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

Quarterly Digest

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

July – September, 2007

Volume: XIII **Issue No.: 3**

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PART – I

Arbitration and Conciliation Act

◆ S. 11(8) – Once S. 11(6) Petition is filed before the Court, seeking appointment of an Arbitrator, the power to appoint Arbitrator in terms of arbitration clause of the agreement ceases.

(Union of India v. M/s. Bharat Battery Manufacturing Co. (P) Ltd.; 2007 (5) Supreme 934)

Civil Procedure Code

◆ O. I, R. 10 – Improper impleadment in suit – Court competent to act suo moto and direct the name of the plaintiff or defendents so improperly impleaded to be struck out from array of the parties.

Plain reading of Order 1, Rule 10(2) CPC sets out that the Court may, at any stage, of the proceedings either suo motu or upon an application of either party may order striking out the name of any party improperly joined whether as plaintiff or defendant. It is not necessary that where an application is preferred only then such an action can be taken. If during the course of the proceedings it is brought to the notice of the Court that a plaintiff or defendant has improperly been impleaded the Court can act under Order 1, Rule 10(2) CPC and direct the name of the plaintiff or defendant so improperly impleaded to be struck out from the array of the parties. **(Mohit Kumar v. Mrs. Lilu Kumar and others; 2007(103) RD 248)**

◆ **O. I, R. 10 – Necessary and proper party – Who is.**

A necessary party is one who ought to have been joined i.e. a person in whose absence no effective decree at all can be passed. On the other hand, a proper party is he whose presence is necessary to enable the Court to effectually and completely adjudicate upon and decide all questions involved. (Mohit Kumar v. M/s. Lilu Kumar; 2007 (103) RD 248)

◆ O. II R. 2 – If the evidence to support the two claims is different, then the cause of action are also different.

The correct test in cases falling U/O. II R. 2 is whether the claim in the new suit is infact founded upon a cause of action distinct from that which was the foundation of former suit. The 'cause of action' means every fact which will be necessary for the plaintiff to prove it traversed in order to support his right to the judgment. If the evidence to support the two claims is different, when the causes of action are also different. The cause of action in the two suits may be considered to be the same if in substance they are identical. (Sandeep Polymers Pvt. Ltd. v. Bajaj Auto Ltd. & Ors.; 2007 (5) Supreme 513)

◆ O. II R. 2 – Joinder of causes of action – Held, O. II R. 2 is directed to securing the exhaustion of the relief in respect of a cause of action and not to inclusion in one and the same action of different causes of action – Jurisdiction in respect of various causes of action inhering in different courts – Amendment of original plaint was enough and return or rejection of original plaint was not necessary.

Under Order II Rule 1 of the Code which contains provisions of mandatory nature, the requirement is that the plaintiffs are duty bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards.

Order VII Rule 11 does not justify rejection of any particular portion of the plaint in this matter. Order VI Rule 16 of the Code is relevant in this regard. **(Sandeep Polymers Pvt. Ltd v. Bajaj Auto Ltd. and Ors;1(2007) 7 SCC 148)**

◆ **O. V R. 1, O. VII R. 14 & O. VIII R. 1 & Proviso thereto – Mandatory or Directory – O. VIII R. 1 & Proviso thereto are directory – They do not take away power of court to take written statement or record though filed beyond 90 days – It only cast an obligation on defendant to file written statement within the time provided for.**

A dispensation that makes Order VIII Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code.

It is, therefore, necessary to emphasize that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order VIII Rule 1 must be adhered to and that only in rare and exceptional cases, the breach thereof will be condoned.

It is true that procedure is the handmaid of justice, the court must always be anxious to do justice and to prevent victories by way of technical knock-outs. **(M/s R.N. Jadi & Brothers & Ors v. Subhashchandra; (2007) 6 SCC 420)**

◈ **O. VI, R. 2 – Material facts and relief – What is required in law is not the piecemeal reading of the plaint but in its entirety – Whether the relief would be granted on the pleaded facts and evidence adduced is totally different from the relief claimed.**

Law does not required the piecemeal reading of the plaint. Whether a relief would be granted on the pleaded facts and evidence is totally different from the relief claimed. All the reliefs claimed may not be allowed to a party on the pleading and the evidence against. Whether part of the relief cannot be granted by Civil Court is different matter from saying that because of a combined claim of reliefs the jurisdiction is ousted are no cause of action is disclosed. Considering the relief plaint vis.-a-vis. the pleading would not mean compartmentalization or segreation, in that sense. **(Sandeep Polymers Pvt. Ltd. v. Bajaj Auto Ltd. & Ors.; 2007 (5) Supreme 513)**

◈ **O. VI R. 17 – Amendment in pleading – Purpose and object of provision.**

In the instant case, no justifiable and cogent reasons for delay in moving the amendment application have been given after the trial has commenced and admittedly the petitioner was preparing the case for final

hearing that he moved the application for amendment. The only reason that has been advanced is vague that on account of some confusion important facts and grounds could not be stated/taken in the written statement, the amendment application could not be moved is vague.

