सीमित प्रसार के लिए
Restricted Circulation

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, 2008

Volume: XV **Issue No.: 1**

Quarterly Digest

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

January – March, 2008

Volume: XV **Issue No.:1**

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

SUBJECT INDEX

29. Prevention of Food Adulteration Act
30. Probation of Offenders Act
31. Service Law
32. Societies Registration Act
33. Specific Performance Act
34. Specific Relief Act
35. Stamp Act
36. Transfer of Property Act
37. U.P. Consolidation of Holdings Act
38. U.P. Industrial Disputes Act
39. U.P. Krishi Utpadan Mandi Samiti Adhiniyam
40. U.P. Municipalities Act
41. U.P. Muslim Waqf Act
42. U.P. Panchayat Raj Act
43. U.P. Public Service Tribunal Act
44. U.P. Stamp (Valuation of Property) Rules, 1977
45. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act
46. U.P.Z.A. & L.R. Act
47. Words and Phrases
48. Statutes
    (1) The Uttar Pradesh Panchayat Laws (Amendment) Act, 2007 [U.P. Act No. 44 of 2007]
    (2) The Uttar Pradesh Public Services (Reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Act, 2007

* * *

LIST OF CASES COVERED IN THIS ISSUE

25. Durga Prasad Tiwari v. Additional District Judge & Ors.; 2008 (1) ALJ 518
26. Gulzar v. State of M.P.; AIR 2008 SC 383
27. Gurunath Manohar Pavaskar and Ors v. Nagesh Siddappa Navalgund & Ors; 2008 (104) RD 243
28. Har Dayal v. State of U.P. & Ors.; 2008 (1) ALJ 337
29. Harpal Singh v. State of Punjab; AIR 2008 SC 743
30. Indal Kumar Kushwaha & Anr. V. Rajesh Kumar Gupta & Ors.; 2008 (1) ALJ 93
31. Inder Mohan Goswami v. State of Uttaranchal; (2008) 1 SCC (Cri) 259
32. Indian Council of Agricultural Research, Krishi Bhawan & Ors. V. Central Administrative Tribunal, Allahabad Bench & Anr.; 2008 (1) ALJ 283
33. Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon & Ors.; AIR 2008 SC 306
34. Kapildeo Mandal & Ors. V. State of Bihar; AIR 2008 SC 533
35. Kishore Chandra Agarwal v. State of U.P. & Ors; 2008 (104) RD 235
36. Kohli Brothers v. M/s. Atlantis Multiplex Pvt. Ltd.; AIR 2008 All 43
37. Laxminarayan Vishwanath Arya v. State of Maharashtra & Ors.; 2008 (1) ALJ 685
38. Lucknow Development Authority v. Krishna Gopal Lahori & Ors.; AIR 2008 SC 399
39. M/s. Bharat Electricals, Kanpur through its Director and Others v. Addl. Civil Judge, Sitapur and Another; 2008 (104) RD 264
40. M/s. Kamil & Bros. V. Central Dairy Farm & Anr.; AIR 2008 All 33
41. M/s. Rewant Hospitality Pvt. Ltd. & Anr. V. State of U.P. & Ors.; 2008 (1) ALJ 354
42. Mahabir Singh v. Subhash and Others; 2008 (104) RD 330
43. Mahboob Deepak v. Nagar Panchayat Gajraula & Anr.; 2008 (1) ALJ 790
44. Manohar Shankar Nale & Ors. v. Jaipalsing Shivlalsing Rajput & Ors.; AIR 2008 SC 429
45. Mohammad Asharaf & Anr. V. Additional District Judge & Ors.; 2008 (1) ALJ 415
46. Mohammad Zafar v. State of U.P. & Anr.; 2008 (1) ALJ 665
47. Mohd. Yasin Khan v. State of U.P.; 2008 (104) RD 51
48. Moses Wilson & Ors. V. Kasturiba & Ors.; AIR 2005 SC 379
49. Ms. Sharda Fuels Distributors Pvt. Ltd. v. Central Bank of India & Ors.; 2008

(1) ALJ (NOC) 110

50. Mujahid Ahmad Hussain v. State of U.P. & Anr.; 2008 (1) ALJ 155
51. Naresh Kumar Madan v. State of M.P.; AIR 2008 SC 383
52. Nathu Ram Tiwari v. U.P. State Public Service Tribunal & Ors.; 2008 (1) ALJ (NOC) 120 All
53. National Insurance Co. Ltd. v. Cholleti Bharatamma & Ors.; AIR 2008 SC 484
54. National Insurance Co. Ltd. v. Deepa Devi & Ors.; AIR 2008 SC 735
55. Oriental Insurance Co. Ltd. v. Smt. Raj Kumari and Ors.; AIR 2008 SC 403
56. Pratap Singh Shishodia v. Board of Revenue, Allahabad and Others; 2008 (104) RD 151
57. Rajeev Hitendra Pathan & Ors. V. Achyut Kashinath Karekar & Anr.; 2008 (1) ALJ 221
58. Rajendra Datta Zarekar v. State of Goa.; AIR 2008 SC 572
59. Rajendra Singh Raghav v. Raja Khagendra Pratap Shahi; 2008 (104) RD 87
60. Rajwanti Nanuwa v. Deputy Director of Consolidation, Bulandshahr and Ors.; 2008 (1) ALJ 294
61. Ram Barai Prasad v. State of U.P. & Ors.; 2008 (1) ALJ 376
62. Ram Chandra Chaturvedi v. State of U.P. and Anr.; 2008 (1) ALJ 180
63. Ramzan & Ors. V. Smt. Gafooran & Ors.; AIR 2008 All
64. Rashid Jamal v. Rent Control & Eviction Officer & Ors.; 2008 (1) ALJ 339
65. S.K. Upadhyay v. State of U.P. & Ors.; 2008 (1) ALJ 331 DB
66. Sanapareddy Maheedhar Seshagiri & Anr. v. State of Andhra Pradesh & Anr.; AIR 2008 SC 787
67. Sangeeta Chaturvedi v. State of U.P. & Anr.; 2008 (1) ALJ 451
68. Savithri & Ors. V. Karthyayani Amma & Ors.; AIR 2008 SC 300
69. Sewa Ram & Anr. V. State of U.P.; AIR 2008 SC 682
70. Shaik China Brahamam v. State of A.P.; AIR 2008 SC 610
71. Shyam Lal v. Satya Narain & Anr.; 2008 (1) ALJ 328
72. Shyam Narain v. Ram Singh; 2008 (104) RD 103
73. Sita Ram and Others v. Radhey Shyam; 2008 (104) RD 114
74. Smt. Kaniz Fatima and others, Petitioners v. Additional District Judge, Meerut and others; 2008(104) RD 305
75. Smt. Majidan w/o Ilahi Baksh & Ors. V. Ishaq s/o Abdul Rahim (since deceased thro. L.Rs.) & Ors.; 2008 (1) ALJ 770

76. Smt. Pramod Bijalwan, W/o Sri Satendra Dutt v. Satendra Dutt, S/o Sri Shiv Dutt; 2008 (1) ALJ 89
77. Smt. Ram Kali v. Kuldeep Chand and Others; 2008 (104) RD 46
78. Smt. Rizwana & Ors. V. Civil Judge (Sr. Divn.), Allahabad & Ors.; 2008 (1) ALJ 326
79. Smt. Sangeeta & Anr. V. Mange Ram; 2008 (1) ALJ 559
80. Smt. Sarla Devi Gupta v. Ravindra Singh; 2008 (104) RD 106
81. Smt. Vidyawati v. Lala Ram (deceased by L.Rs.) & Anr.; 2008 (1) ALJ 355
82. State of Karnataka v. Ameerjan; (2008) 1 SCC (Cri) 130
83. State of M.P. v. Babulal; AIR 2008 SC 582
84. State of Punjab v. Raninder Singh and Anr.; AIR 2008 SC 609
85. State of Rajasthan & Ors. V. M/s. Khandaka Jain Jewellers.; AIR 2008 SC 509
86. State of Rajasthan v. Ganeshi Lal; AIR 2008 SC 690
87. State of U.P. and Others v. Roshan Singh (Dead) by LRs. And Others; 2008 (104) RD 210
88. State of Uttaranchal & Anr. V. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad; 2008 (1) ALJ 51
89. The New India Assurance Co. Ltd. v.Padam Singh & Ors.; 2008 (1) ALJ 7
90. U.P. State Agro Industrial Corporation Ltd. v. Kisan Upbhokta Parishad and others; 2008 (1) AWC SC1
91. Umardeen v. Additional District Judge, Muzaffarnagar & Ors.; 2008 (1) ALJ 379
92. United India Insurance Co. Ltd. v. Serjerao and Ors.; AIR 2008 SC 460
93. United India Insurance Company Ltd. v. Satya Narain Sharma & ors.; AIR 2008 Raj. 23
94. Ved Prakash Rastogi v. Nagar Palika, Budaun; AIR 2008 All 27
95. Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd.; AIR 2008 SC 716
96. Vineet Kumar Chauhan v. State of U.P.; AIR 2008 SC 780
97. Vithal v. State of Maharashtra; (2008) 1 SCC (Cri) 91

* * *

Arbitration and Conciliation Act

◆ **S. 9 – Application for Interim measures can be made at pre-reference stage.**

An application for interim measure can be made either before or during arbitral proceedings or at the time after making arbitral award. When at post-reference stage application for interim measure can be entertained by Court keeping the question of jurisdiction or validity of the arbitration agreement open for the arbitral tribunal, then the same can also be made as a pre-reference stage on a prima facie view. **(Kohli Brothers v. M/s. Atlantis Multiplex Pvt. Ltd.; AIR 2008 All 43)**

Arms Act

◆ **S. 13 – Grant/Renewal of arms licence – Order of non-issuance of arm licence would be proper if criminal cases were registered against applicant's husband.**

From the scheme of the provisions of the Act and Rules, as noted above, it is clear that registration of criminal case against members of the family, in the present case husband of the applicant, cannot be said to be irrelevant fact having no bearing for grant of licence for trade and business in the arms and ammunition. The submission of the petitioner's counsel that the fact of registration of criminal cases against the petitioner's husband are wholly irrelevant and the acts of the respondents on the said basis are wholly illegal cannot be accepted. No error has been committed by the District Magistrate in not issuing arms licence in Forms-XIII and XIV to the petitioner taking into consideration the aforesaid facts. Thus the submission of the petitioner's counsel that on irrelevant facts the respondents have refused to issue licences in Forms XIII and XIV cannot be accepted. The action of the respondents in not taking any steps for renewal of the licence in Form-XII can also not be said to be without any basis. **(Sangeeta Chaturvedi v. State of U.P. & Anr.; 2008 (1) ALJ 451)**

Banking Law

◆ **Recovery of Dues to Banks and Financial Institution Act, 1993 – S. 20 – Recovery of Debts to Banks and Financial Institutions Act (51 of 1993) – Relief against order of refusal to restraining Bank from realising loan by recovery officer lies U/s. 20 of above Act but not in Article 226 – of Constitution of India due to alternative remedy.**

In this case debtor sought injunction restraining the bank from realising loan by attaching and auctioning property of debtor. In case of refusal of recovery officer, debtor could move appeal U/s. 20 of above Act. **(Ms. Sharda Fuels Distributors Pvt. Ltd. v. Central Bank of India & Ors.; 2008 (1) ALJ (NOC) 110)**

Civil Procedure Code

◆ **S. 2 – Composite decree – Decree for possession and for computatin of mesne profits is not composite decree.**

Where a review petition is dismissed, the doctrine of merger will have no application whatsoever. It is one thing to say that the judgment debtor was entitled to file an application for review in terms of S. 114 read with O. 47,R. 1 of Civil P.C. but it is another thing to say that the decree passed in favour of the decree holder merged with the order dismissing the review application. Matter might have been different, if the review application had been allowed either wholly or in part interms whereof an application for execution of the decree could have been filed only interms of the modified decree. **(Manohar Shankar Nale & Ors. V. Jaipalsing Shivalsing Rajput & Ors.; AIR 2008 SC 429)**

◆ **S. 47, O. 21 and R. 92 – Private alienation of property after attachment – purchaser of property cannot be termed as representative of judgment debtor, hence cannot file objections U/s. 47 of Code.**

Section 47 of the CPC provides as under:

"47. Questions to be determined by the Court executing decree. – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(***)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this Section, bedetermined by the Court."

A perusal of the aforesaid provision indicates that all questions arising between the parties to a suit in which a decree was passed or their representatives, and relating to the execution shall be determined by the Court executing the decree and not by a separate suit. Admittedly, the plaintiff was not a party in O.S. No. 57 of 1972. the question which now requires to be answered is, whether the plaintiff was a representative of thedefendant in O.S. No. 57 of 1972? In Musammat Bhamphul Devi v. Rai Sahib Harbakhsh Singh, 1912(14) IC 40, it was held that a transferee of a judgment debtor's property is not a representative of the judgment debtor's property is not a representative of the judgment debtor and an objection could not be filed by such a person under Section 47 of the CPC and that a separate suit would be maintainable. In Ghafur-Ud-Din v. Hamid Husain and others, ILR 32 All 129, it was held that a purchaser of the property which was under attachment was not a representative of the judgment debtor.

In view of the aforesaid, this Court is of the opinion that the plaintiff was not a representative of the judgment debtor since she was not a party in O.S. No. 57 of 1972 and therefore could not have filed an objection under Section 47 of the CPC. **(Smt. Vidyawati v. Lala Ram (deceased by L.Rs.) & Anr.; 2008 (1) ALJ 355)**

◆ **Ss. 96 and 100 – First appellate court can go into question of fact, while dealing with appeal under S. 100 High Court cannot enter before with the finding of fact of the first Appellate Court.**

In a First Appeal filed under section 96, CPC, the Appellate Court can go into questions of fact, whereas in a Second Appeal filed under section 100, CPC, the High Court cannot interfere with the findings of fact of the First Appellate Court, and it is confined only to questions of law. **(Chacko and Another v. Mahadevan; 2008 (104) RD 117)**

◆ **S. 100 – Second Appeal – Court could hear 2nd Appeal on any question of law after formulating such question.**

In Govindaraju v. Mariamman [2005 (98) RD 731 (SC) = 2005 (28) AIC 628] the Supreme Court held that the substantial questionof law is 'sine qua non' for exercise of jurisdiction under section 100 of the CPC and relied upon the judgments in Kshitish Chandra Purkait v. Santosh Kumar Purkait [(1997) 5 SCC 438)] Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 713] Kondiba Dagadu Kadam v. Savitribai Sapan Gujar [1999 (36) ALR 218 (SC)] and traced out the background and reasons for adding such on restriction in section 100 CPC. It referred to Santosh Hazari v. Purushottam Tiwari [2001 (42) ALR 794 (SC)] in which the purpose which necessitated and persuaded the Law Commission of India to recommend for the amendment of section 100 was referred, to and the meaning of 'Substantial question of law' is explained as follows:-

> "14. As to which would constitute a substantial question of law, it was observed: (SCC pp. 187-88, para 14)
>
> 14.A A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material

bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

The judgment was followed in Thiagrajan v. Shri Venugopalaswamy B. Coil [2004 (17) AIC 134 = 2004 (55) ALR 22 (Sum.) = (2004) 5 SCC 762]. In Phool Patta v. Vishwanath Singh [2005 (99) RD 477 (SC) = 2005 (33) AIR 749 (SC)], the Supreme Court held that the High Court could have heard the second appeal on any question not formulated by it only after formulating such question, for reasons to be recorded, and not otherwise. **(Durga Prasad Gaur v. Ram Murat Ram Vishwakarma; 2008 (104) RD 30)**

◆ **S. 100 – Second Appeal – Substantial questionof law – What is.**

To be a 'substantial' question of law must be debatable, not previously settled bylaw of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it

must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. **(Boodireddy Chandraiah & Ors. V. Arigela Laxmi & Anr.; AIR 2008 SC 380)**

◆ **S. 114, O. 47, R. 1 – Review – Deoctine of merger – Does not apply when review petition is dismissed.**

Where a review petition is dismissed, the doctrine of merger will have no application whatsoever. It is one thing to say that the judgment debtor was entitled to file an application for review interms of S. 114 read with O. 47, R. 1 of Civil P.C. but it is another thing to say that the decree passed in favoaur of the decree holder merged with the order dismissing the review application. Matter might have been different, if the review application had been allowed either wholly or in part interms whereof an application for execution of the decree could have been filed only interms of the modified decree. **(Manohar Shankar Nale & Ors. V. Jaipalsing Shivlalsing Rajput & Ors.; AIR 2008 SC 429)**

