

necessary for determination of lease. **(Union of India & Anr. V. Smt. Jagdish Kaur; 2007 (1) ALJ 548)**

◆ Sale Deed – Challenge of – A person having no interest in the property had no locus standi to challenge the sale.

Once it is held that plaintiff Smt. Anandi did not have any title or any interest under section 31 of the Specific Relief Act to challenge the sale deed, the enquiry whether the sale deed was a sham transaction and whether any sale consideration was paid was not relevant. A person having no interest in the property had no locus standi to challenge the sale. (Smt. Kailasho and Another v. Smt. Anandi Devi and Others; (2007 (102) RD 370)

U.P. Consolidation of Holdings Act

◆ S. 9-A – Controversy settled in terms of compromise and provisions of R. 25 not complied with – Alleged compromise or conciliation proceedings held suffers from substantial illegality.

In the present case no finding has been recorded by all the three Courts below that provisions contained in Rule 25-A of the Rules have been complied with. The certified copy of the conciliation memo filed with the present writ petition also does not indicate that rules have been followed. The judgment of Consolidation Officer dated 14.10.1980 is also silent relating to compliance of Rule 25-A of the rules. Neither the appellate Court nor the revisional Court had recorded a finding relating to applicability of Sections 9-A and 9-B of the U.P.C.H. Act read with Rule 25-A of the Rules.

From the perusal of the impugned orders as well as evidence on record it appears that the provisions contained in Rule 25-A of the Consolidation of Holdings Rules have not been complied with while relying upon the compromise in question. Accordingly, the alleged

compromise or conciliation proceeding suffers from substantial illegality. **(Anwar v. Distt. D.D.C. Officer, Hardoi & Ors.; 2007 (1) ALJ 744)**

◆ S. 19 – Chak allotment – Guidelines to be followed.

Due to wide discretion in respect of carvation of chaks given to the consolidation authorities, drastic changes may be made by all the three authorities, CO, SOC and DDC. This gives rise to lot of confusion, heart burning, adventurism and allegations of all sorts. In such situation the best course is to make all possible qefforts within the framework of section 19 to leave original holdings with the tenure holders of their maximum part. This will avoid all the above negative aspects of consolidation. It must also be born in mind that villagers particularly those who have got small pieces of agricultural land inherited from their ancestors have got a sort of attachment with their lands, which may not be ascertained in terms of valuation. This feeling of attachment will also be satisfied if maximum effort is made to leave with the tenure holder his original holding/holdings. (Fateh Chand Chaturvedi and Another v. Joint Director of Consolidation, Allahabad and Another; (2007 (102) RD 171)

◆ S. 48 – Maintainability of revision against order condoning the delay – Order condoning delay is an interlocutory order against which no revision is maintainable.

A bare perusal of the aforesaid section goes to show that an interlocutory order passed by the subordinate consolidation authorities is not open to challenge in revision before the Deputy Director of Consolidation. An order allowing delay condonation application is in the nature of interlocutory order since it does not touch merits of the case. In the case of *Paras Nath v. Deputy Director of Consolidation, Basti and Others* (supra) a learned single Judge of this Court has held that an order condoning delay is an interlocutory order, against which no revision is maintainable under S. 48 of the Act. I am in respectful agreement with the view taken by the learned single Judge. (Anshuman Khetan v. State of U.P. and Others; 2007 (102) RD 27)

◆ S. 48 – Revisional Court is competent to decide the questions of fact and also to appreciate the evidence.

The second submission of Sri R.S. Misra that the Deputy Director of Consolidation could have decided the matter himself and also taken additional evidence does appear to have merit. The case is pending before the Consolidation Court since the year 1976. It is therefore appropriate that the matter may be decided without any further delay by the Deputy Director of Consolidation himself. After the amendment in section 48 of the U.P. Consolidation of Holdings Act, the Deputy Director of Consolidation is entitled to decide questions of fact and also appreciate the evidence. As Counsel for the both the parties agree that the matter may be decided by the Deputy Director of Consolidation, the order of the Deputy Director of Consolidation in so far it directs the remand of the case to the Consolidation Officer is set aside. He may decide the case himself. (Sita Ram v. Dy. Director of Consolidation; 2007 (102) RD 113)

◆ Ss. 48 & 9-A (2) – Proof of Will – Mere registration of will not sufficient for its proof.