In my opinion, the purpose and object of Order VI, Rule 17, CPC is to allow the party to alter or amend his pleadings in such terms and conditions as may be just and proper which may not harm or prejudice the other party. **(Manni Lal Gupta v. Waqf Haji Inayat Hussain Makki and Another; 2007 (102) RD 775)**

◆ **O. VI, R. 17 – Belated attempt to amend plaint – When allowed – Amendment seeking to make claim more precise.**

No doubt there had been delay in seeking amendment but that delay could have been compensated by awarding costs. Amendment sought for, would enable the Court to pin-pointedly consider the real dispute between the parties and would enable it to render a decision more satisfactorily to its conscience. **(Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale (D) & Ors; (2007) 6 SCC 737)**

◆ **O. VI, R. 17 – Amendment of plaint – After a long delay of 15 years for seeking a relief that the sale deed dated 4.10.1985 be declared as bogus and not binding – Ought not to have been allowed.**

We have gone through the amendment applicaton carefully where we do not find any explanation whatsoever for this towering delay. We would expect some explanation, atleast regarding the delay since the delay was very substantial. The whole amendment application, when carefully scanned, does not show any explanation whatsoever. This negligent complacency on the part of the plaintiffs would not permit them to amend the plaint, more particularly when the claim has, apparently, become barred by time. **(Shiv Gopal Sah @ Shiv Gopal Sahu v. Sita Ram Saraugi and Others; 2007 (103) RD 187)**

◆ **O. VI, R. 17 – Amendment of plaint – Plaintiff is always at liberty to give up any relief including alternative relief.**

A plaintiff is always at liberty to give up any relief including alternative relief. The plaint, as it stood after first amendment application was allowed, contained two alternative reliefs, one for restitution of conjugal rights and the other for divorce. Plaintiff was at complete liberty

to give up any of the two reliefs. Similarly, plaintiff's prayer, for deleting the names of relatives of wife from the array of the parties, could also not be rejected. It is sole discretion of the plaintiff to choose his defendants. As the plea of restitution of conjugal rights had been sought to be deleted, hence there was no sense in retaining the relatives of wife as defendants. As far as plea of divorce is concerned, relatives of wife have got absolutely no concern therewith. **(Gyan Prakash v. District Judge, Deoria & Ors.; 2007 (5) ALJ 314)**

◈ **O. VI, R. 17 – Trial Court striking portion of Affidavit of examination-in-chief filed by plaintiff – High Court refusing to stay order – By and large which part of the evidence is to be discarded as being outside the pleadings is something that the court the considers when it discusses the evidence.**

What part of pleadings and what part of evidence have to be discarded, will have to be considered by the Court in the light of the order passed by the Court and if the part of evidence is covered by the pleadings that are directed to be struck out then, obviously the part of the evidence will have to be ignored. **(Kishor Kirtilal Mehta & Ors. v. L.K. Mehta Medical Trust & Ors.; 2007 (5) Supreme 163)**

◈ **O. VI, R. 17 – Delay in filing application for amendment – Held, delay is no ground to refuse the prayer for amendment.**

Delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. **(Andhra Bank v. ABN Amro Bank N.V. and Ors; (2007) 6 SCC 167)**

◈ **O. VIII, R. 3 – Suit for partition – family settlement – Any co-owner can cause severence in status of joint family expressing his intention to separate.**

Any co-owner can cause a severance in the status of joint family by expressing his unequivocal intention to separate. Such intention can be expressed even by filing a suit for partition. But, despite such separation in the joint status, parties may continue to possess the lands jointly unless a

partition of the joint family property takes place by metes and bounds. **(M. Venkataramana Hebbar (D) by L.Rs. v. M. Rajagopal Hebbar and Others; 2007 (103) RD 233)**

◆ **O. VIII, R. 6-A(1) – Counter claim for possession – Could be entertained by operation of O. VIII R. 6-A(1) CPC in a suit for injunction.**

In the case of *Gurbachan Singh v. Bhag Singh and Others (2005 (99) RD 621 (SC))* the Apex Court was of the view that only limitation while preferring a counter-claim or set-off, it must be pleaded by way of defence in the written statement before defendants submit his written statement, whether such counter-claim is in the nature of claim for damages or not. Further limitation was that counterclaim should not exceed the pecuniary limits of the jurisdiction of the Court. In other words, by laying counter-claim, pecuniary jurisdiction of the Court cannot be divested and the power to try the suit already entertained cannot be taken away by accepting counter-claim beyond pecuniary jurisdiction. Thus it was held that in a suit for injunction, counter-claim for possession could be entertained by operation of Order VIII, Rule 6(A)(1) CPC. **(Dan Singh v. Khaleel Higher Secondary School Kutubkhana, Bareilly through its Principal and Another; 2007 (103) RD 21)**

◆ **O. IX, R. 13 read with O. IX R. 6(1)(c) and O. V, R 2 – Limitation Act – Article 123 – Determination of Limitation period for filing of application for setting aside of ex-parte decree.**

In facts of instant case, summons served after the date fixed as per summons – Case adjourned to next date without sending fresh notice to the defendant of such adjourned date and ex parte decree passed on such adjourned date – Held, procedure adopted was in violation of O. IX, R. 6(1)(c) of CPC. Refusal to set aside the ex parte decree in facts of case was unjustified. Limitation for filing of application for setting aside of ex parte decree would start running from the date of knowledge of the ex parte decree. Impugned order of refusal to set aside the ex parte decree as maintaned in appeal, set aside. **(M/s. Nahar Enterprises v. M/s. Hyderabad Allwyn Ltd. And Another; 2007 (102) RD 784)**

◆ O. XXI, R. 64 – Nature of – Mandatory – Violation of – Renders the sale illegal – Point not raised at any stage could not be permitted to the raised for first time in writ petition.