◆ **S. 151 – Object of**

The principles which regulate the exercise of inherent powers by a Court have been highlighted in many cases. In matters with which the CPC does not deal with, the Court will exercise its inherent power to do justice between the parties which is warranted under the circumstances and which the necessities of the case require. If there are specific provisions of the CPC dealing with the particular topic and they expressly ornecessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent powers of the Court cannot be invoked in order to cut across the powers conferred by the CPC. The

inherent powers of the Court are not to be used for the benefit of a litigant who has remedy under the CPC. Similar is the position vis-à-vis other statutes. The object of section 151 CPC is to supplement and not to replace the remedies provided for in the CPC. Section 151 CPC will not be available when there is alternative remedy and same is accepted to be a well-settled ratio oflaw. The operative field of power being thus restricted, the same cannot be risen to inherent power. The inherent powers of the Court are in addition to the powers specifically conferred to it. If there are express provisions covering a particular topic, such power cannot be exercised in that regard. The section confers on the Court power of making such orders as may be necessary for the ends of justice of the Court. Section 151 CPC cannot be invoked when there is express provision even under which the relief can be claimed by the aggrieved party. The power can only be invoked to supplement the provisions of theCode and not to override or evade other express provisions. The position is not different so far as the other statutes are concerned. Undisputedly, an aggrieved person is not remediless less under the Act. **(State of U.P. and Others v. Roshan Singh (Dead) by LRs. And Others; 2008 (104) RD 210)**

◆ **O. VIII, R. 1 – Nature of – Not mandatory, rather they are directory and procedural in nature.**

The provisions under Order VIII, Rule 1 CPC, are not mandatory, rather they are directory and procedural in nature. They do not give substantive right to any of the parties of procedings rather cast an obligation upon the defendant to file written statement within 30 days from the date of service of summons and within extended time falling within 90 days for the reasons to be recorded by the Court while accepting the written statement after 30 days within the outer time limit of 90 days. The provisions do not deal with the power of the Court and also do not specifically take away the power of the Court to take the written statement on record though filed beyond time as provided for. As held by Hon'ble Apex Court in Rani Kusum's case it is no doubt true that the amended provision of Order 8, R. 1 CPC as substituted by Amendment Act, 2002 with effect from 1.7.2002 intends to curb the mischief of unscrupulous defendants

adopting dilatory tactics in delaying the disposal of the case causing inconvenience to the plaintiff approaching the Court for quick relief and also to curb the serious inconvenience of the Court faced with frequent prayer for adjournments, but the ultimate object is to expedite the hearing and not to scuttle the same. The provisions have been made to advance the cause of justice and not to defeat it. In an adversial system no party should ordinarily be denied the opportunity of participating in the process of justice dispensation, unless compelled by express and specific language of the statute.The provisions of CPC or any other procedural enactment ought not to be construed in a manner, which would leave the Court helpless to meet the extra ordinary situation in the ends of justice.

Court held that no straitjacked formula can be laid down except that observance of time schedule contemplated by Order VIII, Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. **(Durga Prasad and Another v. District Judge, Lucknow and Others; 2008 (104) RD 318)**

◈ **O. XIV, R. 1 – Framing of issues – Question relating to court fee can be very well considered by Trial Court after framing issue.**

A plain reading of Order XIV Rule 1 of the Code of Civil Procedure would show that while proceeding with the case, Court has to frame issue on the material preposition of facts and law both. Accordingly, it can be very well be inferred that the framing of issues in a civil suit is a condition precedent to proceed with a suit. A plain reading of section 6 of the Court Fees Act read with Order XIV Rule 1 of the Code of Civil Procedure shows that question relating to Court Fees Act can be very well considered by theTrial Court after framing issues. However, it is incumbent upon the Trial Court to decide the issue relating to Court fee as preliminary issue and in case, the trial court finds that suffient court fees has not been paid, then court may direct the plaintiff to make good the deficiency in court fee within the specified time. In case the court fees is not paid, then court may not proceed further and the suit can be dismissed on account of non compliance of the order passed by the trial court. **(M/s. Bharat**

Electricals, Kanpur through its Director and Others v. Addl. Civil Judge, Sitapur and Another; 2008 (104) RD 264)

◆ **O. XVII, R. 1 – Power to adjourn case under – Given to serve the principles of natural justice.**

The code of Civil Procedure, 1908 provides for adjournment by the Court at any stage of the suit, for reasons to be recorded in writing. This power to adjourn the case under Order XVII, Rule 1 of the Code of Civil Procedure, 1908, given to serve the principles of natural justice, is often misused by the Counsels of both the parties as well as the Court. The cases are adjourned for reasons, which can be avoided and are often not recorded in the orders. On most of the occasions the cases are adjourned without any application filed by either of the parties causing long delays, leading to mounting arrears, which has virtually crippled the legal system. Many a times the adjournments are given by the Court only to manage the case diary cause list. On such occasions, when the Courts have large numberof cases on the day, adjournments are given for asking to managing the work. The Courts do not manage their roster in such a manner that only a reasonable number of cases are fixed on any day. The Counsels very often seek adjournments not to provide opportunity to defend to their clients. Sometimes theswe adjournments are sought as they re over busy, which is mostly, a case with senior Counsels and on many other occasions for filmsy reasons. The Counsels practicing in law Courts have deviced thousands of ways to get the cases adjourned. Some Counsels are known as experts in adjournments and are engaged only to delay the cases. The misuse of the power of adjournment has virtually put the entire administration of justice to ransom. **(Dr. R.K. Agarwal v. Judge, Small Causes Court, Allahabad & Another; 2008 (104) RD 326)**

◆ **O. 23, R.1 – Grant of permission for withdrawal of appeal – Court becomes functus officio thereafter – Cannot grant further relief.**

In the instant case, the order of the Civil Court may be bad but then it was required to be set aside by the Court of Appeal. An appeal

had been preferred by the appellants thereagainst but the same had been withdrawn. The said order of City Civil Court, therefore, attained finality. The High Court, while allowing the appellant to withdraw the appeal, no doubt, passed an order of status quo for a period of two weeks in terms of its order but no reason therefor had been assigned. It ex facie had no jurisdiction to pass such an interim order. Once the appeal was permitted to be withdrawn, the Court became functus officio. It did not hear the parties on merit. It had not assigned any reason in support thereof. Ordinarily, a Court, while allowing a party to withdraw an appeal, could not have granted a further relief. **(Ajay Mohan & ors. V. H.N. Rai & Ors.; AIR 2008 SC 804)**

◆ **O. 39, R. 1 & S. 9 – Maintanability of suit for injunction – Whether civil court has jurisdiction to entertain the suit as assessment and imposition of the tax was governed by U.P. Act No. XI of 1961 – Held, "No".**

A Full Bench of Court in the case of Union of India v. Sir Shadi Lal Sugar and General Mills Ltd. AIR 1980 All page 379 held that the jurisdiction of Civil Court though all embracing unless it is excluded by an express provision of law or by clear intendment arising from such law. Paragraph No. 11 of the aforesaid judgment is quoted herein below:

It is well settled that the urisdictionof the Civil Court is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. In Dhulabhai v. State of M.P. AIR 1969 SC 78 the Supreme Court of India had occasion to consider in detail as to in which circumstances the suit would be maintainable in the Civil Court and in which not. After examining the various authorities the following propositions were laid down:-

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. Such

provisions, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of juridical procedure.

(2) Where there is an express bar of the jurisdiction of the Court, an examinationof the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

Whether there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determinationof the right or a liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Ven the High Court cannot go into that question on a revisionor reference from the decisionof the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Question of the correctness of the assessment apart from its constitutionality are for the decisionof the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the

particular Act must be examined because it is a relevant enquiry.

(7) An exclusionof the jurisdiction of the Civil Court is not readily tobe inferred unless the conditions above set down apply."

(Har Dayal v. State of U.P. & Ors.; 2008 (1) ALJ 337)

◆ **O. 39 – Applicability of principle of Res-judicata – Apply in different stages of the same proceedings.**

It is a trite law that the principles of res judicata apply in different stages of the same proceedings. [See Satyadhyan Ghosal and others v. Smt. Deorajin Debi and another (AIR 1960 SC 941), Arjun Singh v. Mohindra Kumar and Others (AIR 1964 SC 993), and C.V. Rajendran and another v. N.M. Muhammed Kunhi (2002) 7 SCC 447, Ishwar Dutt v. Land Acquisition Collector and another (2005) 7 SCC 190, and Bhanu Kumar Jain v. Archana Kumar and Another, 2005 (98) RD 466.] **(Ajay Mohan and Others v. H.N. Rai and Others; 2008 (104) RD 252)**

◆ **O. XLVII, R. 9 – Second Review application is not maintainable.**

Once the writ petition has been decided on merits, the scope of review is very limited and successive review applications are not maintainable. In the instant case the first review application was filed without consent of the original Counsel who is alleged to have given a wrong undertaking before the Court has neither filed review application nor has appeared in the Court to admit or deny the allegations made against him. It would be laying down a bad precedent to allow successive review applications by subsequent Counsel by making allegations against the origianl Counsel engaged initially. **(Smt. Kaniz Fatima and others, Petitioners v. Additional District Judge, Meerut and others; 2008(104) RD 305)**

◆ Scope of consent decree – Need not be confined to the relief prayed for nor it be confined to the subject matter of the suit.

A consent decree need not be confined to the relief prayed for nor be confined to the subject matter of the suit. It terminates the litigation between the parties and has binding effect. The parties are not allowed to wriggle out of the consent terms on the puported plea of seeking clarifications. (Rajendra Singh Raghav v. Raja Khagendra Pratap Shahi; 2008 (104) RD 87)

Constitution of India

◆ Article 14 – Prohibition on employment of women in Hotels and Bars serving liquor would violate gender equality.

Section 30 of Punjab Act prohibiting employment of women in any part of premises in which liquor or intoxicating drug is consumed by the public results in an invidious discrimination.

Right to self-determination is an important off shoot of Gender Justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix. Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship. It is to be borne in mind that legislations with prononced ‘protective discrimination’ aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. Secction 30 of Punjab Act suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

Instead of prohibiting women employment in the bars altogether the State should focus onfactoring in ways through which unequal consequences of sex differences can be eliminated. It is State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other policy inference (such as the one embodied under S. 30) from societal conditions would be oppressive on the women and against the privacy rights.

International treaties vis-à-vis the rights of women was noticed by this Court in a large number of judgments, some of which we may notice at this stage. **(Anuj Garg & Ors. V. Hotel Association of India & Ors.; AIR 2008 SC 663)**

◆ **Article 21 – Prohibition on employment of men below 25 years of age in Hotels and Bars would violate right to livlihood.**

Young men who take a degree or diploma in Hotel Management enter into service at the age of 22 years or 23 years. It, thus, cannot prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a facet of the right to livlihood do not stand judicial scrutiny. **(Anuj Garg & Ors. v. Hotel Association of India & Ors.; AIR 2008 SC 663)**

◆ **Article 21 – Speedy Justice – Denial of – Concern express by Apex Court at delay in disposal of cases.**

Before parting with this case, the Apex Court again express his deep concern at the delay in disposing of cases in Courts. Recently in Civil Appeal No. 1307 of 2001 titled Rajindra Singh (Dead) through L.Rs. & Ors. V. Prem Mai & Ors. Decided on 23rd August, 2007 the Court expressed his deep anguish about this situation, and had observed that because of delay in disposal of cases people in this country are fast losing faith in the judiciary. Court observed in the media news of lynching of suspected thieves in Bihar's Vaishali District, the gunning down of an undertrial prisoner outside Patna City

Civil Court, and other incidents where people have taken the law into their own hands. This is obviously because many people have started thinking that justice will not be done in the Courts due to the delays in Court proceedings. This is indeed an alarming state of affairs, and once again request the concerned authorities to do the needful in the matter urgently before the situation goes totally out of control. **(Moses Wilson & Ors. v. Kasturiba & Ors.; AIR 2005 SC 379)**

◆ **Article 311 – Termination of service on the ground that respondent was not eligible for post being over age – Appointment would be void ab initio.**

In the instant case, if the petitioner was not eligible being overage, his application ought not to have been considered and thus, his appointment is void. It, therefore, makes no difference as how he has been removed from service.

So far as the issue of non-observance of principle of natural justice is concerned, the Hon'ble Supreme Court in State of U.P. v. Om Prakash Gupta, AIR 1970 SC 679, has observed that Courts have to examine whether the non observance of any statutory provision or principle of natural justice have resulted in deflecting the course of justice.

In view of the above, it is clear that the respondent No. 2 admittedly was overage and, therefore, was not eligible even to apply for the post what to talk of giving appointment to him. This is not a case where the said respondent had been removed during the period of probation on the ground of unsuitability. The said respondent canot be permitted to take any advantage merely ontechnicalities. The Courts are meant to do substantial justice. **(Indian Council of Agricultural Research, Krishi Bhawan & Ors. V. Central Administrative Tribunal, Allahabad Bench & Anr.; 2008 (1) ALJ 283)**

Consumer Protection Act

◆ **Ss. 17, 22A – State Commission – Power to set aside exparte order.**

The effect of the amendment to the Act in 2003 whereby Section 22(A) was introduced has the effect of conferment of power of restoration on National Commission, but not to the State Commission. In view of the divergence of opinion expressed by coordinate Benches, matter has been referred to a larger Bench to consider the question whether the State Commission has the power to recall the ex parte order. Hence, Records be placed before the Hon'ble Chief Justice of India for appropriate orders. **(Rajeev Hitendra Pathan & Ors. V. Achyut Kashinath Karekar & Anr.; 2008 (1) ALJ 221)**

Contempt of Courts Act

◆ **S. 2(c), 14 – Contempt of Court – Use of improper language by Police Officer in his Affidavit & Application – Whether amount to Contempt of Court.**

Section 438(1)(i) of the Code of Criminal Procedure is very clear that while granting anticipatory bail the Court can lay down a condition that the accused shall make himself available for interrogation by a police officer as and when required.The purpose of such a provision is that anticipatory bail cannot be permitted to be abused. It is therefore, implicit that whenever the Court imposes such a condition in its order, and the accused called for interrogation or for certain investigation does not appear before the investigating officer then it will be open for the State to move the High Court for cancellation of bail. **(State of Punjab v. Raninder Singh and Anr.; AIR 2008 SC 609)**

Contract Act

◆ **S. 8 – Agreement in sub-silentio – Offereess silence in certain circumstances coupled with his conduct – An agreement sub silentio, therefore, the terms of a contract between the parties can be proved not only their words but also by their conduct.**

It is no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words.