Neither the Deputy Director of Consolidation nor the Settlement Officer Consolidation however have considered the reasons given by the Consolidation Officer in arriving at the finding about the date of death of Sukhai and Bhoj and about the Will. As the findings of the Consolidation Officer were being reversed the material evidence referred to in the Consolidation Officer's order and the reasons given by him ought to have been considered and met. One of the circumstances relief upon by the Consolidation Officer in support of his finding that the Will dated 6.6.1978 could not be relied upon is that on the same day on which it is alleged to have been executed there was an order of mutation of the name of the respondents 3 and 4, which was not possible. Moreover, Smt. Phoolmani was the sister of Bhoj and Sukhai. The Deputy Director of Consolidation and Settlement Officer Consolidation have not considered whether there were circumstances on account of which she may have been excluded by Sukhai to bequeath the property to the respondents. It is a settled principle of law that the burden to prove a Will lies upon the propounder. The Settlement Officer Consolidation, however, erroneously placed the burden of proof upon the petitioner. The Deputy Director of Consolidation also erred in not considering the evidence regarding the proof of the Will. The mere fact that a Will is a registered one is not

sufficient for its proof. The Deputy Director was, therefore, required to consider the evidence. (Smt. Phoolman v. Deputy Director of Consolidation, Deoria and Others; 2007 (102) RD 128)

◆ S. 49 – Bar of – Declaration of title barred by S. 49 of the Act and bar of S. 49 could be decided as preliminary issue.

Question of bar of section 49 of the Act need not be decided in every case as preliminary issue. However, in appropriate cases bar of jurisdiction of section 49 of the Act may be decided as preliminary issue. There is no absolute bar in that regard. (Smt. Manjhari (Dead) Through LRs. V. Second Addl. District Judge, Jaunpur and Others; (2007 (102) RD 293)

U.P. Imposition of Ceiling on Land Holdings Act

◆ **S. 5(6) – Determining the ceiling area – Transfer made after 24.1.1971 to be ignored.**

Sub-section (6) of section 5 of the Act provides that in determining the ceiling area applicable to a tenure holder, any transfer of land made after 24.1.1971, which but for the transfer would have been declared surplus under this Act, shall be ignored and not taken into account. **(Vishnu Kant v. Upper Ayukt Chitrakut Dham Mandal, Banda and Others; 2007 (102) RD 141)**

◆ Ss. 10, 13 and 3(17) – "Tenor-Holder" – Does not include a minor child whose mother or father is a tenor-holder.

Even though through gift deed land in dispute had been transferred to the minor petitioners through their mother as guardian, however, in the normal course father is the guardian.

Irrespective of validity of the gift deed, the land of the minor petitioners was liable to be clubbed with the land of their father by virtue of section 3(17) of the Ceiling Act which defines 'tenure-holder' to be a person who is the holder of a holding but does not include a minor child whose mother or father is a tenure-holder. (Krishna Murari Lal and Another v. 2nd Addl. Distt. Judge, Aligarh; (2007 (102) RD 366)

U.P. Land Revenue Act

◆ S. 34 – Nature of Mutation Proceedings – Summary – Do not decide title of the party.

It is well settled that mutation proceedings under section 34 of U.P. Land Revenue Act, 1901 are summary proceedings which do not decide any title of the party and the writ petition challenging the orders passed in mutation proceedings generally are not entertained by this Court, however, in view of the facts and circumstances of the present case, as mentioned hereinafter, and the chequered history of the case it is appropriate that submissions of Counsel for the parties be considered. (Jagdish Narain and Others v. Board of Revenue, Lucknow and Another; 2007(102) RD 20)

U.P. Public Premises (Eviction of Unauthorized Occupants) Act

◆ S. 5 – Nature of eviction proceedings under Act – Proceedings for eviction under Act are summary in nature and in such proceedings title cannot be decided.