The petitioner has vehemently argued that the land of the perititioner which was auctioned was comprised in two plots i.e. Plot No. 166 and 167 of Khata No. 352 and the amount sought to be realised could very well be realised by selling only one of the two plots. This argument is quite substantial. Supreme Court in *Balakrishnan v. Malaiyandi Konar (2006 (100) RD 805 SC)* has held that provisions of Order XXI Rule 64 CPC are mandatory and its violation renders the sale illegal. However, this point was not raised by the petitioner before the Commissioner. In the entire objection copy of which is Annexure-2 to the writ petition this point was not mentioned hence it cannot be permitted to be raised for the first time in writ petition. Even in the grounds of writ petition this point has not been taken. **(Kalyan Singh v. Devendra Dutt; 2007 (103) RD 214)**

◆ O. XXII R. 9(2) – Abatement of suit for failure to move an application for bringing the legal representation on record within the prescribed period of limitation is automatic, yet a prayer for bringing legal representative on record, if allowed, would have the effect of setting aside the abatement.

A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of

setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order XXII and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction. (Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah & Ors.; 2007 (5) Supreme 895)

◈ O. XXIII, R. 1 – Permitting withdrawal of suit without leave to file fresh suit on the same subject matter – Held, such an order permitting withdrawal passed without adjudication does not constitute a decree under S. 2(2).

The position in law is clear that when the court allows the suit to be withdrawan without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it cannot debar the petitioner from taking the defence in the second round of litigation. Such order does not constitute a decree under S. 2(2) of the Code. It is the provision of Sub R. 3 of Rule 1 of O. XXIII (like that in rule 9 of O. IX) and not any principle of res judicata that procludes the plaintiffs in such a case from bringing a fresh suit in respect of the same matter. (Kandapazha Nadar v. Chitraganiammal; (2007) 7 SCC 65)

◈ O. XXIII, R. 6 – read with S. 24 – Indigent Person – For allowing application to sue as an indigent – Plea of want of notice to court counsel cannot be raised by the defendant.

It is correct that by virtue of Order XXIII, Rule 6 CPC, notice shall be given to Government Pleader before allowing application to sue as an indigent person. However, plea of want of notice may be

taken only by the party to whom notice was required to be given i.e. Government Counsel in the matter like the one in question. The Collector or Government Counsel never raised the plea. It was raised only by the defendants. In this regard, reference may be made to *Siddappa and others v. Mahadevamma and others; AIR 1955 Hyd. 160* wherein it has been held that plea of want of notice to Government Counsel cannot be raised by the defendant. (Shiv Gopal Sah v. Sita Ram Saraugi; 2007 (103) RD 186)

◈ O. XXXIII, R.10 & 11 – Suit for damages by indigent person – Direction for recovery of court-fee on dismissal of suit – Challenge there against – Held, the calculation of court-fee, there does not exist any distinction between a situtation attracting Rule 10 on the one hand and Rule 11 on the other – Court fee to be calculated on amount claimed not on amount decreed.

The question whether the indigent plaintiff is liable to pay the court fee on his failure in the suit and whether the State could recover or realise. The court fee payable by him under due process of law are separate and distinct matter to be considered independently. The court is not called upon to pronounce on this issue as to whether the state will be able to realise the court fee payable on the plaint and memorandum of appeal by the petitioner in this case under due process of law.

From rules 10 & 11 of the Order XXXIII, it follows that if the plaintiff's suit is dismissed the court has no discretion or option in the matter but to order the plaintiff or any added co-plaintiff to pay the court-fee. In such a case the court cannot direct the court fee to be paid by the defendants. It must be paid only by the plaintiff, or the co-plaintiffs' as the case may be, and by none else. If however, the plaintiff succeeds in the suit the court has been given a discretion to direct from which party the court shall be payable. In such case the court has been given wide discretion. It cannot direct the entire court fee to be paid either by plaintiff or the defendants or both. On the facts and circumstances of each particular case, the court can exercise its discretion and direct the court fee to be payable accordingly. But in a case where a suit has been decreed in part, it is the plaiintiff's claim which has been partly allowed and partly disallowed, there is no provision in the code which int erms applies. The code has not laid down anywhere the procedure which is to be followed by the Court in a

such cases. Obviously therefore, to such cases neither Rule 10 nor 11 in terms, would apply. (R.B. Dev Alias R.A. Nair v. Chief Secy., Govt. of Kerala & Others; 2007 (5) Supreme 352)

◆ O. XXXIX, R. 4 – Application pending for setting aside ex-parte injunction – Appeal cannot be sustained.

The appellant-Bank filed an application therein under Order XXXIX, Rule 4 CPC for the purpose of discharge, variation or setting aside such order which is passed ex parte and during the pendency of such application he has filed and proceeded with this appeal.