Under certain circumstances, offerees silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance – an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct. **(Bharat Petroleum Corpn. Ltd. v. Great Eastern Shipping Co. Ltd.; AIR 2008 SC 357)**

◆ **S. 23 – Constitution of India – Article 14 – Contract opposed to public policy violation S. 23 and Art. 14.**

Services of employees recruited, trained, appointed by PSU (NTPC) and governed by service terms and conditions as applicable to NTPC employees cannot be transferred to a private concern on basis of a bi-partite agreement entered subsequently between NTPC and transferee-employer (BALCO) by giving the agreement a retrospective effect. Such agreement violates S. 23 of Contract Act as well as Art. 14 of Constitution. **(BCPP Mazdoor Sangh & Anr. V. N.T.P.C. & Ors.; AIR 2008 SC 336)**

◆ **S. 74 – Breach of Contract – Sufferance of damage or loss is essential pre-condition for award of compensation by way of damages.**

A person is entitled to receive compensation in terms of money only if he has actually suffered damage or loss on account of breach of contract by the other party and not otherwise.Therefore, sufference of damage or loss is an essential pre-condition for award of compensation by way of damages. The determination or assessment of damage or loss caused is altogether another aspect of the matter. The assessment of damages can be made by actual proof of damage or loss suffered or it may be a reasonable sum which Court thinks fit but not exceeding amount named in contract where it is not possible to assess the same on the basis of material on record.the party aggrieved may be absolved of the burden of proving the amount of actual damage or loss but nevertheless is responsible to prove that breach of contract had actually caused damage or loss to it. **(M/s. Kamil & Bros. V. Central Dairy Farm & Anr.; AIR 2008 All 33)**

Criminal Procedure Code

S. 41 – Arrest of accused – Powers can be exercised by Police without intervention of court.

A Police Officer or a person empowered to arrest may arrest a person without intervention of the Court subject to the limitations specified under the provisions of the Code. The provisions of Section 41 of the Criminal Procedure Code, provides for arrest by a Police Officer without an order from a Magistrate and without a warrant. A distinct and different power under Section 44 of the Code empowers the Magistrate to arrest or order any person to arrest the offender. Under Section 44 of the Code, that power is vested in the Court of the Magistrate when an offence is committed in his presence. If the Legislature has taken care of providing such specific power under Section 44 of the Code, then there could be no reason for such a power not to be specified under the provisions of Chapter XII of the Code. In terms of Section 41, a police officer may arrest a person without a warrant or order from the Magistrate for any or all of the conditions specified in that provision. Language of this provision clearly suggests that the Police Officer can arrest a person without an order from the Magistrate. Thus, there appears to be no reason why on the strength of Section 156(3) of the Code, any restriction should be read into the powers specifically granted by the legislature to the Police Officer. Of course, freedom of investigation is the essence of these provisions but in order to suppress the mischief it is sufficiently indicated under different provisions of the Code that the arresting officer should exercise his power or discretion judiciously and should be free of motive. Some kind of inbuild safeguard is available to the accused in the cases where the Magistrate directs investigation under Section 156(3) of the Code by taking recourse to the provisions of Sections 438 of the Code by approaching the Court of Session or the High Court for such relief. Thus, during the course of investigation of a criminal case, an accused is not remediless.**(Laxminarayan Vishwanath Arya v. State of Maharashtra & Ors.; 2008 (1) ALJ 685)**

◆ **S. 156(3) – Order of Magistrate directing investigation – Order of arrest of accused also contained in it – Police investigating the matter not required to seek ex-parte order for arresting accused, while investigating.**

It is neither obligatory nor mandatory for a Police Officer to obtain the leave of the Court before arresting an accused against whom FIR is registered in pursuance of the order passed by the learned Magistrate under Section 156(3) of the Criminal Procedure Code, 1973. Certainly, exercise of discretion by the arresting officer should be exercised with greater sensitivity and in accordance with the settled canon of criminal jurisprudence, while keeping the facts and circumstances of each case in mind. It needs to be remembered by the investigating agencies that order under Section 156(3) may be passed by the Court as a result of failure to perform its duty on the part of the investigating agencies. The observation of the Division Bench in Jagannath Singh's case reported in 2006(5) AIR Bom R. 745 stating a general principle of law requiring leave of the Court prior to arresting an accused except to the sections stated therein, may not be a correct statement of law, keeping in view of the provisions of Sections 41, 154, 166 and 167 of the Code. Once the section does not provide any such power to a Magistrate under these provisions to add such power by implication would not be in conformity with the basic rules of interpretation of statutes. **(Laxminarayan Vishwanath Arya v. State of Maharashtra & Ors.; 2008 (1) ALJ 685)**

◆ **Ss. 204, 70, 72, 73, 78 & 79 – Issuance non-bailable warrant – When justified – Duty of court in such cases discussed.**

The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment mean deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely

imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when it is reasonable to believe that the person will not voluntarily appear in court; or the police authorities are unable to find the person to serve him with a summons; or it is considered that the person could harm someone if not placed into custody immediately. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. **(Inder Mohan Goswami v. State of Uttaranchal; (2008) 1 SCC (Cri) 259)**

◈ **S. 320 – Compounding of offence of dishonour of cheque – Permissibility of.**

It is thus clear that even though technically the provisions of Section 320 of the Code of Criminal Procedure did not apply to offences not covered by the Indian Penal Code, the fact as to compromise between the parties and payment of dues under Section 138 of the Act was considered a relevant fact and compounding was allowed by the Court (vide Kishore Kumar v. J.K. Corporation Ltd.; (2004) 13 SCC 494; Shailesh Shyam Parsekar v. Baban @ Vishwanath; (2005) 4 SCC 162; K.J.B.L. Rama Reddy v. Annapurna Seeds & Anr.; (2005) 10 SCC 632).

As observed by this Court in Electronic Trade & Technology Development Corporation Ltd. v. Indian Technologists & Engineers; (1996) 2 SCC 739, the object of bringing Section 138 in the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. The provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act

upon it. It thus seeks to promote the efficacy of banking operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realized this aspect and inserted Section 147 by the Negotiable instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002). The said section reads thus:

S.147. Offences to be compoundable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

Taking into consideration even the said provision (Section 147) and the primary object underlying Section 138, there is no reason to refuse compromise between the parties. Appeal is disposed on the basis of the settlement arrived at between the appellant and the respondent. **(Vinay Devanna Nayak v. Ryot Seva Sahakari Bank Ltd.; AIR 2008 SC 716)**

◈ **S. 378 – Anticipatory bail – Grounds of cancellation.**

Section 438(2)(i) of the Code of Criminal procedure is very clear that while granting anticipatory bail the Court can lay down a condition that the accused shall make himself available for interrogation by a police officer as and when required. The purpose of such a provision is that anticipatory bail cannot be permitted to be abused. It is therefore, implicit that whenever the Court imposes such a condition in its order, and the accused called for interrogation or for certain investigation does not appear before the investigating officer then it will be open for the State to move the High Court for cancellation of bail. **(State of Punjab v. Raninder Singh and Anr.; AIR 2005 SC 609)**

◈ **S. 482 – Quashing of proceedings – Exercise of power by High Court – When permissible.**

The High Court should be extremely cautious and slow to interfere with the investigation and/or trial of criminal cases and should not stall the

investigation and/or prosecution except when it is convinced beyond any manner of doubt that the FIR does not disclose commission of any offence or that the allegations contained in the FIR do not constitute any cognizable offence or that the prosecution is barred by law or the High Court is convinced that it is necessary to interfere to prevent abuse of the process of the Court. In dealing with such cases, the High Court has to bear in mind that judicial intervention at the threshold of the legal process initiated against a person accused of committing offence is highly detrimental to the larger public and societal interest. The people and the society have a legitimate expectation that those committing offences either against an individual or the society are expeditiously brought to trial and, if found guilty, adquately punished. Therefore, while deciding a petition filed for quashing the FIR or complaint or restraining the competent authority from investigating the allegations contained in the FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect. If the allegations contained in the FIR or complaint discloses commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges malus animus against the author of the FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of the FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same. However, if the High Court is satisfied that the complaint does not disclose commission of any offence or prosecution is barred by limitation or that the proceedings of criminal case would result in failure of justice, then it may exercise inherent power under S. 482 Cr.P.C. **(Sanapareddy Maheedhar Seshagiri & Anr. v. State of Andhra Pradesh & Anr.; AIR 2008 SC 787)**

◆ Criminal Trial – Interested or partisan witness would not mean that testimony should be discarded on that ground alone.

The submission that the appellant was inimically disposed of towards the deceased is not a matter which by itself would lead to a conclusion that the prosecution case should not be believed. He had a motive to commit the offence. He had caused injuries to the deceased ten days prior to the incident. He picked up quarrel with him even on the date on which offence took place. The offence took place near the

house of the deceased. He in his dying declarations not only named the appellant but also gave other details which were vital in nature. The testimony of the mother of the deceased should not be discarded on the ground that she is an interested witness. **(Vithal v. State of Maharashtra; (2008) 1 SCC (Cri) 91)**

Evidence Act

◆ **S. 3 – Evidence of witnesses who were relatives of deceased cannot be discarded in the absence of any infirmity in said evidence.**

In State of Himachal Pradesh v. Mast Ram; (2004) 8 SCC 660, this Court observed as under:-

> "The law on the point is well settled that the testimony of the relative witnesses canot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law."

(Dharam Pal v. State of U.P.; 2008 (1) ALJ 721)

◆ **S. 3 – Eye-witness – Credibility of eye-witness not to be judged merely on basis of his relationship with deceased and strained relation with accused.**

Now it is well settled that while appreciating the evidence of the witnesses related to the deceased, having strained relations with the accused party, their evidence cannot be discarded solely on that basis, but the court is required to carefully scrutinize it and find out if there is scope for taking view whereby the court can reach to the conclusion that it is a case of false implication. The credibility of a witness cannot be judged merely on the basis of his close relation with the deceased and as such cannot be a ground to discard his testimony, if it otherwise inspires confidence and, particularly so, when it is corroborated by the evidence of independent and injured witnesses. **(Kapildeo Mandal & Ors. V. State of Bihar; AIR 2008 SC 533)**

◆ **S. 32 – Dying declaration- Generally – If dying declaration found acceptable, it need not to be in question and answer form.**

Dying declarations which were four in number were made before different authorities including a Magistrate. The Executive Magistrate Shashikant was examined as PW 6. The learned trial Judge was not correct in discarding the said dying declarations. It is now well settled that a dying declaration if found to be acceptable, the same need not be described to be in question and answer form.

In Laxman v. State of Maharashtra; 2002 SCC (Cri) 1491 the law has been laid down in the following terms:

> "Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks upto the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaraton, the medical opinion will not prevail, nor can it be said that since there is no certificationof the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight

has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

(Vithal v. State of Maharashtra; (2008) 1 SCC (Cri) 91)

◈ **S. 35 – Documentary evidence – Which documents have evidentiary value.**

Section 35 of the Evidence Act provides that an entry in any public or other official book or register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specifically enjoined by law of the country in which such book or register is kept, is itself a relevant fact. Having regard to the provisions of Section 35, entries in school admission registers in regard to age, caste etc. have always been considered as relevant and admissible. [See: Umesh Chandra v. State of Rajasthan; 1982 (2) SCC 202 and State of Punjab v. Mohinder Singh; 2005 (3) SCC 702]. In Kumari Madhuri Patil v. Addl. Commissioner [1994 (6) SCC 241], this Court observed that caste is reflected in relevant entries in the public records or school or college admission register at the relevant time and certificates are issued on its basis. In Birad Mal singhvi, this Court after referring to the ingredients of Section 35 held thus:

> "An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove

> the age of the person in the absence of material on which the age was recorded. The entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record, was examined. In the absence of the connecting evidence, the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value."

This Court further held unless the parents, or persons conversant with their date of birth were examined, the entry in the school register by itself will not have much evidentiary value. In this case, we are concerned with the 'caste' and not the date of birth. The residents of a village have more familiarity with the 'caste' of a co-villager, than the date of birth of the co-villager. Several villagers who knew the respondent and their father, including a cousin of the respondent has been examined and they have stated the caste of the respondent. Appellant has also produced other documentary evidence which clinch the issue, namely the application made by the respondent's father for admission of respondent to school, birth register extract and village Pariwar Register extracts to establish the caste of the respondent. Further the said entries in the school register were made nearly forty years prior to the election petition. When read with other oral and documentary evidence, it cannot be said that Ex. PW-2/A has no evidentiary value even by applying the strict standards mentioned in Birad Mal Sanghvi. **(Desh Raj v. Bodh Raj; AIR 2008 SC 632)**

Explosive Substances Act

◆ **S. 5 – Accused charge-sheeted under TADA Act and Explosive Substances Act – Sanction of Competent Authority under TADA Act was not obtained – Effect of.**

In this case, in the first charge-sheet which was filed on 24.2.1994 there was no mention of TADA at all. It was in the

supplementary charge-sheet filed on 29.5.2006 that the prosecution introduced the offence under TADA. But there was no sanction of the Inspector General of Police or of the Commissioner of Police as required under Section 20-A(2) of TADA and, therefore, the Designated Court had no jurisdiction to take cognizance of the offence.Since the Designated Court lacked inherent jurisdiction to try the offence under TADA it could not have tried the appellant even for offences under the Explosive Substances Act, 1908 or the Explosives Act, 1884. Thus the conviction of the appellant under Section 5 of the Explosive Substances Act, 1908 is illegal.

The aforesaid view has also been taken by this Court in Rambhai Nathabhai Gadhvi and Others v. State of Gujarat; (1997) 7 SCC 744 and Para 8 of the report is reproduced below:-

> "8. Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. Sanction is not granted to the Designated Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the court in order to enable, the court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such

action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

In view of the discussion made above there cannot be any escape from the conclusion that the Designated Court had no jurisdiction to try and convict the appellant under the Explosive Substances Act, 1908 in view of the fact that it could not have taken cognizance of the offence under TADA for lack of sanction by the competent authority under Section 20-A(2) of TADA. Inview of the fact that the Designated Court could not try the offence under TADA being debarred from taking cognizance thereof on account of want of sanction by the competent authority under the mandatory provisions of Section 20-A(2), it could not try any offence under any other Act as well. **(Harpal Singh v. State of Punjab; AIR 2008 SC 743)**

Guardian and Wards Act

S. 17 – Custody of minor – Relevant consideration of.

Where question of custody of minor arose as natural guardian of minor got separated and mother of minor had remarried and minor was residing with his maternal uncle for last 11-12 years and was happily passing off, his childhood and was getting proper education, fooding and lodging with no complaint, only the fact that minor's grandfather had larger agricultural holding, would not be weighty circumstance, which would entitle the grandfather to have custody of minor. **(Smt. Sangeeta & Anr. V. Mange Ram; 2008 (1) ALJ 559)**

Hindu Law

◆ **Daya Bhag School – Does not prohibit of immovable property in favour of his wife by her husband but it only does not recognize.**

Where in year 1935 the property was purchased by husband in the name of wife through a power of attorney which was executed by wife in favour of husband's brother and husband himself attested the power of attorney and name of wife was mutated in land records, it was held that it was not a benami transaction but the property was purchased by husband for the benefit of his wife as he had seven

minor daughters and a son and he wanted to secure the future of his wife and daughters. Moreover, in 1935, Hindu Women's Right to Property Act, 1937 did not come into force. He, therefore, might have been of the opinion that incase of his early death, something should be kept apart for his wife and daughters. When a peson develops such an intention, it would be opposed to the essential characteristics of a benami transaction. He furthermore was not a debtor. He was not required to avoid any liability. He had no apparent motive for entering into a benami transaction. Further, in the power of attorney she was not described as his wife but daughter of 'B'. Therefore, he being in the position of husband and if he intended to have a benami transaction, ordinarily he would not get his wife described as daughter of somebody instead of his own wife. Such unusual step on the part of husband would lead to one conclusion that he intended to purchase the property for the benefit of his wife. Moreover, in the power of attorney it was categorically stated that it was wife who had decided to purchase the said property and it was she who was appointing her husband's brother as her attorney. Further, the fact that an insurance was also made in her name is also a pointer to show that husband intended to provide sufficient money at the hands of his wife. It was more so when after the death of husband and wife, their son maltreated the daughters who were unmarried at that time and those daughters mutated the property in their name and the fact that the son allowed the order of mutation to attain finality, thus, would also be a pointer to suggest that despite such bitter relationship between the parties he accepted the same; moreso, when mutation of one's name in the Municipal Corporation confers upon him a variety of rights and obligations. **(Binapani Paul v. Pratima Ghosh & ors.; AIR 2008 SC 543)**

Hindu Marriage Act

◆ **S. 13(1)(i-a) – Cruelty by wife – Allegations of adueltery levelled by against husband but alleged adulterer not impleaded it would amount to cruelty and can very well be a ground for divorce.**

The respondent wife has failed to implead said Manisa as a party and then to prove her allegation of adultery against the petitioner.

Thus mere allegation of adultery against a spouse, without any convincing and cogent evidence is amount to cruelty and it can very well be a ground for divorce. The above conduct of the appellant amounts to cruelty in the matrimonial law. **(Smt. Pramod Bijalwan, W/o Sri Satendra Dutt v. Satendra Dutt, S/o Sri Shiv Dutt; 2008 (1) ALJ 89)**

◆ **S. 13(1)(i-a) – Desertion by wife – Determination of.**

The respondent has stated that whenever during vacation he went to his house at Dehradun, the appellant did not allow him to enter inside the house and misbehaved him. The appellant deserted the respondent and did not cohabit with him. D.W. 1 Smt. Pramod Bijalwan has admitted in her cross-examination that there are no relationship of husband and wife between the parties since 1996-97.

Thus from the above statement of the appellant it is clear that there were no relationship between the parties as husband and wife even they were not resided under single roof since April, 2001. She has stated that the said woman Manisha was the reason behind it, which indicates that the respondent was wilfully deserted by the respondent-appellant and has not fulfilled her obligation to cohabit with her husband for a continuous period of more than two years immediately preceding the presentation of the petition for divorce.