Proceedings for eviction under Public Premises (Eviction of Unauthorized Occupants) Act are summary in nature and in such proceedings title cannot be decided. If a question of title is involved then it can better be decided by Civil Court in spite of order of eviction under aforesaid Act.

A clear cut bona fide dispute of title was/is involved in between the parties.

Accordingly, the writ petition is disposed of with liberty to the petitioners and/or respondent-trust to file regular suit before Civil Court on the basis of title. (Madan Mohan Sharma & Ors. V. VIIth Additional District Judge & Ors; 2007 (2) ALJ 334)

U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rule

◆ **Rule 5 – Compassionate appointment – The only ground for compassionate appointment under this rule is that Govt. servant must be in service.**

Government servant, if he is in service and dies, is one who dies in harness and dependent members of family are entitled for suitable employment under Rule 5 of 1974 Rules. The aforesaid Rule nowhere require that the death of the Government servant must occur while

discharging duty in the course of employment. The only requirement under 1974 Rules is that the Government servant must be in service. It is not disputed that the petitioner's father when died in 1992, was in service, therefore, apparently the view taken by the Superintendent of Police, Mainpuri for rejecting the claim of the petitioner is, incorrect and in the teeth of 1974 Rules. It appears that the aforesaid authority has no at all cared to look into 1974 Rules and has passed the impugned order under some misconception showing total non-application of mind on his part. In a matter pertaining to compassionate appointment, this kind of exercise on the part of the competent authority shows total apathy and cannot be appreciated. **(Rajesh Kumar v. State of U.P. and Ors.; 2007 (1) ALJ 88)**

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act

◆ **S. 20 – Proof of sub-letting – Brother is not member of "family" of tenant – It amounts to sub-letting.**

Admittedly also, petitioner No. 1 inducted his brother Sri Dinesh Kumar into the shop who inducted Sri Devasheesh Guha as sub-tenant, which they could not have done as this act of the petitioners amounts to sub letting. Sri Dinesh Kumar does not fall within the meaning of 'family' as defined in the Act and Sri Devasheesh Guha was an outsider.

Though sub-letting is very hard to prove but the facts and circumstances of each case have to be considered. Petitioner N. 1 has not been able to prove before the Courts below in which capacity his brother petitioner No. 2 and Sri Devasheesh Guha have been doing business in

aforesaid shop No. 10 with Godown, toilet etc. It may be mentioned that the business of Sri Guha is also different than the petitioners and in the facts and circumstances of this case, sub-letting is proved. **(Ramesh Kumar & Anr. V. Addl. Dist. Magistrate (Civil Supplies), Varanasi & Ors.; 2007 (1) ALJ 371)**

◆ **S. 21 – It is duty of the prescribed authority to consider part release of accommodation even though no such plea raised by tenant.**

Learned counsel for the petitioner relied upon a decision of the Apex Court in *Smt. Raj Rani Mehrotra v. IInd Additional District Judge and Others, 1980 ARC 311*, wherein the Apex Court has held as under:-

> "1. We have heard counsel for the parties. On going through the judgments of the lower authorities also of the High Court we are satisfied that the issue arising under Rule 16(1)(d) of the Rules framed under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, as to whether the landlord's need could have been satisfied by releasing only a part of the premises have not been gone into or considered by any of them. When the plea under the said rule was pressed on behalf of the tenant in the High Court, the High Court rejected it on the sole ground that no such plea has been raised by the tenant in his written statement and as such it

could not be considered. It is clear that under the relevant rule it is a duty of the Court to take into account that aspect while considering the requirements of personal occupation of the landlord and therefore, this issue will have to be remanded to the High Court.