Learned Counsel appearing for the respondents contended before this Court that the appellant-Bank cannot avail both opportunities. Learned Counsel appearing for the appellant-Bank contended that there is no bar to prefer the appeal in view of a Full bench decision of this Court rendered in *Zila Parishad, Budaun and others v. Brahma Rishi Sharma; AIR 1979.*

From perusal of the aforesaid decision it is crystal clear that the bank can avail opportunity of appeal either being unsuccessful to get the ex parte injunction order discharged, varied or set aside in terms of Order XXXIX, Rule 4, CPC or straightway.

In the instant case when the appeallant-Bank's application is pending, the appeal has been filed. Learned Counsel for the appellant contended that since several adjournments are granted by the Court below, the application would not be heard at the earliest. We are afraid that such submission cannot be a ground of appeal. We can only express our desire that the application which is pending before the Court below will be heard as expeditiously as possible.

Therefore, taking into totality of the matter we are of the view that the appeal cannot be sustained at this stage when the application is already pending. It may lie only when it is decided and the appellant remains unsuccessful. **(Punjab National Bank v. M/s. Salim Mian Typre Retrading Co. (Works) through its Proprietor, Budaun and Another; 2007 (103) RD 227)**

◆ **O. XXXIX – Whether suit for permanent injunction over agricultural land would be maintainable in civil court – Held, "Yes".**

On behalf of the appellants it has been argued that the appellants and respondents are co-tenure holders and no decree of injunction could be passed in favour of the plaintiff. Specific Khasara numbers have been shown in the sale deeds executed by Kundan Singh in favour of Danbeer Singh and Danbeer Singh in favour of the plaintiff Girdhari Prasad. Thus the parties were tenure-holders of separate Khasara numbers and if the Revenue Authorities had recorded their names jointly, the parties cannot be said to be joint tenure-holders. **(Umrao Singh and Others v. Giridhari Prasad; 2007 (103) RD 182)**

◆ **O. XXXIX, R. 4, Proviso (U.P. Amendment) – Exparte injunction order – Cannot recalled under O. XXXIX, R. 4, it can only be discharged, varied or set aside by court.**

The exparte injunction order granted by the trial Court, cannot be recalled under O. XXXIX Rule 4 of the CPC the exparte injunction order can only be discharged, varied or set aside either under the first proviso or the second proviso or under the proviso added by the U.P. Amendment Act. The Court cannot recall the injunction order nor could it pass an order directing the injunction application to be heard afresh. Such an order is wholly illegal and without jurisdiction. Since the defendant was served with the notice and he failed to appear, therefore, he cannot allege that no opportunity of hearing was provided to him or that the injunction order was passed without giving a notice to him. If there is a change in the circumstances or the order causes undue hardship, the Court in that event, can vary, discharge or vacate the injunction order but could not, on those grounds recall its order and post the matter afresh for reconsideration. **(M/s. Mayur Packaging Industries v. U.P. State Financial Corporation; 2007 (5) ALJ 74)**

◆ O. XXXIX – Principles applicable in interim orders in matters under S. 9 of Arbitration and Conciliation Act – Held – the well recognized principles applicable to exercise of general power to grant interim relief, including specific injuctive relief under O. XXXIX CPC and Specific Relief Act.

Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof

vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. **(Adhunik Steels Ltd v. Orissa Manganese and Minerals Pvt. Ltd; (2007) 7 SCC 125)**

- O. XXXIX – Unconditional Bank guarantee – Enforcement of – Grounds on which may be prevented by injunction – Grant of injunction on grounds of fraud unlikely of irretrievable injury – Precondition for – Necessity of lay sufficient factual foundation.

The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. **(Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. And anr; (2007) 6 SCC 470)**

- O. XXXXI Rule 31 – Suit for partition decreed by trial judge and High Court – Appeal their against on the plea that trial Judge also High Court committed a serious error in so far as they fail to take into consideration effect of exhibit B-8, which categorically showed that accounts have been settled by and between parties.

It was for the High Court framed appropriate points for its determination in the light of submissions made on behalf of appellants in terms of O. XXXXI Rule 31 of the Code of Civil Procedure. The High Court failed to address itself on the said issue. Thus, apart from issue no. 2 and 4 other points which for its consideration including the

extent of the share of pltinaiff and defendant no. 1 were required to be specifically gone into particularly in view of the fact that such a contention had been considered by the trial judge. (Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.; 2007 (5) Supreme 357)

◆ S. 2(11) – "Legal Representative" means a person who in law represents the estate of the deceased person, and includes any person who inter meddles with the estates of the deceased and where a party sues or is sued in representative character, the person on whom the estate devolves on the death of the party so suing or sued – A legal representative is one who suffers on account of death of person due to Motor Vehicle Accident and need not necessarily be a wife, husband, parents and child.

The definition contain in S. 2(11), CPC is inclusive in character and its scope is wide, it is not confined to legal heirs only. Instead, it stipulates that person who may or may not be legal heir, competent to inherit the property of the deceased, can represent the estate of the deceased person. It includes heirs as well as persons who represents the estates even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be

covered by the expression legal representative. (Mrs. Hafizun Begum v. Md. Ikram Heque & Ors.; 2007 (5) Supreme 498)

◈ S. 9 – Jurisdiction of civil court – Exclusion of – Must either be explicitly express or clearly implied.