Thus the respondent has proved both the grounds for divorce i.e. cruelty and desertion and the petition has rightly been allowed by the trial Court for a decree of divorce. **(Smt. Pramod Bijalwan, W/o Sri Satendra Dutt v. Satendra Dutt, S/o Sri Shiv Dutt; 2008 (1) ALJ 89)**

Hindu Minority and Guardianship Act

◆ Ss. 4 5 – Age of Majority – Person is a minor only upto till age of 18 years and S. 5 of said Act shall have overriding effect on other law.

The appellants has specifically pointed out that Lower Appellate Court instead of accepting the age of majority as 18 years has erroneously held the age of majority to be 21 years. Section 4 of Hindu Minority and Guardianship Act, 1956 was placed before me in support of the argument that person is a minor only up till age of 18 years and section 5 of the said Act clearly provides that Hindu Minority and Guardianship Act, 1956 shall have overriding effect on other law, therefore, findings recorded by the Lower Appellate Court assuming age of majority as 21 years amounts substantial error of law and judgment impugned is liable to be set aside on the ground of limitation alone. **(Smt. Sarla Devi Gupta v. Ravindra Singh; 2008 (104) RD 106)**

Houses and Rent

◆ **S. 20(4) – Protection against eviction – Entitlement to.**

In respect of default tenant-petitioner sought the benefit of section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. In order to avail the said benefit petitioners deposited Rs. 2428/- on 4.8.2000 and Rs. 2108/- on 19.10.2000. Date 4.8.2000 was the date fixed in the summons. On the said date petitioners sought adjournment on the ground of illness of their counsel, which was granted and 4.9.2000 was fixed. On 4.9.2000 also some more adjournment was sought by the tenants-petitioners which was allowed and 19.10.2000 was fixed.There is no serious dispute that if 19.10.2000 is taken to be the date of first hearing, then the petitioners' deposit was completed and they were entitled to the benefit of Section 20(4) of the Act. However, the courts below took 4.8.2000 as the date of first hearing.

After discussing five authorities of the Supreme Court on the interpretation of first date of hearing used in section 20(4) of the Act, I have held in K.K. Gupta v. ADJ; 2004 (2) ARC 659 (2005 All LJ 893). That if written statement is filed within the time/extended time granted by the court then no date prior to the date of filing of written statement can be taken to be the date of first hearing. In the instant case on 4.9.2000 petitioners were permitted to file written statement

by 19.10.2000 and on 19.10.2000 they filed written statement, hence 19.10.2000 was the date of first hearing. Accordingly, the petitioners were fully entitled to the benefit of section 20(4) of the Act. **(Mohammad Asharaf & Anr. V. Additional District Judge & Ors.; 2008 (1) ALJ 415)**

◆ **S. 21(1)(a) – Release of premises – Bonafide need – Determination of.**

The findings of fact on bona fide need recorded by the Courts below is based on sound reasoning arrived at after considering the stand of the rival parties and the evidence brought on the record. The courts below, have given a categorical finding that respondent No. 3 was a paid employee and that he had purchased the building from his savings and from the loan taken from his wife and father, in order to do business for himself and to set up a business for his son. While coming to this conclusion, the courts below have found that the intention of the respondent No. 3 for purchasing the building was to do a business from the premises in question and not to earn a petty rent of Rs. 35/- per month. The court found that the landlord had invested a huge amount of Rs. 14 lacs for the purpose of doing business and had also paid a sum of Rs. 2 lacs towards stamp duty. Therefore, the need of respondent No. 3 was bona fide and that the transaction was not a sham transaction. The submission of the counsel for the petitioner that the sale made by the previous landlord to the present landlord was a sham transaction is patently erroneous. The submission that the building was worth of Rs. 23 lacs and not Rs. 14 lacs is not supported by any documentary evidence. No proof of the valuation of the building has been given by the petitioner before the Courts below. Merely making a bald allegation, in a supplementary counter-affidavit, is not sufficient for the purpose of holding that the sale was a sham transaction. Further, the allegation that the landlord was a partern in the firm of the previous landlord and was not an employee, is again belied by documentary evidence, namely, the income-tax returns that was brought on the record which clearly showed that respondent No. 3 was only an employee in the firm of the previous landlord. Another factor which weighted heavily in favoaur

of the respondent No. 3 is that he had explained his finances in purchasing the building in question. This Court has also perused the pass book of the bank account of respondent No. 3 as well the P.P.F. pass book which showed that a sum of Rs. 13,66,265.39 had matured on 7.4.2003 which was transferred to the respondent's bank account. This amount along with other amounts transferred from his wife and father, enabled the respondent No. 3 to purchase the building from the previous owner. It has also come on record that more than Rs. 2 lacs was paid towards stamp duty. Consequently, it can safely be held that a bona fide transactionwas made and that a sum of Rs. 14 lacs was paid towards the sale consideration. The Court below was, therefore, justified in coming to the conclusion that a bona fide purchase was made by respondent No. 3 for setting up his business. Consequently, the findings of bona fide need given by the Courts below need no interference. **(Durga Prasad Tiwari v. Additional District Judge & ors.; 2008 (1) ALJ 518)**

Indian Penal Code

◆ **S. 34 – Common intention – When criminal act is done with common intention all are liable in same manner as principal offender.**

When a criminal act is done by several persons in furtherance of common intention of all, the other offenders are liable for that act in the same manner as the principal offender as if the act was done by such offenders also. In this case, both the accused went jointly to a place where the deceased had gone for attending the call of nature and they jointly assaulted him. The fact that A-2 also received injuries in his palm shows that he took active part in snatching the knife from the hands of the deceased when he had succeeded in snatching it from A-1. This clearly shows that A-2 shared the common intention with A-1 to cause injuries to the deceased. The essential conditions for the application of Section 34, IPC are common intention to commit an offence and participation by all the accused indoing act or acts in furtherance of that common intention, if these two ingredients are established, all the accused shall be liable for the said offence. Both

the ingredients are fully established and, therefore. A-2 is also liable for commission of the offence. A-2 is guilty of the offence under Section 302 read with Section 34, IPC and the High Court rightly convicted and sentenced him for the said offence. **(Shaik China Brahamam v. State of A.P.; AIR 2008 SC 610)**

◆ **S. 34 – Common intention – Such intention can only be inferred from circumstances appearing from proved facts of case.**

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jontly, the position in law is just the same as if each of them has done it individually by himself. **(Sewa Ram & Anr. V. State of U.P.; AIR 2008 SC 682)**

◆ **S. 300 – Offence by use of fire-arm – Absence of Ballistic Expert evidence would not always fatal to prosecution.**

It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such

an unimpeachable character, and the nature of injuries, disclosed by post-mortem notes is consistent with the direct evidence, the examination of Ballistic Expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent in-consistency or for the purpose of corroboration of oral evidence.

In the instant case when the ocular evidence is totally consistent with the opinion of doctors who have given injury report and the post-mortem report and it was clear that the bullet fired from revolver by accused had damaged the spinal cord of the victim leading to paralysis of both lower limbs of victim and consequent death, the absence of Ballistic Expert's evidence is not fatal to the case of prosecution, notwithstanding the fact that the Forensic Science Laboratory, in its report had not expressed a difinite opinion about the bullet recovered from the place of occurrence. **(Vineet Kumar Chauhan v. State of U.P.; AIR 2008 SC 780)**

S. 375 – Rapture of Hymen – Not essential to constitute rape.

Learned counsel for the appellant has next submitted that the doctor had found that the hymen of Sonia was intact and, therefore, the charge for rape under S. 376 IPC as defined in S. 375, IPC has not been made out. An identical question was considered by a Bench of this Court in Santosh Kumar v. State of M.P.; 2006 (8) JT SC 171, and para 10 of the report is reproduced below:-

> "10. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in Madan Gopal Kakkad v. Naval Dubey; 1992 (3) JT (SC) 270 and paras 37 to 39 of the said judgment are being reproduced below:
>
> > "37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medieal Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:
> >
> > > "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape with out producing any injury to the genitals or leaving any seminal stains. Insuch a case the medical officer should mention the

> negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

38. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "Sexual intercourse.- In law, this term is held to mean the slightest degree of peneetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

> "……even slight penetration is sufficient and emission is unnecessary."

Therefore, the absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed."

Here the victim was a very young girl of six years of age and it is quite likely that full penetration did not take place as the accused is a grown up person of over 20 years of age. The injuries clearly

indicate that rape, as defined in S. 375, IPC did take place. **(Rajendra Datta Zarekar v. State of Goa.; AIR 2008 SC 572)**

◆ **S. 376 – Imposition of sentence in rape cases – Undeserved indulgence of liberal attitude in not awarding adequate sentence would not proper.**

The Courts are, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos. Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public adhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. **(State of M.P. v. Babulal; AIR 2008 SC 582)**

Indian Registration Act

◆ **S. 17 (as amended by U.P. Act No. 57 of 1976) – Document compulsorily registrable – Agreement to sale immovable property required to be registered by virtue of amendment Act.**

The appellants drew attention of this Court to provisions of Sections 154, 155 and 164 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred as the U.P. Act No. 1 of 1951). It is contended that the document dated 21.7.1970, executed by Smt. Rahmati, in favour of the plaintiffs was not a registered document and neither it could have been read in evidence, nor a decree for its specific performance could be passed. However, appellants failed to show, how in the year 1970 (i.e. prior to 1.1.1976), an agreement of sale was necessarily required to be registered. Section 17 of the Registration Act, 1908, as amended vide U.P. Act No. 57 of 1976, requires even agreement of sale of immovable property to be

registered under the Registration Act. This amendment came into force w.e.f. 1.1.1976. The agreement of sale in question is of 20.1.1970 i.e. prior to 1.1.1976. **(Smt. Majidan w/o Ilahi Baksh & Ors. V. Ishaq s/o Abdul Rahim (since deceased thro. L.Rs.) & Ors.; 2008 (1) ALJ 770)**

◆ **Ss. 17 & 49 – Non-registration of compulsorily registrable documents cannot be read in evidence.**

Section 17(1) of the Registration Act envisages that any document which come within any of the enumerated instruments, is compulsorily required to be registered. Clause (b) provides that other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property is required to be compulsorily registered, failing which the document could not be read in evidence in view of the prohibition contained in section 49 of the Registration Act. **(Smt. Ram Kali v. Kuldeep Chand and Others; 2008 (104) RD 46)**

Indian Succession Act

◆ **Ss. 57, 213 – Probate of Will not necessary for claiming right on basis of Will executed in State of U.P. by a Hindu and it necessary if Will is executed by Christian in respect of properties situated in U.P.**

It appears that in 1962 authority of Supreme Court parties were Christians. The names Mitter, Momin and Judah indicate towards that direction. Probably it was for this reason that Supreme Court did not consider Section 57 of the Act. As held by the Supreme Court authority of 2001 probate is necessary if the Will is executed by a Christian in respect of properties situated in U.P.

By virtue of Section 57 of the Act probate is necessary for a Will executed by a Hindu provided that Will is made within the teritories of Bengal, Madras and Bombay even though the properties may be situated outside those territories or to the Wills made outside

such territories in respect of properties situate within those territories. In the aforesaid authority of the Supreme Court of 1962 Will was made in Calcutta, hence, probate was necessary. **(Shyam Lal v. Satya Narain & Anr.; 2008 (1) ALJ 328)**

◈ **S. 63 – Will – Will depriving natural heirs of their share would not lead to suspicious circumstances.**

Deprivation of a due share to the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances surrounding execution of Will. For the said purpose, the background facts should also be taken into consideration. The son was not meeting his father (testator). He had not been attending to him. He was not even meeting the expenses for his treatment from a long time, when father lost his job till his death. The testator was living with sister and her children. If in that situation, he executed a Will in favour of his nephew and nieces who looked after him no exception thereto can be taken. Even then, under the Will something was left for the son. **(Savithri & Ors. V. Karthyayani Amma & Ors.; AIR 2008 SC 300)**

◈ **S. 63 – Execution of Will – Plea of coercion – Burden to prove is on party alleging coercion.**

The legal requirements in terms of the said provisions are now well-settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the

onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine.

According to the appellants themselves, the signature of the testator on the Will was obtained under undue influence or coercion. The onus to prove the same was on them.They have failed to do so. If the propounder proves that the Will was signed by the testator and he at the relevant time was in sound disposing state of mind and understood the nature and effect of disposition, the onus stands discharged. For the aforementioned purpose the background fact of the attending circumstances may also be taken into consideration. **(Savithri & Ors. V. Karthyayani Amma & Ors.; AIR 2008 SC 300)**

◆ **Ss. 217 & 227 – Effect of Probate – Mere fact that probate of Will was granted by competent court in respect of property does not bar civil suit for declaration of title and permanent injunction in respect of self same property.**

It is well settled law that the functions of a probate Court are to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue inference and the same was duly attested. It was, therefore, not competent for the probate Court to determine whether testator had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.

In the instant case the plaint clearly states that the civil suit was for a declaration to the effect that the suit properties were joint Hindu family properties of the HUF of which the appellant and his two brothers, mother and unmarried daughter were the members. Consequential relief for permanent injunction was also sought restraining the respondent No. 1 from alienating the suit properties, in any manner, whatsoever. Besides claiming that the

suit properties were the joint family properties, it was also averred in the plaint that testator was the Karta of the aforesaid HUF and by utilizing the income from their ancestral agricultural land had acquired various properties including the suit properties.

The dismissal of suit by holding that after the probate having been granted by the competent probate Court and affirmed by this Court, the Civil Court had no jurisdiction to proceed with the suit was improper. **(Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon & Ors.; AIR 2008 SC 306)**

◆ **S. 263 – Revocation of probate – Who can apply.**

An application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the Court but also binds all other persons in all proceedings arising out of the Will or claims under or connected therewith. Being a judgment in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file and application for revocation or probate on such grounds as may be available. **(Basanti Devi v. Raviprakash Ramprasad Jaiswal; AIR 2008 SC 295)**

◆ **S. 373 – Succession certificate – No condition can be imposed by court while granting succession certificate.**

Court below committed an error in imposing a condition on the issuance of the succession certificate. In the opinion of the Court, no condition can be imposed by the Court while granting a succession certificate. Admittedly, the petitioners are the legal heirs. They have the right to utilise the money in whatever fashion they like. The Court is only required to make a summary enquiry in order to find out as to whether the petitioners are the rightful claimants or not. The Court does not have any jurisdiction to impose a condition namely, that the amount would be kept in a fixed deposit for a certain period of time. In the opinion of the Court, the imposition of such a condition is clearly outside the domain of the jurisdiction of the Court, while issuing a succession certificate under Section 373 of the Indian

Succession Act. Infact, the Court while issuing a succession certificate is protected by the provisions of Section 375 of the Act, which allows the Court to impose a condition precedent to the granting of a succession certificate by taking a surety or other sufficient security for the purpose of indemnifying such person or persons who could be entitled to the whole or any part of the debt. **(Smt. Rizwana & Ors. V. Civil Judge (Sr. Divn.), Allahabad & Ors.; 2008 (1) ALJ 326)**

Industrial Disputes Act

◆ **Sch. 2, Item 6-N – Regularisation of service – Whether completion of 240 days of service in calender year confers right of regularisation – Held, "No"**

Whether completion of 240 days in a year confers any right on an employee or workman to claim regularization in service. In Madhyamik Shiksa Parishad v. Anil Kumar Mishra & Ors.; 2005 (5) SCC 122, it was held that the completion of 240 days work does not confer the right to regularization under the Industrial Disputes Act. It merely imposes certain obligations on the employer at the time of termination of the service. In M.P. Housing Board and Anr. V. Monoj Srivastava (2006 (2) SCC 702) (Paragraph 17) after referring to several earlier decisions it has been reiterated that it is well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularized in service. This view has been reiterated in Gangadhar Pillai v. Siemens Ltd. (2007) (1) SCC 533). The same question has been examined in considerable detail with reference to employee working in a Government Company in Indian Drugs and Pharmaceuticals Ltd. v.

Workman, Indian Drugs & Pharmaceuticals Ltd. (2007 (1) SCC 408 and paragraphs 34 and 35 of the judgment are being reproduced below:-

"34. thus, it is well settled that there is no right vested in any daily wager to seek regularization. Regularization can only be done in accordance with the rules and not dehors the rules. In the case of E. Ramakrishnan and Ors. V. State of Kerala and Ors. (1996) 10 SCC 565) this Court held that there can be no regularization dehors the rules. The same view was taken in Dr. Kishore v. State of Maharashtra (1997) 3 SCC 209 and Unionof India and Ors. V. Bishambar Dutt (1996) 11 sCC 341. The direction issued by the Services Tribunal for regularizing the services of persons who had not been appointed, on regular basis in accordance with the rules was set aside although the petitioner had been working regularly for a long time.