We accordingly set aside the order of the High Court dismissing the writ petition and remand the matter back to it for determination of the aforesaid issue. If necessary, the parties may have to be allowed to lead fresh evidence, if the High Court is unable to decide it on the materials on the record. If evidence becomes necessary, the High Court may in its turn remand the matter back to the trial court, which will give an opportunity to both the parties to lead fresh evidence."

(Nand Kishore Awasthi v. A.D.J., Court No. 16, Kanpur Nagar, and Others; 2007 (1) AWC 173)

◆ S. 21(1)(a) – Release of shop – 11 months agreement between landlord and tenant- Tenant bound to vacate premises after expiry of period.

The judgments and orders of the learned Courts below are not in consonance with the modern trend of law in rent litigation. Here is a

case where a landlord having a large family consisting of his mother, wife and three children. The daughters of the petitioner are of marriageable age and he is requiring the two shops for running a business of selling building material to augment his income.

The learned Courts below has excluded from consideration that there was a 11-months agreement between the parties. This material piece of evidence was ignored. Under law, both the parties are bound by the terms and condition of the agreement. The eleven months' period stipulated in the agreement had already come to an end on 30.6.2006 and as per terms and condition of the said agreement he was required to vacate the premises. **(Rajesh Kumar Singh v. Distt. Judge, Unnao & Ors.; 2007 (1) ALJ 720)**

◆ **S. 21(1)(a) – Exercise of inherent power by appellate court to correct that error under rule 22(f) of U.P. Eviction Rules (1972) cannot be said to be illegal or without jurisdiction.**

Rule 22(f) of the Rules does provide that the authority under U.P. Act No. 13 of 1972 can exercise its inherent jurisdiction as provided in Section 151, CPC which is notwithstanding anything in the Code. Such exercise of jurisdiction by the Court below has to be considered upon the facts which have been brought forward on the record of the case. As has already been seen above the application was considered when the landlord brought to the notice of the appellate Court the finding recorded on a misconception and on facts which were factually incorrect and wrongly recorded by the Court. The exercise of inherent jurisdiction by the appellate Court therefore cannot be said to be illegal or without jurisdiction in any manner. It is not a case where there is inherent lack of jurisdiction nor it is a case where there is irregularity in jurisdiction. The order therefore cannot be said to be a nullity and in view of the facts of the case and the case setup by the parties the order has been passed to prevent the abuse of process of authority concerned and in the ends of justice. **(Srawan Kumar Singh Chauhan v. IIIrd Addl. Dist. Judge, Kanpur & Ors. Etc.; 2007 (1) ALJ 357)**

U.P. Zamindari Abolition and Land Reforms Act

◆ S.7 (aa) – Right to keep khalihan on Gaon Sabha land not an easementry right.

A perusal of the pleadings of the parties, the judgments of the Courts below and other materials available on record, makes it quite obvious that the plaintiffs are admittedly not the owners of the plots. The right to have 'Khalihan' over a particular piece of land given to the villagers by the Gaon Sabha, is not an easementary right. The present right of 'Khalihan', in the, disputed, plot No. 35, as has been claimed, does not have any dominant heritage for enjoyment of which the right is claimed. In the definition of easement, as given in section 4 of the Indian Easements Act, there are certain illustrations. Illustration (e) is squarely applicable to such property in which the right of 'Khalihan' is claimed as easement. This illustration (e) excludes such rights being an easementary right. If a property is given by the Gaon Sabha to the public for keeping their 'Khalihan' for some days in a year, this right is not an easement. Therefore, it is not possible to bring the implication of section 7(aa) of the aforesaid Act in the present matter. It is wholly misconceived interpretation of the very provision itself. (Ram Gopal and Another v. Kewal Prasad and Others; (2007 (102) RD 242)

◆ S. 18(1)(a) – Claim of Bhumidhari Rights can be made by person not in actual cultivatory possession.