Law is well settled that exclusion of the jurisdiction of the Civil Court is not to be readily inferred and that such exclusion must either be explicitly expressed or clearly implied and that it is for the party which contends that the Civil Court does not have the jurisdiction to establish this fact. In this connection reference may be made to the decision of the Supreme Court in *Abdul Waheed Khan v. Bhawani and Others*; *AIR 1966 SC 1718* - "It is settled principle that it is for the party who seeks to oust the jurisdiction of Civil Court to establish has contention. It is also equally well settled that a statute ousting the jurisdiction of a Civil Court must be strictly construed." **(Ram Kunwar Singh and Others v. Pramod Kumar and Another; 2007 (103) RD 264)**

◈ S. 100 – Proper test for determination of substantial question law – Question of law must be debatable, not previously settled by law of land or a binding precedent.

The Apex Court in the case of *Rajeshwari v. Puran Indoria;2005 (99) RD 621 (SC),* "Substantial question of law" it was held that the proper test for determination whether question of law raised in a case is substantial and would affect rights of the parties, if so whether it is either an open question in the sense it was not finally settled by Hon'ble Supreme Court or Privy Council or Federal Court, or is not free from difficulty or calls for discussion or alternative views. Similar view was expressed by theApex Court in the case of *Govindaraju v. Mariamman; 2005 (98) RD 731 (SC),* as well as *Santosh Hazari v. Purushottam Tiwari; 2001 (92) RD 336 (SC)*. The question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have material bearing as to the rights of the parties before the court. (Dan Singh and Others v. Khaleel Higher Secondary School Kutubkhana Bareilly through its principal, and Another; 2007 (103) RD 21)

◆ S. 100 – Second Appeal – Substantial question of Law – Proper test for determination.

The Apex Court in the case of *Rajeshwari v. Puran Indoria; 2005(99) RD 621 (SC),* has elucidated and explained the term "Substantial queston of law" it was held that the proper test for determination whether question of law raised in a case is substantial and would affect rights of the parties, if so whether it is either an open question in the sense it was not finally settled by Hon'ble Supreme Court or Privy Council or federal Court, or is not free from difficulty or calls for discussion of alternative views. Similar view was expressed by the Apex Court in the case of *Govindaraju v. Mariamman; 2005(98) RD 731 (SC),* as well as *Santosh Hazari v. Purushottam Tiwari; 2001 (92) RD 336 (SC)*. The question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have material bearing as to the rights of the parties before the Court. The foundation is to be laid in the pleadings and the questions are emerged from sustaining findings of fact arrived at by the Court after the appraisal of evidence. (Ram Padarath and Others v. Krishna Kumar and Another; 2007 (103) RD 254)

◆ S. 115 – O. XXXIX, Rule 1 & 2 – Application under – Revision shall not be maintainable at the stage of interlocutory proceedings.

A plain reading of all the three judgments namely: *Shiv Shakti (supra), Surya Dev Rai (supra) and Gayatri Devi* show that revision under section 115 of the Code of Civil Procedure shall not be maintainable at the stage of interlocutory proceeding. A close reading of provision contained in Maharashtra as well as in the State of U.P. at the face of record shows that order passed by the Trial Court while issuing a notice on an application under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure shall be interlocutory order and it can not be termed as case decided. Needless to say that provision under section 115 Code of Civil Procedure is a procedural law and ipso facto the provision itself can not be termed to be declaration that revision shall be maintainable even if case is not decided. **(Lakhan Singh v. Tanak Pal Singh; 2007 (103) RD 288)**

◆ **Article 14 – Notification by State Government fixing two different pay-scales for trained lecturers and untrained lecturers – Whether violative of Article 14?**

Doctrine of equal pay for equal work – However equal pay would depend upon not only on nature or volume of work but also on its quality.

There was a clear distinction between a trained teacher and untrained teacher. Such a distinction was legal, valid, rational and reasonable. Trained lecturers and untrained lecturers, hence could neither be said to be similarly circumstanced nor they formed one and same class. Classification between trained lecturer and untrained lecturer is reasonable and based on intelligible differentia which distinguished one class included therein from other class which was left out.

Eventhough it is true that equal pay for equal work is a doctrine well established in service jurisprudence and is also a concomitment of Article 14 of the Constitution. However, equal pay would depend upon not only on nature or volume of work but also on the quality of the work as regards reliability and responsibility as well as different pay-scales may be described on the basis of such reliability and responsibility. **(State of Bihar & Ors. V. Bihar State + 2 Lecturers Associations & Ors.; 2007 (5) Supreme 557)**

◆ **Article 14 – Illegality or Irregularity – Benefit conferred on the basis of violation of prescribed procedure, reiterated, cannot be extended.**

It is true that Article 14 of the Constitution embodies a guarantee against arbitrariness but it does not assume uniformity in erroneous actions or decisions. It is trite to say that guarantee of equality being a positive concept, cannot be enforced in a negative manner. To put it differently, if an illegality or irregularity has been committed in favour of an individual or even a group of individuals, others, though falling in the same category, cannot invoke the jurisdiction of the writ courts for enforcement of the same irregularity on the reasoning that the similar benefit has been denied to them. Any direction for enforcement of such claim shall tantamount to perpetuating an illegality, which cannot be permitted. **(State of Kerala & Others v. K. Prasad & Others; (2007) 7 SCC 140)**