35. In Dr. Surinder Singh Jamwal and Anr. V. State of Jammu & Kashmir and Ors. (AIR 1996 SC 2775), it was held that ad hoc appointment, does not give any right for regularization as regularization is governed by the statutory rules.

The above position was highlighted in Hindustran Aeronautics Ltd. v. Dan Bahadur Singh and Ors. (2007) (6) SCC 207).

It is not in dispute that some of the concerned workmen have been regularized. Before any direction for regularization can be given, the factual position has to be noted as to whether there was any sanctioned post. (State of Uttaranchal & Anr. V. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad; 2008 (1) ALJ 51)

Interpretation of Statutes

◆ **Rules of interpretation – Mimansa Principles of interpretation should be used by court.**

In the Mimansa Rules of Interpretation, which is our indigenous system of interpretation, one of the principles is:

:f<+;ksZxeigjfr

The above principle means "the popular meaning overpowers the etymological meaning."

Before parting with this case, we would like to say that it is deeply regrettable that in our Courts of law, lawyers quote Maxwell and Craies but nobody refers to the Mimansa principles of Interpretation.Today our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors and the intellectual treasury they have bequeathed us. The Mimansa Principles of Interpretation is part of that intellectual treasury, but it is distressing to note that apart from a reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Cour, in ILR 14 All 67 (FB), there has been almost no utilization of these principles even in our own country (except by one of us, M. Katju, J. in some of his judgments delivered at Allahabad High Court and in this Court vide M/s. Ispat Industries Ltd. v. Commissioner of Customs, Mumbai; JT 2006 (12) SC 379.

Mimansa Rules of Interpretation were our traditional principles of interpretation laid down by Jaimini whose Sutras were explained by

Shabar, Kumarila Bhatta, Prabhakar, etc.These Mimansa Principles were regularly used by our great jurists like Vijnaneshwar (author of Mitakshara), Jimutvahana (author of 'Dattak Mimansa') etc. whenever they found any conflict between the various Smritis or any ambiguity or incongruity therein. There is no reason why we cannot use these principles on appropriate occasions. However, it is a matter of deep regret that these principles have rarely been used in our law Courts. It is nowhere mentioned in our Constitution or any other law that only Maxwell's Principles of Interpretation can be used by theCourt. We can use any system of interpretation which helps us to solve a difficulty. In certain situations Maxwell's principles would be more appropriate, while in other situations the Mimansa principles may be more suitable. **(U.P. State Agro Industrial Corporation Ltd. v. Kisan Upbhokta Parishad and others; 2008 (1) AWC 1 (SC))**

Land Acquisition Act

◆ Ss. 11 and 15-A – Scope of Power of Commissioner U/s. 11(1) – Power is administrative in nature and limited to approval which means confirming, relying, assenting, sanctioning or consenting to some other act.

The State Government under S. 15-A has the power to re-assess the correctness or otherwise of any proceeding at any time before the award is made by the Collector under S. 11 and may pass such orders or issue such directions in relation thereto as it may think fit. The State Government has, however, been given this power subject to the condition that no such order shall be passed or issued which may be prejudicial to any person without affording such person a reasonable opportunity of being heard.

In view of the above, it is evident that the power of the Commissioner under S. 11(1) is administrative in nature and limited to approval, which means confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. The very act of approval in part, the act of passing judgment, the use of discretion and the determining as an adjudication therefrom unless limited by the context of the Statute. Thus, he

cannot exercise the appellate or revisional powers. He may examine that the Award should not suffer for want of jurisdiction, and as to whether the Award had been made by the Collector authorised to do so in view of the provisions of Section 3-C of the Act, but he cannot re-appreciate the evidence and re-fix the market value or substitute his own calculations in place of the valuation determined by the Collector. (S.K. Upadhyay v. State of U.P. & Ors.; 2008 (1) ALJ 331 {DB})

◆ **S. 23 – Acquisition compensation – Large area acquired and rate fixed for small plots – No absolute rule that they must be kept out of consideration.**

Where large area is the subject-matter of acquisition, rate at which small plots are sold cannot be said to be a safe criteria. It cannot, however, be laid down as an absolute proposition that in such cases, the rates fixed for the small plots cannot be the basis for fixation of the rate. For example, where there is no other material it may in appropriate cases be open to the adjudicating Court to make comparison of the prices paid for small plots of land. However, in such cases necessary deductions/adjustments have to be made while determining the prices. **(Lucknow Development Authority v. Krishna Gopal Lahori and Ors.; AIR 2008 SC 399)**

Land Revenue

◆ **Revenue Record – Not a document of title – It merely raises a presumption of possession U/s. 110 of the Evidence Act.**

A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under section 110 of the Indian Evidence Act. The Courts below, were, therfore, required to appreciate the evidence keeping in view the correct legal principles in mind. **(Gurunath Manohar Pavaskar and Others v. Nagesh Siddappa Navalgund and Others; 2008 (104) RD 243)**

◆ **S. 3 and Article 123 – Jurisdiction – No court could ignore the jurisdictional fact, if any suit or appeal has been filed after the expiry of the period of limitation.**

Article 123 of the Limitation Act, 1963 provides for 30 days time for filing such an application.

In terms of section 3 of the Limitation Act, 1963, Court shall have jurisdiction to entertain any suit or application if the same has been filed after expiry of the period of limitation. The High Court could not have ignored the said jurisdictional fact. **(Mahabir Singh v. Subhash and Others; 2008 (104) RD 330)**

◆ **S. 5 – Application for setting aside ex parte decree along with application for condonation of delay U/s. 5 – Rejection of condonation of delay would tentamount to rejection of application U/O. 9, R. 13 of CPC.**

The order rejecting the application under Section 5 is the main order in such a case and the rejection of the application under Section 5 of the Limitation Act tantamounts to the rejection of the application under Order 9, Rule 13, CPC. The order was therefore appealable under Order 43, Rule 1 (Cal), CPC. **(Umardeen v. Additional District Judge, Muzaffarnagar & Ors.; 2008 (1) ALJ 379)**

◆ **S. 5 – U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam – Section 27(2) – U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules – Rules 3 and 4 – Election petition under – Provisions of S. 5 of the Limitation Act would not apply in respect of election for condoning the delay, if any.**

From the aforesaid statutory provisions, it will be seen that the provisions of Limitation Act, which would include section 5 also have not been made applicable in respect of election petitions to be filed under section 27(2) of the Uttar Pradesh Khsettra Panchayats and Zila Panchayats Adhiniyam, 1961 for condoning the delay, if any, in filing

of the election petitions. **(Ajay Kumar Tripathi v. Ram Bahadur Yadav; 2008 (104) RD 270)**

◆ **S. 65 – Adverse possession – Requirement of**

Unless there is specific plea and proof that adverse possessor has disclaimed his right and asserted title and possession to the knowledge of the true owner within the statutory period and the true owner has acquired to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.

Where the defendants were not sure as to who was the true owner and questionof their being in hostile possession, then the question of denying title of true owner does not arise. At the most, the defendants had claimed and which was found to be correct by the trial Court that they had been in possession of the disputed property since the inception of the sale deeds in their favour. They came in possession, according to their showing, as owner of the property in question. It follows that they exercised their right over the disputed property as owner and exercise of such right, by no stretch of imagination, it can be said that they claimed their title adverse to the true owner. Thus the possession of the contesting defendants was not of the variety and degree which was required for adverse possession to materialise. **(Ramzan & Ors. V. Smt. Gafooran & Ors.; AIR 2008 All)**

◆ **Ss. 115, 151 – Whether court has discretion to grant permission to convert revision into appeals in exercise of inherent powers U/s. 151 – Held, "Yes".**

It has been held in Bahori v. Vidya Ram; AIR 1978 All 299 that the court has discretion to permit conversion of a revision into an appeal in exercise of inherent power under Section 151, CPC. The same view has been taken in Kuldeep Chand v. Shiv Ram; AIR 2000 HP 119

In view of the aforesaid decisions the court below ought to have allowed the application for conversion of the revision into an appeal.

(Umardeen v. Additional District Judge, Muzaffarnagar & Ors.; 2008 (1) ALJ 379)

Motor Vehicles Act, 1988

◆ **S. 140 – Order passed on basis of "No fault Liability is appealable U/s. 173.**

So far as the question of maintainability aspect is concerned, the issue is concluded by a judgment of this Court in Smt. Yallwwa & Ors. v. National Insurance Co. Ltd. and Anr. (2007 (8) SCALE 77). **(United India Insurance Co. Ltd. v. Serjerao and Ors.; AIR 2008 SC 460)**

◆ **S. 147 (Before Amendment in year 1994) – Goods Carriage – Carrying passengers met accident – Insurance Co. would be liable for death and injury of said passengers.**

The date of accident being 16.12.1993, the amendment carried out in the year 1994 in Section 147 of the Motor Vehicles Act would not be applicable.

The Motor Accident Claims Tribunal, Nalgonda, by a judgment and award dated 13.11.1997 awarded various sums overruling the defence of the appellant herein that they were unauthorized passengers. The High Court, however, by reason of the impugned judgment, relying on or on the basis of a decision of this Court in Satpal Singh directed as under:

> "According to Insurance Company the issue involved in these appeals is squarely covered by the decision of the Supreme Court in the case reported in New Indian Assurance Company Ltd. v. Satpal Singh, 2000 ACJ 1, wherein the Court held that under the Motor Vehicles Act, 1988 all insurance policies covering third party risks are not required to exclude gratuitous passengers in the Vehicle though Vehicle is of any type or class.

In view of the proposition of law laid down by the Supreme Court in the decision stated, these appeals are dismissed. No costs."

Following the aforementioned principles, the impugned judgment cannot be sustained which is set aside. The appeals are allowed accordingly. CA @ SLP (C) No. 7241-7243/03 **(National Insurance Co. Ltd. v. Cholleti Bharatamma & Ors.; AIR 2008 SC 484)**

◆ **S. 163-A – Accident claim – Award passed by Tribunal U/s. 163-A on structured formula basis is final award and not interim, no further award or proceeding can be undertaken U/s. 166 of Act.**

The award passed by Tribunal under S. 163-A of Act under structured formula is a final award and once that award has been passed, no further award under Chap. XII of M.V. Act could be passed by the Tribunal.

The provisions contained in Ss. 163-A and 166 of Act provide for two different modes but the two modes cannot stimultaneously be invoked by the claimants. The claimant must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the M.V. Act but not under both. The award under Section 163-A is final and cannot be described as 'interim' and no proceeding for compensation under Section 166 can be undertaken once the award is declared under Section 163-A. **(United India Insurance Company Ltd. v. Satya Narain Sharma & ors.; AIR 2008 Raj. 23)**

◆ **S. 163-A, Sch. 2 Item 6 – Accident claim in case of death of Minor – Assessment of compensation should be made on basis of national income of Rs.15,000/- p.a. under 6th heading of second schedule.**

It is crystal clear that none of the judgments proceeded on any uniform trend nor it can be. It has to be based on facts and circumstances of each case. Against this background, it has to ascertain what is the ratio decidendi available on the basis of the

discussion from the aforesaid judgments. The ratio decidendi is that in arriving at 'just' compensation the Court cannot proceed by adopting a straight-jacket formula. It has to vary from case to case. The other ratio decidendi is that in case of death of minor children, there is no scope of ascertainment of income. It is also very difficult to assess future prospect.

Under Section 163-A of the Act. Section163-A of the Act provides special provisions for payment of compensation on the basis of structured formula therein. By now, it is well settled that even in a case of 'just' compensation, the multiplier system of the Second Schedule as far as practicable will be followed. Our anxiety is when the law is explicit to bring the non-earning persons under the heading of notional income, why the children, who are actually non-earning persons, cannot be brought under such protective umbrella uniformly to arrive at a quantum of compensation. Why there should be futile exercise for determination of their income on the future prospect by applying multiplier method in general. According to us, several thoughts have been given about multiplier system but such multiplier system cannot be applicable for the entire second schedule. The same will be applicable only in respect of the first heading of the Schedule with a note at the bottom about reduction by 1/3rd on account of the expenses, which the victim would have incurred towards maintaining himself had he been alive. How does it applicable towards children? When there is no income, there is no deduction. A social piece of legislation is always mass based but not made with a mind set of class. No body can assume who will be genius or prosperous in future only on the existing family structure. Mahatma Gandhi (since deceased) never knew about the fate of his son when father of Abraham Lincon (since deceased) never knew about fate of his son. In any event, if any claimant insists for adopting structured formula, it will be entirely open for him or them. Therefore, choice of the claimant, being the carriage of proceeding, will become prime. If the claimant chooses to go by the multiplier system under the first heading of the second schedule, it will be entire risk and responsibility of the claimant to prove the case. Uncertainty of the income of children is matching with

the notional income but militating with the scheduled income and deduction thereto. None of the above referred cases have shown any guideline why the multiplier method will only be applicable even in the case of death of children when entire schedule is not covered by such method. Therefore, if the claim petition ismade on the basis of notional income or the Court feels that notional income will be appropriate to ascertain the claim of the claimant in case of death of a children, the Court will not be slow or hesitant inawarding compensation on the basis of the notional income of Rs. 15,000/- per annum, under 6th heading of the Second Schedule. It is also to be remembered inthis context that composite analysis of two/three Judges' Bench of the Supreme Court in National Insurance Company Limited (AIR 2004 SC 1531) and Jeevanlal Ltd. and Others (AIR 1984 SC 1842) is that when an act is a social welfare legislation and in construing so the Court should adopt a beneficent rule of construction and if a section is capable of two constructions, that construction should be preferred which fulfills the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed. There is no necessity of making further exercise unnecessarily when the law is explicit to award compensation to non-earning persons to the extent of Rs. 15,000/- per annum. **(The New India Assurance Co. Ltd. v. Padam Singh & Ors.; 2008 (1) ALJ 7 (DB))**

◈ **S. 168 – Liability of registered owner – Car in question at time of accident was requisitioned by Magistrate for assembly election – State shall be, therefore, liable to pay compensation and not registered owner of car.**

In the instant case Respondent Nos. 3 and 4 continued to be the registered owner of the vehicle despite the fact that the same was requisitioned by the District Magistrate in exercise of its power conferred upon it under the Representation of People Act. A vehicle is requisitioned by a statutory authority, pursuant to the provisions contained in a statute. The owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remains under requisition, the

owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in-charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefor interms of the Act but he cannot exercise any control thereupon. In a situation of this nature, the Court must proceed on the presumption that the Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view.

It is not a case where the car was handed over to a person with consent of the owner thereof. When a vehicle is requisitioned, the owner of the vehicle has no other alternative but to handover the possession to statutory authority.

Therefore, in the opinion of the court the State shall be liable to pay the amount of compensation to the claimants and not the registered owner of the vehicle and consequently the appellant herein. **(National Insurance Co. Ltd. v. Deepa Devi & Ors.; AIR 2008 SC 735)**

Precedents

◆ **Article 141 – Precedent – Principle on which question before the court is decided is as Precedent.**

Every decision contains three basic postulates: (a) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (b) statements of the principles of law applicable to the legal

problems disclosed by the facts; and (c) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. Observations of courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too taken out of their context. **(Oriental Insurance Co. Ltd. v. Smt. Raj Kumari and Ors.; AIR 2008 SC 403)**

◆ **Article 141 – Precedent reliance on a decision without looking into factual background of case before it is clearly impermissible.**

Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent.The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts: and (iii) judgment based on the combined effect of the above.A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason of principle on which a question before a Court has been decided is alone binding as a precedent. **(State of Rajasthan v. Ganeshi Lal; AIR 2008 SC 690)**

Prevention of Corruption Act

◆ **S. 19 – Sanction order – Mode of construction of.**

It is true that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the PC Act by refusing to accord sanction for his prosecution or not. For the aforementioned purpose, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority. **(State of Karnataka v. Ameerjan; (2008) 1 SCC (Cri) 130)**

Prevention of Food Adulteration Act

◆ **S. 2(xiii) – Definition of sale – Sale to Food Inspector for which he paid price would constitutes sale within meaning of Act.**

The applicants are being prosecuted for an offence under Section 7/16 of the Prevention of Food Adulteration Act. Three contentions have been raised by the leanred counsel for the applicants for the prayer that the aforesaid prosecution of the applicant be quashed.