It is settled law that Bhumidhari rights in lands can be claimed by a co-sharer under section 18(1)(a) of U.P. Zamindari Abolition and Land Reforms Act, 1950 even if he is not in actual cultivatory

possession. (Kailash Chandra v. State of U.P. and Others; (2007 (102) RD 301)

◆ S. 122(B) – Assessment of damages – At 100 times each year the amount of rent computed at the sanctioned hereditary rates applicable to the plots concerned.

The provision of S. 115-F(2) makes it specifically clear that in case of wrongful occupation of land, the damage caused to the Gaon Sabha or the local authority, as the case may be, shall be assessed for each year of such wrongful occupation or any part thereof, at 100 times the amount of rent computed at the sanctioned hereditary rates applicable to the plots concerned. (M/s. J.K. Dairy and Foods Ltd. (Chhoya) Gajraula through It's Vice President v. Additional District Magistrate (F & R)/Upper Collector, Jyotiba Phule Nagar and Others.; (2007 (102) RD 375)

◆ S. 122-B (4-F) – Admission as Bhumidhar with non-transferable rights – When could be made.

U.P. Zamindari Abolition and Land Reforms Act, but for the aforesaid provision of sub-section (4-F), no where recognizes the rights of any person as bhumidhar with transferable or non-transferable rights, as the case may be, unless of course his name is duly recorded in the revenue records and in the absence of which, he/she seeks declaration by filing a suit under section 229-B of the Act. It is only by virtue of sub-section (4-F) of section 122-B that the Agricultural labourer who fulfills the conditions given therein is not required to seek declaration by filing a suit but can be admitted as bhumidhar with non-transferable rights under section 195.

In the case of co-tenure holder, may be a suit, under section 176 could also be filed either with a declaratory relief or without seeking it as the law may permit. (Shambhoo Nath and Others v. Commissioner, Vindhyachal Region, Mirzapur and Another; 2007 (102) RD 136)

◆ S. 122-C (6) and 333 – Revision against order passed under S. 122-C (6) of the Act is maintainable.

Revision is maintainable against the order of Additional Collector. (Shambhu Nath v. Rauf Beg; 2007 (102) RD 89)

◈ S. 123(2) – Nature of S. 123 (2) is prospective and cannot not be given a retrospective effect.

The provisions of section 123(2) of the U.P.Z.A. and L.R. Act, as inserted by U.P. Act No. 34 of 1974, and as amended from time to time, is prospective in nature and cannot be given a retrospective effect. Further, I find that the provisions of section 123 of the Act does not provide, either expressly or by necessary implication, to indicate, that from the appointed date, the valid decrees or orders of the Court would become void or would be rendered a nullity. The Act No. 24 of 1974 nowhere states that a decree of the Court would become invalid or nullity either by express provision or by implication. The provisions of section 123(2) of the Act does not give any overriding effect to any valid decree passed by a Court of law. In fact, the expression "notwithstanding anything contained in the Act" as given in section 123(2) is confined to the provisions of U.P.Z.A. and L.R. Act. The said expression cannot be stretched to anything beyond the Act. (Majid and Others v. Rahmat Ullah; (2007 (102) RD 235)

◈ S. 229B – Suit for cancellation of sale deed in respect of agricultural land – Mutation in dependent's name already done – Civil Court has no jurisdiction to give any finding on possession over agricultural land and suit could be filed before Revenue Court.

Having heard the learned advocates for the parties, in our opinion, the submission of the learned counsel for the appellants deserves to be accepted. So far as abadi land is concerned, the trial Court held that Civil Court had jurisdiction and the said decision has become final. But as far as agricultural land is concerned, in our opinion, the Trial Court as well as Appellate Court were right in coming to the conclusion that only Revenue Court could have entertained the suit on two grounds. Firstly, the case of the plaintiff himself in the plaint was that he was not the sole owner of the property and defendant Nos. 10 to 12 who were proforma defendants, had also right, and the interest therein. He had also stated in the plaint that though in the Revenue Record, only his name had appeared but defendant Nos. 10 to 12 have also right in the property. In our opinion, both the Courts, below were right in holding that such a question can

be decided by a Revenue Court in a suit instituted under Section 229B of the Act.