◆ **Article 32 – PIL – Maintainability – Private Disputes, Reiterated are not maintainable.**

Public interest litigation may be entertained when an issue of great public importance is involved, but not to settle private scores. In an application under Article 32 of the Constitution there must be an element of infraction of one or the other fundamental rights contained in Part III of the Constitution. Although, the writ petitioner has attempted to show that the writ petition had been filed for the benefit of the people of the States of Gujarat, Madhya Pradesh and Rajasthan, the facts as sought to be projected clearly indicate that the writ petition has been filed out of grudge harboured. Although, the writ petition is alleged to be in the nature of a public interest litigation, the same appears to be a 'private interest litigation'. The materials in the writ petition consist only of vague allegations without any proper foundation. No case has therefore been made for a direction to the CBI to investigate. **(National Council for Civil Liberties v. Union of India & ORS; (2007) 6 SCC 506)**

◆ **Article 134 – Appeal before Supreme Court against conviction – Vital issue regarding the appellant's age below 18 years at the time of occurrence was not considered – Held, it is a vital issue having substantial bearing on the subject matter and the same having not been considered in proper perspective matter has to be remanded.**

The appellant succeeds in showing that he was less than 18 years of age on the date of occurrence the applicability of Section 20AA has to be considered. This plea was not specifically taken before the trial Court and only some documents were filed before the First Appellate Court. The trial Court did not get the opportunity to examine the same. The First Appellate Court did not find any substance in the plea as the documents were not proved. A specific plea was taken before the High Court in the revision petition about unsustainability of the conclusion. It is a case where questionrelating to age of the accused has not been considered in the proper perspective by the first Appellate Court and the High Court. Since it is a vital issue which has substantial bearing on the subject matter of dispute, the matter is remanded to the High Court to consider acceptability of the plea relating to age and decide the matter afresh in accordance with law. (**Mohd. Yaseen v. State of U.P.; (2007) 7 SCC 49)**

◈ **Article 226 – Invoking of writ jurisdiction – Petitioner not coming with clean hands – Petition liable to be dismissed with heavy and deterrent costs.**

Moreover, the petitioner has also not filed the copy of the application 5-Ga before this Court as such he has not come with clean hands before this Court while assailing the orders of the Court below.

In the facts and circumstances of the case, the writ petition is liable to be dismissed with heavy and deterrent cost.

The Apex Court in *Salem Advocate Bar Association, Tamil Nadu v. Union of India; AIR 2005 SC 3353*; has held that –

"far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the Courts in directing the parties to bear their own costs had led the parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised. Costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rule in force. If any of the parties has unreasonably protracted the proceeding, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates." **(Manni Lal Gupta v. Haji Inayat Hussain through its Mutwalli Mohd. Makki and Another; 2007 (102) RD 775)**

◈ Article 226 – U.P. Panchayats Raj Act – S. 12-C(6) – Election petititon – Order of recount – Whether revisable – Held, 'No'.

We answer the questions referred to by the learned Single Judge as fillows:-

(1) A revision under section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

(2) The judgment of the learned Single Judge in the case of *Abrar v. State of U.P. and Others; 2004(5) AWC 4088*, does not lay down the law

correctly and is, therefore, overruled to the extent of the question of maintainability of a revision petition, as indicated hereinabove.

(3) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under section 12-C of the U.P. Panchayat Raj Act, 1947.

(**Mohd. Mustafa v. Up-Ziladhikari, Phoolpur, Azamgarh and Others; 2007 (103) RD 282)**

Contempt of Courts Act

S. 2(c) – "Judge bashing" and using derogatory and contemptuous language against Judges cannot be permitted because that will be against the public interest – Judiciary cannot be immune from criticism – But when such criticism is based on obvious distortion or gross mis-statement and make in manner which seems designed to lower respect of judiciary and destroy public confidence cannot be ignored.

Statements tend to scandalize and lower the authority of the courts cannot be permitted because, for functioning of the democrary, and independent judiciary to dispense justice without fear and favour is paramount. Its strength is the faith and confidence of people in that institution. That cannot be permitted to undermine because that will be against the public interest. Judiciary should not be reduced to the position of flies in the hence of wanton boys. Judge bashing is not and cannot be substitute for the constructive criticism.

There is no doubt that the court like any other institution does not enjoy immunity for fair criticism. No court can claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves to be in position of all truth to hold that wherever others differ from them are in error. No one is more concious of his limitations and fallibility than a Judge. But because of his training and assistance he gets from learned counsel he is apt to avoid mistakes more than others. While fair and temperate criticism of the court even if strong may not be actionable, but attributing in proper motives or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly while the functioning of the courts is serious contempt of which notice must be

and will be taken. Respect is expected not only from those to whom the judgment of the court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging vilification of the institution of the court, administration of justice and an instrument through which the administration acts, should take heed for they will act at their own peril.

Whether or not the publication amounts to a contempt, what will have to be seen is, whether the criticism is fair temperate and made in good faith or whether it is something directed to the personal character of a judge are to the impartiality of the judge of court. A finding, one way or other, will determined whether or not the act complained of amounted contempt. Anyone who intends to tarnish the image of judiciary should not be allowed to go unpunished. By attacking the reputation of a judge, the ultimate victim is the institution. The day, the consumers of the justice loose faith in the institution that would be the darkest day of mankind. The importance of judiciary needs no reiteration. **(Haridas Das v. Smt. Usha Rani Banik & ors.; 2007 (5) Supreme 265)**

Court Fee Act

Counter claim for possession of same property – No two different yard stick can be adopted while assessing valuation of the same property.