The contended that the applicants are running a restaurant business and therefore, there is no sale of the Basan in qustion which was kept for preparation of eatable in the restaurants. The said contention of the learned counsel for the applicants is bereft of any sound reasoning because Food Inspector after preparation of Form-6 paid the sale price of Rs. 21/-. The said sale to the Food Inspector by itself constitute sale within the meaning of the sale under the PFA Act and is indicative of the fact that Basan was meant for sale. There is no requirement of the law that thesale to the Food Inspector is not covered within the definition of sale under the Prevention of Food Adulteration Act. The first contention of learned counsel for the applicant, therefore, is wholly meritless. **(M/s. Rewant Hospitality Pvt. Ltd. & Anr. V. State of U.P. & Ors.; 2008 (1) ALJ 354)**

Probation of Offenders Act

◆ **S. 4 – Benefit of Probation – Scope of S. 4 of Act and S. 360 of Cr.P.C. is different and both statute cannot co-exist at same time in same area.**

Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the P.O. Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while P.O. Act does make such a provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the P.O. Act as applicable at the same time ina given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable. **(Gulzar v. State of M.P.; AIR 2008 SC 383)**

Service Law

◆ **Article 16 – U.P. Govt. Servant Seniority Rules, R. 8 – Determination of Seniority between direct recruits and promotees – Made of.**

The basic criteria of determination of seniority is date of order of their substantive appointment. Rule 8(1) and Rule 8(2) both have to be harmoniously construed to give effect to object and purpose of entire rule. The sub-rule (3) of R. 8 contemplates determination of seniority in a cyclic order only when appointments are made both by promotion and direct recruitments as a result of any one selection.

Thus, sub-rule (3) of R. 8 comes into play when both promotion and direct recruitments take place as result of one selection. In case both direct recruitment and promotion are not on basis of result of one selection,the determination of seniority has to be in accordance with R. 8(1) i.e. from date of order of substantive appointment. The 1991 Rules were framed for determining seniority giving it overriding effect and quota rota rule has been applied only to a limited extent i.e. while determining seniority when both promotion and direct recruitment is on basis of one selection. When selections are different, i.e.held in different years, there is no question of applicability of quota and rota Rules. The substantive appointment of direct recruits were made in year 1974 by U.P. Public Service Commission thereafter ad-hoc direct recruits were regularised in year 1981 and ad-hoc promotions were regularised in year 1989. All substantive appointments being in different years i.e. 1974, 1981 and 1989, there is no question of applying quota rota rules for determining the seniority. The substantive appointments of all being of different years, they have been placed in the seniority list accordingly, which is in conformity with Rule 8 of 1991Rules. **(Ram Chandra Chaturvedi v. State of U.P. and Anr.; 2008 (1) ALJ 180)**

Societies Registration Act

◆ **S. 15 – Refusal to refer dispute relating election of office bearers to prescribed authority by Registrar would not be improper if candidate failed to show and substantiate that she was valid member of society.**

Whenever dispute is raised before Registrar, that an incumbent is valid member or not within the scope and ambit of S. 15 of the Act, the said question can be very much looked into and decided by Registrar/Assistant Registrar/Deputy Registrar, as the case may be, in view of wide amplitude of authority vested under Ss. 22, 23, 24 of the Act, Registration and renewal of registration of society is the exclusive domain of Registrar/Assistant Registrar/Deputy Registrar as the case may be. Authority to accept, annual list of Managing Body is also exclusive domain of Registrar/Assistant/Deputy Registrar as the

case may be. While proceeding to exercise authority vested under S. 3-A or 4 of the Act, in case election dispute or dispute in respect of continuance of office bearers is raised, then Registrar/Assistant Registrar/Deputy Registrar, may in his/her discretion, refer the dispute to the prescribed Authority, if he, she is satisfied that bona fide genuine dispute has arisen in respect of election or continuance of office bearers and in case dispute totally lacks bona fides and is in genuine dispute, then reference is not at all required, and there is no impediment in the exercise of authority vested under Ss. 3A and 4 of the Act. This action of Registrar/Assistant Registrar/Deputy Registrar,can always be tested on the parameters of judicial review. Apart from this, the group of persons on list being accepted under S. 4 are not remediless, as they can always assail the validity of said list, after mustering supporting of one fourth members of society,before the Prescribed Authority. Prescribed Authority gets jurisdiction to decide dispute in respect of election or continuance of office bearers, either on reference or on being moved by one fourth members of the General Body. In entertaining dispute, on behalf of one fourth member of general body of society, Prescribed Authority, must satisfy himself that dispute has been raised by one fourth members of the General Body of society, who are members in term of Section 15 of the Act, and once satisfaction is recorded on this score, then dispute can be adjudicated in summary manner, and in the event of negative finding being there, the Prescribed Authority will have no jurisdiction. **(Babu Ram Shiksha Prasar Samit Etah and Anr. V. Deputy Registrar Firm, Societies & Chits and Anr.; 2008 (1) ALJ 207)**

Specific Performance Act

◆ S. 16(c) read with Explanation (ii) – Person seeking relief of specific performance of contract of sale – must plead and prove that his conduct has been blemishless throughout.

The basic principle behind section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes

a personal bar. The Court is to grant relief on the basis of the conduct of the pension seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief. **(Sita Ram and Others v. Radhey Shyam; 2008 (104) RD 114)**

Specific Relief Act

◆ **S. 16(c) – Suit for specific performance for agreement of sale readiness and willingness – Complete in action or silence on parties of plaintiff and inordinate delay in institution of suit (i.e. 11 years) are sufficient in itself to disentitle them to discretionary relief of specific performance.**

The land in dispute being Bhoomidhari land recorded as such would remain to be an agricultural land on which the provisions of Section 26 of the Ceiling Act would not be applicable, even though a small part of it may have been in use as an Abadi land. Accordingly, the conclusion is safe that after the expiry of the ban on registration of the sale deeds w.e.f. 31.12.1975 there remained no rider or any clog upon the plaintiffs to get sale deed executed in accordance with the agreement to sell.

Thus, the plaintiffs-respondents neither come forward between 1.1.1976 to 16.2.1976 nor thereafter to get the sale deed executed, it was for the first time on 13/14-2-1984 that a notice was given to the defendants-appellants to execute the sale deed. Accordingly, there was complete inaction or silence on part of the plaintiffs-respondents to perform their part of the contract so as to get the sale deed executed. Therefore, they cannot be regarded as persons who were continuously ready and willing to perform their part of the obligation. Moreover, inordinate delay in the institution of the suit i.e. after 11 years of the agreement is also sufficient in itself to disentitle them to the discretionary relief of specific performance. **(Indal Kumar Kushwaha and Anr. V. Rajesh Kumar Gupta and Ors.; 2008 (1) ALJ 93)**

◆ **S. 38 – CPC, S. 9 – Permanent injunction – Simpliciter suit for injunction in absence of relief of possession is maintainable.**

Simpliciter suit for injunction is maintainable before a Civil Court and can be filed U/s. 9 CPC If the plaintiff was threatened by defendants in any form by way of dispossessionor by way of trespass, nuisance, etc. it is always open to plaintiff to approach the Civil Court and seek relief of permanent injunction agaisnt defendant. The plaintiff has to show that he was owner and in possession and establish his title and possession, upon which, the Civil Court would be duty bound to grant a relief for injunction. The finding of appellate Court, that since relief for prossession was not claimed, the suit was not maintainable before a Civil Court, is patently erroneous. It is settled law that the Civil Courts has jurisdiction to a suit of civil nature except those which are expressly or impliedly excluded U/s. 9 CPC. The provisions of law which seeks to oust the jurisdiction of a Civil Court needs to be strictly construed.

The averments contained in the plaint and the relief claimed by the plaintiff were crucial to decide jurisdiction of Civil Court. The plaintiff claimed that he was owner and in possession of plots in question. The fact that a portion of plot was an agricultural land was immaterial to decide jurisdiction of Civil Court. The crucial fact was that plaintiff had claimed relief restraining defendants from interfering in his possession and from destroying the crops standing on the said plot. Once it is alleged that the plaintiff is in possession and was also the owner of the plots in question, the suit was clearly maintainable. **(Ved Prakash Rastogi v. Nagar Palika, Budaun; AIR 2008 All 27)**

Stamp Act

◈ **S. 17 – Assessment of stamp duty – Current market value at time of execution has to be seen.**

The valuation of property mentioned in instrument has to be done at current market value at time of its execution. Fact that purchaser had to litigate for long to get the instrument (Sale Deed) registered is immaterial. Section 17 stipulates that all the instruments chargeable with duty and executed by person of India shall be stamped before or “at the time of execution”. The word “execution”

has been defined in Section 2(12) which says that "Execution" used with reference to the instruments, mean "signed" and "signature". It shows that the document which is sought to be registered has to be signed by both the parties. Till that time the document does not become an instrument for registration. A reading of Section 2(12) with Section 17 clearly contemplates that the document should be complete in all respects when both the parties should have signed it with regard to the transfer of the immovable property. The expression "execution" read with Section 17 leaves no manner of doubt that the current valuation is to be seen when the instrument is sought to be registered. Therefore, the market value of the instrument has to be seen at the time of the execution of the sale deed, and not at the time whenagreement to sale was entered into. An agreement to sale is not a sale. An agreement to sale becomes a sale after both the parties signed the sale deed. A taxing statute has to be construed strictly and considerations of hardship or equity have no role to play in its construction. **(State of Rajasthan & Ors. V. M/s. Khandaka Jain Jewellers.; AIR 2008 SC 509)**

Transfer of Property Act

◆ **S. 5 – "Transfer of Property" – What constitute – Agreement to sale canot said to be transfer of property.**

The plain meaning of the 'transfer of property is transfer of interest in the property. Like transfer of interest by way of lease, transfer of interest by way of mortgage, or transfer of interest by way of sale etc. But, by executing a mere agreement of sale, no interest in the property, as such, is transferred by the transferor to the transferee. Rather, two persons agree to be transferor or transferee on certain terms in respect of a property in which the interest would be transferred.

Lastly, it is argued that since the possession of the land is transferred with the agreement of sale, as such, the interest in the property stood transferred. The court is not agreed with that delivery of possession at the time of executing the agreement of sale is a transfer of interest in the property. **(Smt. Majidan w/o Ilahi Baksh &**

Ors. V. Ishaq s/o Abdul Rahim (since deceased thro. L.Rs.) & Ors.; 2008 (1) ALJ 770)

◆ **S. 41 – Benami Transaction – Transaction when cannot be termed as benami transaction.**

Where in year 1935 the property was purchased by husband in the name of wife through a power of attorney which was executed by wife in favour of husband's brother and husband himself attested the power of attorney and name of wife was mutated in land records, it was held that it was not a benami transaction but the property was purchased by husband for the benefit of his wife as he had seven minor daughters and a son and he wanted to secure the future of his wife and daughters. Moreover, in 1935. Hindu Women's Right to Property Act, 1937 did not come into force. He, therefore, might have been of the opinionthat in case of his early death, something should be kept apart for his wife and daughters. When a person develops such an intention, it would be opposed to the essential characteristics of a benami transaction. He furthermore was not a debtor. He was not required to avoid any liability. He had no apparent motive for entering into a benami transaction. Further, in the power of attorney she was not described as his wife but daughter of 'B'. therefore, he being in the position of husband and if he intended to have a benami transaction, ordinarily he would not get his wife described as daughter of somebody instead of his own wife. Such unusual step on the part of husband would lead to one conclusion that he intended to purchase the property for the benefit of his wife. Moreover, in the power of attorney it was categorically stated that it was wife who had decided to purchase the said property and it was she who was appointing her husband's brother as her attorney. Further, the fact that an insurance was also made in her name is also a pointer to show that husband intended to provide sufficient money at the hands of his wife. It was more so when after the death of husband and wife, their son maltreated the daughters who were unmarried at that time and those daughters mutated the property in their name and the fact that the son allowed the order of mutation to attain finality, thus, would also be a pointer to suggest that despite such bitter relationship between the

parties he accepted the same; moreso, when mutation of one's name in the Municipal Corporation confers upon him a variety of rights and obligations. **(Binapani Paul v. Pratima Ghosh & Ors.; AIR 2008 SC 543)**

◆ **S. 53A – Part performance – Benefit of protection U/s. 53A is not available to transferee who remains passive.**

The existence of right to claim protection under Secton 53-A of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform his part of the contract and convey his willingness. On the other hand, the factual finding is that there was no intimation by defendant Nos. 3 & 4 to perform their part of contract to claim protection of Section 53-A of the Transfer of Property Act. Likewise, as rightly concluded by the courts below, there is no material to show that the plaintiff had notice of agreement of sale Ex. D-1 in favoaur of defendant Nos. 3 and 4. The conclusion of the High Court that defendant Nos. 3 and 4 or even defendant No. 1 who claims through them are not entitled to protection of Section 53-A of the Transfer of Property Act is acceptable and the argument contrary to the said conclusion is liable to be rejected. **(A. Lewis & Anr. V. M.T. Ramamurthy & Ors.; AIR 2008 SC 493)**

◆ **S. 54 – Agreement to sale – When not hit by provisions of S. 54 of the Act.**

If the agreement is not signed by the party the whole agreement will vitiate. It has also not been held in any of the rulings that the said agreement is not enforceable. The effect of an agreement which has not been signed by the parties is that the agreement will not amount to a written agreement and hence oral evidence is admissible to prove the real intention of the parties. In this case the defendant has taken plea that he had no intention to execute the agreement to sale and he only wanted to create a guarantee. The defendant failed to prove that the agreement in question was for the purposes of guarantee of the payment alone. On the other

hand the plaintiff has successfully proved the execution of the agreement to sale.

In other case this document is a promise to sale the disputed and plaintiff in part performance has paid Rs. 1,50,000/- to the defendant. Even the section 54 of the Transfer of the Property Act does not provide that a contract of sale hould be signed by both the parties. There is evidence that the agreement was voluntarily entered by the defendant. The appellant failed to prove that the agreement to sale is hit by provision of section 54 of the Transfer of Property Act. (**Shyam Narain v. Ram Singh; 2008 (104) RD 103)**

- **Agreement – Not signed by the parties – Effect of.**

The effect of an agreement which has not been signed by the parties is that the agreement will not amount to a written agreement and hence oral evidence is admissible to prove the real intention of the parties. In this case the defendant has taken plea that he had no intention to execute the agreement to sale and he only wanted to create a guarantee. The defendant failed to prove that the agreement and the agreement in question was for the purposes of guarantee of the payment alone. On the other hand the plaintiff has successfully proved the execution of the agreement to sale. (**Shyam Narain v. Ram Singh; 2008 (104) RD 103)**

- Allienation – By minor's guardian without legal necessity is a voidable document.

Findings of the Lower Appellate Court that Patta in question executed by mother of minor as guardian without establishing any need for doing so, therefore, above patta was void to the extend of share of minor is also not acceptable. In view of well settled law that alientation by the guardian without legal necessity is not void document but voidable document and since it is accepted that the plaintiff had instituted suit after lapse of 3 years of attaining his majority, therefore, this objection is not available to the plaintiff and judgment of the Lower Appellate Court in not sustainable in law. Question of law raised that whether lease deed 4.1.1955 was void?

The deed was not void but voidable document, it should have been challenged within the period of limitation after attaining majority. Having failed to do so, findings of the Lower Appellate Court are not sustainable in law. **(Smt. Sarla Devi Gupta v. Ravindra Singh; 2008 (104) RD 106)**

◆ **S. 58(c)k – Mortgage by conditional sale and sale with condition of repurchase – Determination of.**

The terms of the documents determine whether the transaction is a 'mortgage' or an out and out sale. A document that prima facie shows that it is an absolute conveyance does not cease to be an absolute conveyance and become a 'mortgage' merely because the vendor stipulates that he shall have a right to repurahase. A previous relationship of debtor and creditor has no bearing in the construcion of the document. The transaction will not be of a loan if by execution of the document, the prior debts are discharged. A deed which conveys absolutely the right, title and interest of the transfer is an out and out sale and if by execution of another document, the transferee expresses an intention to recovey the property to the transferor, then it would be a sale with a condition of repurchase.

Where the executant by executing the sale deed discharged all prior debts and outstandings and possession of property was delivered to vendor who became absolute owner free from all encumbrances, and the sale deed further provided that good title was being conveyed to vendor and in case any person claimed better title over the property and vendee lost title, then vendor and his heirs would be responsible for reimbursing the transferee and after registration of sale deed vendor was also obliged to get name of vendor mutated in Municipal records and it was, therefore, clear that right, title and interest of vendor was conveyed absolutely in favour of vendee and yet there was a relationship of debtor and creditor and a perusal of subsequent deed showed that vendor could repurchase property within 20 years on certain terms and conditions, the said deed together with earlier sale deed would constitute a "sale" with a condition to repurchase.