On second question also, in our view, Courts below were right in coming to the conclusion that legality or otherwise of insertion of names of purchasers in Record of Rights and deletion of name of the plaintiff from such record can only be decided by Revenue Court since the names of the purchasers had already been entered into. Only Revenue Court can record a finding whether such an action was in accordance with law or not and it cannot be decided by a Civil Court.

In this connection, the learned counsel for the appellant rightly relied upon a decision of this Court in *Shri Ram & Anr. V. 1st Addl. Distt. Judge & Ors., (2001) 3 SCC 24*. In Shri Ram, A, the original owner of the land sold it to B by a registered sale deed and also delivered possession and the name of the purchaser was entered into Revenue Records after mutation. According to the plaintiff, sale deed was forged and was liable to be cancelled. In the light of the above fact, this Court held that it was only a Civil Court which could entertain, try and decide such suit. The Court, after considering relevant case law on the point, held that where a recorded tenure holder having a title and in possession of property files a suit in Civil Court for cancellation of sale deed obtained by fraud or impersonation could not be directed to institute such suit for declaration in Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land.

The Court, however, proceeded to observe:

> **"The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession".**

The instant case is covered by the above observations. The lower Appellate Court has expressly stated that the name of the plaintiff had been deleted from Record of Rights and the names of purchasers had been entered. The said fact had been brought on record by the contesting defendants and it was stated that the plaintiff himself appeared as a witness before the Mutation Court, admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the property purchased by them. It was also stated that the records revealed that the names of contesting defendants had been mutated into Record of Rights and the name of plaintiff was deleted.

In the light of the above facts, in our opinion, the Courts below were wholly right in reaching the conclusion that such a suit could be entertained only by a Revenue Court and Civil Court had no jurisdiction. The High Court by reversing those orders had committed an error of law and of jurisdiction, which deserves interference by this Court. (Kamla Prasad & Ors. V. Sri Krishna Kant Pathak & Ors; 2007 (2) Supreme 173)

◆ S. 229-B – Question of validity of sale deed in respect of agricultural land can be entertained by Revenue Court only.

So far as abadi land is concerned, the Trial Court held that Civil Court had jurisdiction and the said decision has become final. But as far as agricultural land is concerned, in our opinion, the Trial Court as well as Appellate Court were right in coming to the conclusion that only Revenue Court could have entertained the suit on two grounds. Firstly, the case of the plaintiff himself in the plaint was that he was not the sole owner of the property and defendant Nos. 10 to 12 who were proforma defendants, had also right, title and interest therein. He had also stated in the plaint that though in the Revenue Record, only his name had appeared but defendant Nos. 10 to 12 have also right in the property. In our opinion, both the Courts below were right in holding that such a question can be decided by a Revenue Court in a suit instituted under section 229-B of the Act. (Kamla Prasad and Others v. Krishna Kant Pathak and Others; (2007 (102) RD 378)

◆ S. 331 (4) – Second Appeal under – Amendment in Section 100 CPC would be applicable.

S. 341 of the U.P. Zamindari Abolition and Land Reforms Act applies the provisions of the Civil Procedure to proceedings under the U.P. Zamindari Abolition and Land Reforms Act applies the provisions of the Civil Procedure to proceedings under the U.P. Zamindari Abolition and Land Reforms Act unless otherwise expressly provided. The Zamindari Abolition and Land Reforms Act has made provision for suits, appeals, second appeals, revisions etc. The Civil Procedure Code thus has been made applicable to them unless otherwise expressly provided. No express provision making the Civil Procedure Code inapplicable has however been cited. On the subject of suits, appeals, revisions and other proceedings the Civil Procedure Code supplements the U.P. Zamindari Abolition and Land Reforms Act by force of section 341. In the earlier Tenancy laws of the State namely in the U.P. Tenancy Act, 1939, Agra Tenancy Act, 1926 and N.W.P. Tenancy Act, 1901 there were provisions similar to section 341 of U.P. Zamindari Abolition and Land Reforms Act.