In the present case, the defendant respondents filed a composite written statement and counter-claim, which are brought on record. Perusal of the counter, claim shows that later part of the written statement is counter-claim, valuation has been given, cause of action and relief has been mentioned as well as the Court fee is paid. In the circumstances, I am not in agreement with the submission of the Counsel for the appellants that the counter-claim was not in proper format and was liable to be dismissed on this ground alone. The lower appellate Court has discarded objection of the plaintiff/appellants on the ground that injunction suit was valued at Rs. 1,000/- by the plaintiffs and the Court fee paid was Rs. 189.50 paise in accordance with Schedule 1 of the Court Fees Act and therefore, claim of possession by the defendants in the counter-claim was also for the same property and the lower appellate Court recorded a categorical finding that no two different yardsticks can be adopted while assessing valuation of the same property which is subject matter of the same suit. **(Dan Singh v.**

Khaleel Higher Secondary School Kutubkhana, Bareilly through its Principal and Another; 2007 (103) RD 21)

◆ **S. 7(iv)(c) – Payability of court to a suit for cancellation of sale deed and power of attorney.**

The reading of the prayer made in the plaint clearly indicates that the plaintiff-respondent had sought cancellation of the sale-deed executed by his attorney as also power of attorney which was executed by the plaintiff-respondent and, therefore, in view of the authorities relied upon by the petitioner herein, the plaintiff-respondent was liable to pay ad valorem Court-fee on the sale consideration.

Accordingly, the revision petition is allowed, the impugned order is set aside and the plaintiff-respondent is required to pay the ad valorem Court-fee. **(Satwinder Kaur @ Satinder Kaur v. Surjeet Singh and Others; 2007 (103) RD 177)**

Criminal procedure Code

◆ **S. 156(3) – Whether the Magistrate is bound to pass an order on each and every application under Section 156 (3) Cr.P.C. – For registration of the F.I.R. of a cognizable offence – If those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, can he exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases"?**

The use of the word 'Shall' in Section 154(3) Cr.P.C. and the use of word 'May' in Section 156(3) Cr.P.C. should make the intention of the legislation clear. If the legislature intended to close options for the Magistrate, they could have used the word 'Shall' as has been done in Section 154(3) Cr.P.C. Instead, use of the word 'May' is, therefore, very significant, and gives a very clear indication, that the Magistrate has the discretion in the matter, and can, in appropriate cases, refuse to order registration.

Let us take an example to make things clear. If somebody wants to file a First Information Report, that the District Judge of the concerned District came to his house at 1.20 O'clock in the day, and fired upon him, with the country made pistol and he ducked and escaped being hurt, and the District Judge is, therefore, liable for an offence under Section 307 Indian Penal Code. The Magistrate knows that the District Judge was in his court

room, at that time, and the concerned staff also knowns that. Is the Magistrate still bound to order registration of a First Information Report because the application discloses a cognizable offence? It is obvious that the answer has to be in negative and it cannot, therefore, be said that the Magistrate is bound to order registration of a First Information Report in all cases, where a cognizable offence is disclosed.

The next point, which remains for consideration is, the question whether the Magistrate can treat an application under Section 156 (3) Cr.P.C. as a complaint?

It is clear from the judgment of the Supreme Court in the case Suresh Chandra Jain Vs. State of Madhya Pradesh and another, 2001 (42) A.C.C. 459, that a Magistrate has the authority to treat an application under Section 156 (3) Cr.P.C. as a complaint.

If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and 'Take' cognizance of a cognizable offence."

It is hardly possible to infer that the Magistrate cannot treat an application under Section 156(3) Cr.P.C. as a 'Complaint'. Even a nebulous of far fetched interpretation will not lead to that inference.

The Magistrate is not always bound to pass an order for register of the case and investigation after receipt of the application under Section 156(3) Cr.P.C. disclosing a cognizable offence. The Magistrate may use his discretion judiciously and if he is of the opinion that in the circumstances of the case, it will be proper to treat the application as a complaint case then he may proceed according to the procedure provided

under Chapter XV of Cr.P.C. I am also of the opinion that it is not always mandatory in each and every case for the Magistrate to pass an order to register and investigate on receipt of the application under Section 156(3) Cr.P.C. In the present case, the Magistrate is perfectly within the judicial power to treat the application under section 156(3) Cr.P.C. as a complaint case. There is no illegality or impropriety in the order. The revision is devoid of merit and is liable to be dismissed".

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under Section 156 (3) Cr.P.C. as a complaint.

Hon'ble Justice V. Prasad has ordered for circulation in subordinate courts of his aforesaid judgment. Since the view propounded by him has not been upheld by the Division Bench, it is necessary that the subordinate courts are informed about the same, so that they may not be misled. For this purpose, it is essential, that the copy of this judgment, be circulated in all the subordinate courts. **(Sukhwasi v. State of U.P.; Criminal Miscellaneous Application No. 9297 of 2007; Date of Decision 18.09.2007(DB of All. HC.))**

S. 190 & 200 to 203, 154 & 156 – Information to Police regarding cognizable offence – No action taken by Police – Proper remedy – Held, in such a case complainant is given power U/s. 190 read with S. 200 Cr.P.C. to lay a complaint before the Magistrate concern.