The transaction would not be a 'mortgage by conditional sale' as condition of retransfer was not embodied in same document. **(Abdul Sami Qureshi & Ors. V. Sardar Kuldeep Singh & Ors.; 2008 (1) ALJ 395)**

◆ **S. 82 – Applicability of**.

The provision of section 82 of the Transfer of Property Act has no application to the present facts and circumstances of the case. It is open to the auction purchaser either to proceed against the whole property or against a part of such property. In the present case, the mortgagee executed his decree in respect of the portion of the property which was purchased by Mool Chand. The question of rateable distribution from the property of defendant No. 1 which was not part of the execution proceding is totally misplaced and without jurisdiction. Such direction could not be issued by the lower Appellate Court. It was held that the lower appellate Court was in error in directing rateable distribution as per the provisions of section 82 of the Transfer of Property Act. **(Smt. Ram Kali v. Kuldeep Chand and Others; 2008 (104) RD 46)**

◆ **(i) S. 105 – Lease – Essential ingredients of.**

Section 105 of Transfer of Property Act, 1882 defines lease as follows:

> "A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promises or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, Lessee, Premium and Rent defined-The transferor is called the Lessor, the transferee is called the Lessee, the price is called the Premium, and the money, share, service or other thing to be so rendered is called the Rent."

The essential ingredients of a lease are:

(a) There should be a transfer of a right to enjoy an immovable property;

(b) Such transfer may be for a certain term or in perpetuity;

(c) The transfer should be in consideration of a premium or rent;

(d) The transfer should be a bilateral transaction, the transferee accepting the terms of transfer.

(B. Arvind Kumar v. Government of India and Others; 2008 (104) RD 213)

(ii) Lease – No duration specified – Permits the lessee to hold the land forever.

To decide the duration of the lease, the deed has to be read as a whole. The deed dated 30.9.1921 does not specify any duration, but permits the lessee to held the land forever subject to the right of the lessor to resume the land by giving one month's notice. There is no grant in perpetuity. The right of the lessor to resume the land by giving a month's notice, is unconditional at the absolute will and discretion of the lessor, whenever he desires.These terms indicate that though the instrument was termed as a lease, it only granted permissive occupation terminable at the will of the owner, and therefore, at best a tenancy at will. The absolute discretion to resume the land at any time without assigning any reason, and absence of any express grant in perpetuity and absence of any consideration, militates against the instrument being construed as a lease in perpetuity. The appellant's version is that Courts have taken the view that existence of a mere provision for forfeiture for non-payment of rent or other specified breach, in a deed granting permanent lease, will not make the lease non-permanent. Such line of decisions, may not assist the appellant as a provision for determination of the lease for a specified breach, is in no way comparable to reservation of an absolute right to resume at will without assigning any reason, in a lease without consideration. We, therefore, affirm the finding that Exhibit P-1 is not a lease in perpetuity. The court desisted from examining the further

question whether the lease itself was invalid for want of consideration, as such a contention was not raised in the written statement nor urged before the Trial Court or High Court. **(B. Arvind Kumar v. Government of India and Others; 2008 (104) RD 213)**

U.P. Consolidation of Holdings Act

◆ **S. 5(c)(ii) – Unalienable property – Sale deed obtained with permission U/s. 5(C)(ii) cannot be recognised in law – Possession and valid alienation of title cannot be made.**

The question arose whether in case the law makes it clear that even if a sale deed allegedly executed cannot be recognized in law possession and valid alienation of title cannot be made, no right can accrue to Opp. Parties by reason of remaining inactual possession when it was not accepted by petitioner at any point of time and any possession on the basis of proceeding under section 145 Cr.P.C. which was denied and was never considered to be uninterrupted and unchallenged by petitioner particularly when Consolidation officer found sale deed not proved in accordance with law as the interest in the present case was unalienable. **(Rajwanti Nanuwa v. Deputy Director of Consolidation, Bulandshahr and Ors.; 2008 (1) ALJ 294)**

U.P. Industrial Disputes Act

◆ **S. 6-N – Regularisationof service – Completion of 260 days of service in calender year – Does not confer, right of regularisation.**

Due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules. Merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularized. **(Mahboob Deepak v. Nagar Panchayat Gajraula & Anr.; 2008 (1) ALJ 790)**

U.P. Krishi Utpadan Mandi Samiti Adhiniyam

◆ **S. 17(iii)(3) – Liabilities of Traders for realisation of Market fee – All traders need not to be licenced traders for purpose of realisation of Market fee.**

A bare perusal of the definition of the said term does not envisage that all traders must be licensed traders for the purpose of realisationof the market fee. The proviso appended to clause (3) of sub-section (iii) of Section 17 of the Act, although was enacted by Act No. 4 of 1999, the same had been given retrospective effect and retroactive operation. In no uncertain terms it provides that the trader would be bound to pay the market fee and shall not be absolved from such liability on the ground that he has not realised it from the purchaser. **(Director, Krishi Utpadan Mandi Samiti & Anr. V. M/s. Ram Kishan Daya Ram & Co.; 2008 (1) ALJ 68)**

◆ **S. 23 – Determination of Seniority – Seniority would be considered from date of his initial appointment.**

Where the employee was initially appointed as clerk in 1972 and thereafter he was re-designated from post of clerk to Amin/Auctioner in 1977 and when Statewise seniority list of Amin was prepared, his date of appointment was shown as of year 1977 but the employee claimed the seniority on the basis of date of his initial appointment in 1972, the Court held that Regulation 13(2) of 1984 itself protect service of employee, and condition that seniority of employee would merge from date of his initial appointment as clerk, made it clear that seniority of employee ought to be determined on basis of his initial appointment as clerk in 1972 and thus employee would be entitled to fixation of his seniority treating the date of his initial appointment and not from such subsequent date when his post was converted to that of Amin/Auctioner. **(Devendra Prasad s/o Late Panna Lal Srivastava v. The Mandi Nideshak, Rajya Krishi Utpadan Mandi Parishad, U.P. & Ors.; 2008 (1) ALJ 602)**

U.P. Municipalities Act

◆ **S. 326(4) – Suit for injunction against Municipal Board is maintainable even without giving a notice in view of sub section (4) of S. 326.**

Sub-section (4) clearly indicates that a suit for injunction could be filed even without giving a notice contemplated under sub-section (1) of Section 326. In view of the clear provision namely, sub-section (4) of Section 326, it is clear that a suit for injunction could be filed against the Municipal Board without giving a notice. **(Ved Prakash Rastogi v. Nagar Palika, Budaun; AIR 2008 All 27)**

U.P. Muslim Waqf Act

◆ **S. 19(2) – Enabling provision and do not take away right of mutawwalli to institute suit for eviction on behalf of waqf.**

The property of the Waqf vests in the Almighty. The Waqf Board is a corporate body, which has a right to hold and dispose of property but the property of the Waqf does not vest in the Waqf Board. The property is also not under the Direct management of the Waqf Board. It is the Mutawalli who is the manager of the Waqf property. No doubt the Board has the overall superintendence over the Waqf property and can issue directions to the Mutawalli and can also institute and defend suits onbehalf of the waqf vide Section 19(2)(q) of the U.P. Muslim Waqf Act, 1960 and Section 32(1) of the Waqf Act, 1995 but these provisions are enabling provisions and do not take away the right of the Mutawalli where the property has been let out by him to institute a suit for eviction of the tenant and for recovery of arrears of rent. A suit for eviction of a lessee in fact is ordinarily to be filed by the lessor, who in this case is the Mutawalli. The plea of the petitioner therefore, that the Mutawalli had no right to institute a suit on behalf of the Waqf or to execute the decree is not tenable. **(Mohammad Zafar v. State of U.P. & Anr.; 2008 (1) ALJ 665)**

U.P. Panchayat Raj Act

◆ **S. 12-J(2) – Authorization to work as Pradhan – Withdrawal of – District Magistrate is competent to withdraw.**

Section 12-J(2) provides nomination for a member, when a statute confers a power of a statutory authority to do a particular thing that power can be exercised from time to time. To nominate under section 12-J(2) was not a one time power which after nominating the petitioner exhausted. The power shall continue with the prescribed authority to nominate, renominate as the exigency may arise. In case the interpretation put by the petitioner is accepted the power of District Magistrate shall come to an end after once nominating a person to discharge the duties of Pradhan. If such interpretation is accepted that will not advance the object of provisions of section 12-J(2) of the Act 1947. U.P. General Clauses Act provides that power conferred by a statute is to be exercisable from time to time section 14 of the U.P. General Clauses Act is quoted as below:-

> **"Power conferred on the State Government to be exercisable from time to time:-** Where, by any (Uttar Pradesh) Act, any power is conferred (XX) then that power may be exercised from time to 5time as occasion requires."

From the provisions of the General Clauses Act, it is clear that when an act confers a power unless the different intention is there such power can be exercised from time to time as occasion requires, thus, the power of nomination can be exercised by the District Magistrate from time to time. The order clearly contemplates that the nomination of the petitioner is purely temporary and can be withdrawn without any notice, hence the submission of the petitioner that nomination could not have been withdrawn cannot be accepted. The next submission of the petitioner is that he was required to be given an opportunity before passing an order for removing him. The petitioner was nominated by the District Magistrate to discharge the function of the Pradhan. The petitioner is not an elected office bearer nor he can claim to have any right to the office of Pradhan by virtue of nomination. The appointment of a nominee is generally up to the pleasure of the authority nominating a person. After receiving complaints regarding functioning of the petitioner no error was

committed by the District Magistrate in recalling the nomination without giving any opportunity. **(Mohd. Yasin Khan v. State of U.P.; 2008 (104) RD 51)**

◆ **S. 95(1)(g) – Constitution of India, Article 226 – Equitable jurisdiction cannot be exercised in favour of person who had contested elections on basis of forged caste certificate.**

In the case of Hotilal v. State of U.P. and others reported in 2002 (3) AWC, 176, where it has been held that the election of the Pradhan cannot be set aside by the District Magistrate, nor any restrain on discharge of duties qua ad-ministrative and financial powers can be directed, in exercise of power under Section95(1)(g) of the U.P. Panchayat Raj Act on the ground that the Pradhan does not belong to the Caste for which the seat was reserved. The proper remedy has been held to be by way of electionpetition.

Two issues arise before this Court.

(a) should equitable writ jurisdiction under Article 226 of the Constitution of India be exercised in favour of the person who has contested the elections claiming to be the member of a caste on the basis of a forged certificate.

(b) Should this Court set aside an order of the District Magistrate on the plea that the proper remedy available is to file an election petition as has been held in the case of Hotilal.

In view of the aforesaid settled legal position even if it is presumed that the District Magistrate could not have exercised powers under Section 95(1)(g) in the facts of the present case, the Court is not willing to exercise its jurisdiction under Article 226 of the Constitution of India inasmuch as setting aside of the order impugned in the present writ petition could only result in perpetuating illegal continuance of the petitioner as Pradhan against the seat reserved for Other Backward Classes although petitioner does not belong to the

said caste. **(Mujahid Ahmad Hussain v. State of U.P. & Anr.; 2008 (1) ALJ 155)**

U.P. Public Service Tribunal Act

◆ **S. 4 – Claim petition against order of termination – Limitation – Order of termination challenged after delay of more than 20 years – Barred by limitation.**

(Nathu Ram Tiwari v. U.P. State Public Service Tribunal & Ors.; 2008 (1) ALJ (NOC) 120 (All) (DB))

U.P. Stamp (Valuation of Property) Rules, 1977

◆ **Determination of Market Value – District Magistrate cannot fix unreasonable market value of the land for the purpose of stamp duty and the registration.**

In the instant case, the land under the sale deed in question is an agricultural land and the petitioner has paid the Stamp duty according to the highest circle rate fixed by the Collector through rate list dated 16.6.2004 for the agricultural land in the semi urban area.

The sale deed in respect to Khasra No. 447 was executed on 8.7.2003 and the stamp duty which was charged by the opposite parties was at the rate of about Rs. 5,00,000/- per hectare. By the impugned notice the opposite parties have assessed/valued the land in question for Rs. 4,17,60,000/- The petitioner has also stated in the writ petition that he is ready to sell the plot on $1/5^{th}$ of the value as fixed by the Sub-Registrar-II, which offer the opposite parties have not accpeted. In the counter affidavit, the Sub-Registrar-II has stated that he has no authority or power to purchase the said land even on $1/5^{th}$ value as fixed by the Sub-Registrar, Lucknow.

The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice, which the quasi-judicial authorities are bound to observe. An arbitrary action is ultra virus.

In the opinion of the court the opposite parties are not justified in demanding the stamp duty on the agricultural land at the rate of Rs. 6,000/- per Sq. Mtr. Which is the rate for the commercial land. The District Magistrate cannot fix unreasonable market value of the land for the purpose of stamp duty and the registration. **(Kishore Chandra Agarwal v. State of U.P. & Others; 2008 (104) RD 235)**

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

◆ **S. 16(4) – Recall of allotment order – When valid.**

Where Rent Control Officer passed allotment order without hearing erstwhile landlord or new landlord and in absence of erstwhile landlord, allottee in collusion with erstwhile tenant received notice of vacancy and Rent Officer took no account of non-appearance of parties before passing order, thus collusion between officers, allottee and erstwhile tenant was apparent, allotment order would be vitiated being against principle of natural justice and fraud. Moreso when there was evidence to show that erstwhile landlord never accepted allottee as tenant. **(Rashid Jamal v. Rent Control & Eviction Officer & Ors.; 2008 (1) ALJ 339)**

U.P.Z.A. & L.R. Act

◆ **S. 86 – U.P.Z.A. & L.R. Rules – R. 285(1) – Agriculture Loan – If dues were cleared during pendency of recovery proceedings and bank still went ahead with auction sale – Sale would be void and liable to be set aside.**

Where petitioner debtor took loan for purchasing tractor against agricultural property and defaulted in payment of instalment, but cleared the dues during recovery proceedings and obtained the receipt from Administration of Tehsil thereto, then auction sale by bank in absence of arrears would be void ab initio and liable to be set aside and petitioner's name would be re-entered in revenue records. **(Ram Barai Prasad v. State of U.P. & Ors.; 2008 (1) ALJ 376)**

◆ S. 161 – Any land vested in Gaon Sabha or Local Authority U/s. 117 of the Act can be subject matter of exchange with the land of any bhumidhar.

Section 12-J(2) provides nomination for a member, when a statute confers a power of a statutory authority to do a particular thing that power can be exercised from time to time. To nominate under section 12-J(2) was not a one time power which after nominating the petitioner exhausted. The power shall continue with the prescribed authority to nominate, renominate as the exigency may arise. In case the interpretation put by the petitioner is accepted the power of District Magistrate shall come to an end after once nominating a person to discharge the duties of Pradhan. If such interpretation is accepted that will not advance the object of provisions of section 12-J(2) of the Act 1947. U.P. General Clauses Act provides that power conferred by a statute is to be exercisable from time to time section 14 of the U.P. General Clauses Act is quoted as below:-

> "*Power conferred on the State Government to be exercisable from time to time:-* Where, by any (Uttar Pradesh) Act, any power is conferred (XX) then that power may be exercised from time to time as occasion requires."

From the provisions of the General Clauses Act, it is clear that when an act confers a power unless the different intention is there such power can be exercised from time to time as occasion requires, thus, the power of nomination can be exercised by the District Magistrate from time to time. The submission of the petitioner that once he has been nominated his nomination cannot be withdrawn cannot be accepted. Further more this submission also runs contrary to the very condition of the petitioner's nomination as contained in the letter dated 13.6.2007. the order clearly contemplates that the nomination of the petitioner is purely temporary and can be withdrawn without any notice, hence, the submission of the petitioner that nomination could not have been withdrawn cannot be accepted.