Undoubtedly section 341 U.P. Zamindari Abolition and Land Reforms Act, which applies the Civil Procedure Code as a whole to proceedings under the U.P. Zamindari Abolition and Land Reforms Act is legislation by reference. It supplements the proceedings under the U.P. Zamindari Abolition and Land Reforms Act in view of section 341. The normal rule of interpretation would, therefore, be to apply the amendments in the Civil Procedure Code to proceedings in the U.P. Zamindari Abolition and Land Reforms Act. If any difficulty in applying this rule of interpretation has arisen in respect of second appeals under the U.P. Zamindari Abolition and Land Reforms Act on account of the reference to the grounds specified in section 100 CPC being legislation by incorporation that difficulty stands removed by the definition in sub-section 30 of section 3 U.P. Zamindari Abolition and Land Reforms Act. If however on amendment in the Civil Procedure Code is of such a nature that its application to the section, which refers to the Civil Procedure Code would be repugnant to the context it would be inapplicable in view of the exception of contrary context contained in the definition clause. (Sri T.R.C.J.M.B., Mandir, Firozabad v. B.R., U.P. at Allahabad and Others; 2007 (102) RD 1)

◆ S. 333 – Scope of – No jurisdiction to decline the parties from hearing on merits.

It is well settled that the scope of revisional jurisdiction under section 333 of the U.P.Z.A. & L.R. Act is limited to the extent of jurisdictional error alone. The Appellate Court having allowed the applications under Order 41 Rule 21 C.P.C., it was not open for the Revisional Court to have allowed the revision so as to decline the parties from hearing on merits. (Raghav Chandra v. State of Uttaranchal Through Secretary Revenue and Others; (2007 (102) RD 216)

Words and Phrases

- **'Material facts' and 'Particular' – Distinction**

A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial. **(Virender Nath Gautam v. Satpal Singh & Ors.; AIR 2007 SC 581)**

- 'Profession' and 'Occupation' – Distinction of.

Furthermore if we draw a distinction between occupation and profession we can see that an occupation is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a profession is an occupation that requires extensive training and the study and mastery of specialized knowledge, and usually has a professional association, ethical code and process of certification or licensing.

Classically, there were only three professions; ministry, medicine, and law. These three professions each hold to a specific code of ethics, and members are almost universally required to swear some form of oath to uphold those ethics, therefore "professing" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value, and importance of its particular oath in the practice of that profession. **(Muir Mills Unit of N.T.C. (U.P.) Ltd. V. Swayam Prakash Srivastava & Anr.; 2007 (1) ALJ 708)**

◈ **'Wakf' – Creation and Continuation of – Once created can't be extinguished by act of Mutawalli.**

Having gone through and considered the judgment of the learned Single Judge of the Allahabad High Court, we see no reason to take a view different from those expressed therein. In our view, the law relating to the creation and continuation of wakfs has been correctly explained by the learned Judge in keeping with the well-established principles that once a wakf is created, the wakif stands divested of his title to the properties which after the creation of the wakf vests in the Almighty. It is no doubt true that in a given case the creation of a wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability. But in the instant case, such a stand is not available to the Wakif or the Mutwalli since the wakf was created in 1926 and was registered under Section 38 of the 1936 Act and was also notified in the Official Gazette in January 1954. It was only thereafter in 1958, that is, after 32 years that the Wakif filed a collusive suit which was decreed on compromise. The Wakif did not, however, question the registration of the wakf under the provisions of the 1936 Act, nor did he challenge the gazette notification published in January, 1954.

Lastly, we do not also find any force in the submission that since the revenue records were altered to show the properties to be the secular properties of the appellant, the wakf character of the properties had been obliterated. The law is well settled that once a wakf is created it continues to retain such character which cannot be extinguished by any act of the Mutwalli or anyone claiming through him. **(Chhedi Lal Misra (Dead) Through LRs. V. Civil Judge, Lucknow & Ors.; 2007 (2) Supreme 236)**

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