The next submissionof the petitioner is that he was required to be given an opportunity before passing an order for removing him. The petitioner was nominated by the District Magistrate to discharge the function of the Pradhan. The petitioner is not an elected office bearer nor he can claim to have any right to the office of Pradhan by virtue of nomination. The appointment of a nominee is generally up to the pleasure of the authority nominating a person. After receiving complaints regarding functioning of the petitioner no error was committed by the District Magistrate in recalling the nomination without giving any opportunity. **(Mohd. Yasin Khan v. State of U.P.; 2008 (104) RD 51)**

◆ **Ss. 134 and 137 – Conversion of "Sirdar" rights into "bhumidhari" right – Death of the tenure-holder could not for the issuance of the bhumidhari sanad in his favour from the date of the deposit.**

Section 134 and 137 of the Act read as follows:

> **"134(1).** If a sirdar belonging to the class mentioned in clause (a) of section 137 pays or offers to pay to the credit of the State Government an amount equal to ten times the land revenue payable or deemed to be payable on the date of application for the land of which he is the sirdar, he shall, upon an application duly made in that behalf to an Assistant Collector, be entitled, with effect from the date on which the amount has been deposited, to a declaration that he has acquired the rights mentioned in section 137 in respect of such land…."
>
> Section 137 insofar as it is relevant then stood as follows:-
>
> "**137(1).** If the application has been duly made and the Assistant Collector is satisfied that the applicant is entitled to the declaration mentioned in section 134, he shall grant a certificate to that effect.
>
> (2) Upon the grant of the certificate under sub-section (1) the Sirdar shall from the date thereof:

(a) become and be deemed to be a Bhumidhar of the holding or the share in respect of which the certificate has been granted, and

(b) * * * ”

On the application being made and the stipulated times of land revenue being paid, the sirdari becomes entitled “with effect from the date on which the amount had been deposited” to a declaration that he has acquired rights mentioned in section 137 of the Act. The section clearly specifies the date with effect from which the rights would stand acquired i.e. the date on which the amount contemplated by section 134 is deposited. This clearly obliviates the uncertainty of the point of time when the title is transferred by fixing the date as being the date on which the amount is deposited. It would be immaterial as to when the declaration under section 137 is made because that declaration must necessarily take effect from the date when the amount is deposited. Prior to the amendment of sub-section (2) of section 137 of the Act the position was that it is only the grant of certificate under sub-section (1) of section 137 that the Sirdar from the date thereof became or is to be deemed to be a Bhumidhar of the holding or the share in respect of which the certificate has been granted. The amendment of sub-section (2) of section 137 by Amendment Act 21 of 1962 with effect from 13.12.1962 brought section 137(2) in line with section 134 brought section 137(2) in line with section 134. The two provisions read together clearly provide that as and when the certificate under section 137 is granted, it must relate back and be effective from the date on which the amount referred to in sub-section (1) of section 134 was deposited. **(Bindha Prasad v. Bhan Datt (D) by LRs.; 2008 (104) RD 70)**

◆ **Settlement – Of land obtained on patta by backdoor – No licence to be given to a wrong act.**

So far as the judgment given in the case of Sukhdev is concerned, action against unauthorised occupation was taken after about 30 years and therefore, on the facts, this Court exercising equity powers granted relief. So far the judgment in the case of Kishore

Singh is concerned, a finding has been recorded that Navin Parti was made cultivable land and therefore, on the facts of that case considering the hardship, relief was granted by this Court. Otherwise also if this kind of tactics is permitted, then it will be very easy for a mighty person to grab public property by back door process in an illegal manner and then to claim its settlement to get it legalised. This will be clearly arbitrary and discriminatory and in violation of principle of natural justice to the public at large. The benefit to which, large number of eligible persons may be entitled cannot be permitted tobe given to an individual in a secret manner without any opportunity of participation to all eligibles. It has been repeatedly said by the Apex Court and this Court that in the matter of public settlement, it has to be after opportunity of participation to public at large and in the manner so provided. The claim of the petitioner was rejected by the Court for settling the land on premium basis as that will be in violation of principle of natural justice as others are to suffer and that will be laying a bad precedent of granting premium to wrong acts certifying the slogan that might is right. Now-a-days, tendency of encroachment of public land property is increasing day by day and thus that has to be checked although on its beginning itself and if for any reason that could not come to notice at its start then as and when, it comes to the notice of a person authorised/capable to take action in accordance with law. There cannot be any license/premium to a wrong and void act unless it is permitted in law or it could get protection in law. **(Pratap Singh Shishodia v. Board of Revenue, Allahabad and Others; 2008 (104) RD 151)**

◈ **Will – Existence of suspicious circumstances is itself sufficient to arrive at a conclusion that execution of the Will has been duly proved.**

Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly been proved. **(Benga Behera and Another v. Braja Kishore Nanda and Others; 2008 (104) RD 61)**

Words and Phrases

◆ "Public Servant" – Officer employed in M.P. Electricity Board is a Public Servant within the meaning of Prevention of Corruption Act.

The officers of the State Electricity Board are required to carry out public functions. They are public authorities. Their action in one way or the other may entail civil or evil consequences to the consumers of electrical energy. They may prosecute a person. They are empowered to enter into the house of the Board's consumers. It is only for proper and effective exercise of those powers, the statute provides that they would be public servants, wherefor a legal fiction has been created in favour of thos employees, when acting or purported to act in pursuance of any of the provisions of the Act within the meaning of Section 21 of the Indian Penal Code. Indian Penal Code denotes various persons to be public servants. It is, however, not exhaustive. A person may be a public servant interms of another staute. However, a person who, inter alia, is in the service or pay of the Government established by or under a Central, Provincial or State Act, would also come within the purview thereof. Section 2(1)(c) of the 1988 Act also brings within its embrace a person in the service or pay of a corporation established by or under a Central Act. **(Naresh Kumar Madan v. State of M.P.; AIR 2008 SC 383)**

◆ Meaning of "Confession", statement.

The expression "confession" is not defined in the Evidence Act, "Confession" is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word "statement" is "act of stating; that which is stated; a formal account, declaration of facts, etc." The word "statement" includes both oral and written statement. Communication to another is not however an essential component to constitute a "statement". An accused might have been overheard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid

nevertheless constitute a statement. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. **(Ajay Singh v.State of Maharashtra; (2008) 1 SCC (Cri) 371)**

Statute

The Uttar Pradesh Panchayat Laws (Amendment) Act, 2007[1]
[U.P. Act No. 44 of 2007]

(As passed by the Uttar Pradesh Legislature)

CONTENTS

[1] Received the assent of the Governor on December 9, 2007 and published in the U.P. Gazette, Extra., Part 1, Section (Ka), dated 10th December, 2007, pp. 5-8

Sections

Chapter III
Amendment of the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961

An Act further to amend the United Provinces Panchayat Raj, 1947 and the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961.

Prefatory Note – Statement of Objects and Reasons – The United Provinces Panchayat Raj Act, 1947 (U.P. Act No. 26 of 1947) provided for the offices of Pradhan and Up-Pradhan in every Gram Panchayat and the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 (U.P. Act No. 33 of 1961) provided for the offices of Pramukh, Up-Pramukh (Senior Up-Pramukh and Junior Up-Pramukh) in every Kshettra Panchayat and Adhyaksha and Upadhyaksha in every Zila Panchayat. It was decided to amend the said Acts to omit the provisions of the offices in respect of which there is no provision in the Constitution namely the offices of Up-Pradhan, Up-Pramukh (Senior Up-Pramukh and Junior Up-Pramukh) and Upadhyaksha.

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Panchayat Laws (Amendment) Ordinace, 2007 (U.P. Ordinance No. 26 of 2007) was promulgated by the Governor on August 20, 2007.

This Bill is introduced to replace the aforesaid Ordinance.

CHAPTER I

PRELIMINARY

1. Short title and commencement. – (1) this Act may be called the Uttar Pradesh Panchayat Laws (Amendment) Act, 2007.

(2) It shall be deemed to have come into force on August 20, 2007.

CHAPTER II

AMENDMENT OF THE UNITED PROVINCES

PANCHAYAT RAJ ACT, 1947

2. General Amendment of U.P. Act No. 26 of 1947. – In the United Provinces Panchayat Raj Act, 1947, hereinafter in this chapter

referred to as the principal Act, the word "Up-Pradhan" wherever occurring including the marginal headings, shall be omitted.

3. Amendment of Section 11-A - In Section 11-A of the principal Act, for sub-section(1) the following sub-section shall be substituted, namely:-

> "(1) There shall be a Pradhan of the Gram Panchayat who shall be the Chairperson thereof."

4. Omissionof Section 11-C.- Section 11-C Section 11-C of the principal Act shall be omitted.

5. Substitution ofSection 12-J.- For Section 12-J of the principal Act, the following section shall be substituted, namely:-

> "12-J. Temporary arrangement in certain cases.- Where the office of Padhan is vacant by reason of death, removal, resignationor otherwise or where the Pradhan is incapable to act by reason of absence, illness or for any reason whatsoever, the prescribed authority shall nominate a member of the Gram Panchayat, to discharge the duties and exercise the powers of Pradhan until such vacancy in the office of the Pradhan is filled in, or until such incapacity of Pradhan is removed."

6. Omission of Section 14-B. – Section 14-B of the principal Act shall be omitted.

7. Amendment of Section 28-A. – In Section 28-A of the Principal Act, for sub-section (2), the following sub-section shall be substituted, namely:-

> "(2) The Pradhan shall be the Chairperson of the Bhumi Prabandhak Samiti and the Lekhpal of the area comprised in the jurisdiction of the Gram Panchayat shall be its Secretary."

8. Amendment of Section 114. – In Section 114 of the Principal Act, in sub-section (2) for the words "vacancies in the offices of both

Pradhan and Up-Pradhan" the words "vacancy in the office of Pradhan" shall be substituted.

CHAPTER III
AMENDMENT OF THE UTTAR PRADESH KSHETTRA PANCHAYATS AND ZILA PANCHAYATS ADHINIYAM, 1961

9. General Amendment of U.P. Act No. 33 of 1961. – In the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, hereinafter in this chapter referred to as the principal Act, the words "Up-Pramukh", "Senior Up-Pramukh", "Junior Up-Pramukh" and "Upadhyaksha" wherever occurring including the marginal headings and Schedules, shall be omitted.

10. Amendment of Section 7. – In Section 7 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:-

> "(3) Notwithstanding anything to the contrary contained in any other provision of this Act, the persons who have been elected to the office of the Up-Pramukh before the commencement of the Uttar Pradesh Panchayat Laws (Amendment) Act, 2007 shall continue to hold the office as such till the expiry of their term as if the said Act were not enacted."

11. Amendment of Section 9. – In Section 9 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:-

> "(2) Where the office of the Pramukh is vacant, the District Magistrate may, by order, make such arrangement as he thinks fit for the discharge of the functions of the Pramukh, till the Pramukh is elected."

12. Substitutionof Section 9-A. – For Section 9-A of the principal Act the following section shall be substituted, namely:-

> "9-A. Temporary arrangement in certain cases. – When the Pramukh is unable to discharge his functions owing to absence, illness or any other cause, the District Magistrate may, by order, make such arrangement, as

he thinks fit, for the discharge of the functions of the Pramukh until the date on which the Pramukh resumes his duties."

13. Amendment of Section 15. – In Section 15 of the Principal Act.–

(a) in sub-section (11) for the words "nor less than two-thirds" the words "more than half" shall be substituted.

(b) In sub-section (12) and sub-section (13) for the words "two years" the words "one year" shall be substituted.

14. Substitution of Section 21-A. – For Section 21-A of the principal Act, the following section shall be substituted, namely:-

"12-A. Temporary arrangement in certain cases. – When the office of the Adhyaksha is vacant or he is unable to discharge his functions owing to absence, illness or any other cause, the State Government may be order, make such arrangement, as it thinks fit, for the discharge of the functions of such Adhyaksha until the date on which the Adyaksha resumes his duties."

15. Amendment of Section 27-A. – In Section 27-A of the principal Act, for the words "Pramukh, Up-Pramukh, Adhyaksha or Upadhyaksha", wherever occurring the words "Pramukh or Adhyaksha" shall be substituted.

16. Amendment of Section 28. – In Section 28 of the principal Act. –

(a) In sub-section (11) for the words "not less than two-thirds" the words "more than half" shall be substituted;

(b) In sub-section (12) and sub-section (13) for the words "two years" the words "one year" shall be substituted.

17. Omission of Section 60. – Section 60 of the principal Act shall be omitted.

18. Amendment of Section 61. – In Section 61 of the principal Act, in sub-section (2) the words "or in his absence from the District, the Upadhyaksha" shall be omitted.

19. Amendment of Section 64. – In Section 64 of the principal Act, in sub-section (2) clause (b) shall be omitted.

20. Amendment of Section 66. – In Section 66 of the principal Act –

(a) in sub-section (1) clause (b) shall be omitted.

(b) For sub-section (2) the following sub-section shall be substituted, namely:-

(2) The Adhyaksha shall be the chairperson of the Karya Samiti.

21. Omission of Section 82 and Section 83. – Sections 82 and 83 of the Principal Act shall be omitted.

22. Amendment of Section 84 .- In Section 84 of the principal Act, in sub-section (2) the words "or in his absence from the Khand the Senior Up-Pramukh, or if the latter is also absent from the Khand, the Junior Up-Pramukh", shall be omitted.

23. Amendment of Section 88. – In Section 88 of the principal Act –

(a) for sub-section (2) the following sub-section shall be substituted, namely:-

"(2) The Pramukh shall be the ex-officio Chairman of Vitta Evam Vikas Samiti, Shiksha Samiti and Samta Samiti."

(b) Sub-section (3), (3-A) and (4) shall be omitted.

(c) For sub-section (5) the following sub-section shall be substituted, namely:-

"(5) As soon as may be after their Constitution each committee specified in sub-section (1) of Section 87, other than Karya Samiti, shall at its first meeting elect

one of their members to be the Vice-Chairman."

24. Amendment of Section 89. – In Section 89 of the principal Act, for sub-section (1) the following sub-section shall be substituted, namely:-

"(1) The elections of members and other office-bearers of every committee referred to in Section 87 shall be in such manner as may be prescribed."

25. Repeal and Savings. – (1) The Uttar Pradesh Panchayat Laws (Amendment) Ordinance, 2007 (U.P. Ordinance No. 26 of 2007) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Acts as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of the principal Acts as amended by this Act as if the provisions of this Act were in force at all material times.

The Uttar Pradesh Public Services (Reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Act, 2007[1]

[U.P. Act No. 45 of 2007]

(As passed by the Uttar Pradesh Legislature)

An Act further to amend the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994

It is hereby enacted in the Fifty-eight Year of the Republic of India as follows:-

Prefatory Note – Statement of Objects and Reasons.-The Uttar Pradesh Public Services (Reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994) has been enacted to provide for the reservation in public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens and for matters connected therewith or incidental thereto. It had been brought to the notice of the State Government that in certain recruitments eligible persons belonging to the Scheduled Tribes, for appointment to the posts reserved therefor are no available. Similar is the case in respect of the persons belonging to Scheduled Castes. In such cases it becomes difficult to fill the vacancies resrved for the persons belonging to the Scheduled Tribes or the Scheduled Castes. It was, therefor, decided to amend the said Act to provide that where a suitable candidate belonging to the Scheduled Tribes or Scheduled Castes is not available in a recruitment the vacancy reserved for him may be filled in such recruitment from amongst the candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, and as soon as a vacancy earmarked for the Scheduled Castes or Scheduled Tribes, as the case may be, arises such person

[1] Received the assent of the Governor on December 9, 2007 and published in the U.P. Gazette, Extra, Part 1, Section (Ka), Dated 10th December, 2007. pp. 3-4

belonging to Scheduled Castes or Scheduled Tribes, as the case may be, shall be adjusted against such vacancy of his own category.

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Public Service (Reservation for theScheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 2007 (U.P. Ordinance No. 28 of 2007) was promulgated by the Governor on August 25, 2007.

This Bill is introduced to replace the aforesaid Ordinance.

1. Short title and commencement. – (1) This Act may be called the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Act, 2007.

(2) It shall be deemed to have come into force on August 25, 2007.

2. Amendment of Section 3 of U.P. Act No. 4 of 1994. – In Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 hereinafter referred to as the principal Act for sub-section (3) the following sub-section shall be substituted, namely:-

> "(3) where a suitable candidate belonging to the Scheduled Tribes or Scheduled Castes, as the case may be, is not available in a recruitment either under sub-section (1) or sub-section (2) the vacancy reserved for him maybe filled in such recruitment, from amongst the suitable candidates belonging to the Scheduled Castes or Scheduled Tribes, as the case may be, and as soon as a vacancy earmarked in the roster referred to in sub-section (5) for the Scheduled Castes or Scheduled Tribes, as the case may be, arises such person belonging to Scheduled Castes or Scheduled Tribes, as the case may be, shall be adjusted against such vacancy of his own category."

3. Repeal and Saving. – (1) The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 2007 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Act as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act as if the provisions of this Act were in force at all material times.

* * * * *