When the information is laid with the police, but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate, after recording evidence, finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence

recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and could issue process to the accused. **(Aleque Padamsee and Ors. v. Union of India and Ors; (2007) 6 SCC 171)**

◆ **S.300(1)– Bar on trial of acquitted/convicted person again for the same offence – Ingriedents - In case of want of prior sanction of I.G./Commissioner of Police by virtue of S. 20-A(2) of TADA Act Court lacks jurisdiction to take cognizance of offence under that Act but for that reason court cannot not acquittal of the accused, it can only discharge the accused.**

In the absence of sanction the court had no jurisdiction to proceed in the matter and take cognizance of the offence but the order passed in the record cannot lead acquital of the accused. **(Balbir Singh v. State of Delhi; (2007) 6 SCC 226)**

◆ **S. 311 – S. 311 is manifestly in two parts – Whereas the word used in the first part is "may", the second part uses "shall" – inconsequence, the first part is purely discretionary authority to a criminal court – On the other hand the second part is mandatory and compels the court to take any of the aforementioned steps if new evidence appears to it essential to the just decision of the case.**

The first part of the section 311 gives discretion to criminal court and enables it at any stage of an enquiry trial or proceedings under the code: (a) to summon anyone as a witness or (b) to examine any person present in the court or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand the second part is mandatory and compels to the court to take any of the aforementioned steps if new evidence appears to it essential to just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it.

The object underlying U/s. 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the value of evidence on record or leaving ambiguity in the statement witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused and it will not be an improper exercise of power of the court to summon a witness under the section merely the evidence

supports the case of prosecution and not that of accused. **(Iddar & Ors. v. Aabida & Anr.; 2007 (5) Supreme 688)**

◆ **S. 319 – If the evidence tendered in the course of any enquiry or trial shows that any person not being the accused has committed any offence for which he could be tried together with the accused, he can be summoned to face the trial eventhough he may not have been chargesheeted by investigating agency or may have been discharged at an earlier stage.**

S. 319 is really an extraordinary power which is conferred on the court and should be used very sparingly and only in compelling reasons exists for taking cognizance against the other person against whom action has not been taken. If a prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and tried them alongwith the accused. The summoning of additional persons by the court under section 319 of those who appear to be involved in the crime from the evidence led during the tiral and directing them to stand their trial alongwith those who have been committed, must be regarded as incidental to the cognizance under section 193 and part of the normal process that follows it. Section 319(4)(b) enacts a deeming provision in that behalf dispensing with the commital order against the newly added accused. The phrase 'any person not being an accused' in section 319 does not excludes from its operation an accused who has been released by police under section 169 of the Code. **(Rajendra Singh v. State of U.P. & Anr.; 2007 (5) Supreme 753)**

◆ **S. 439 – Observation in an order granting bail may not be considered as an authoritative pronouncement on the relevant task at the trial of the cause or as concluding any question – Such observation cannot control the decision to be taken after the trial by the concerned court.**

It is not proper for the court to go into that question in detail in this proceeding which is only an appeal against the grant of bail. After all, whatever we may say will not even control decision to be taken after the conclusion of the trial and it is to be left on the court trying the case to take

a final view on all questions after the evidence has been elet. **(C.B.I. v. Pradeep Balchandra Sawant & Ors.; 2007 (5) Supreme 889)**

◈ **S. 457 – The section applies when the seizure of property by police officer is reported to the Magistrate under the provision of the Code – There is a marked difference between police officers and officials under the Wild Life (Protection) Act, 1972 – When the seizure is made by the officials under this Act, section 457 of the Code has no application in view of the clear language of sub section(1) of Section 50 of the Act.**

In view of the clear language of sub section (1) of S. 50, Section 457 of the Code has no application. But there is other provision which also is relevant i.e. section 451 of the Code that relates to the order for the custody and disposal of the property pending trial in certain cases. It provides that when any property is produced before any criminal court, during any enquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of such enquiry or trial. It also provides for action to be taken with the property is subject to speedy and natural decay. If the court otherwise thinks it expedient to do so, the court may after recording such evidence as it thinks fit may pass order for the sale of the property or disposal thereof.

It is to be noted that under sub section (1) of Section 50 for the purpose of entry, seizure, arrest and detention the official has to form the belief on reasonable ground that person has committed an offence under the Act. The Magistrate is, therefore, required to consider these aspects while dealing with the applications as noted above. **(State of U.P. & Anr. v. Lallu Singh; 2007 (5) Supreme 475)**

◈ **S. 468 – Limitation of taking cognizance – The Limitation Act, 1963 does not apply to Criminal proceedings unless there are express and specific provision to that effect – Court of law has no power to throw away to prosecution solely on the ground of delay**

Limitaton, Date of reckoning – The two things, namely – (1) filing of complaint or initiation of criminal proceedings & (2) taking cognizance or issuing process are totally different distinct and interdependent.

As soon as complainant files a complaint in a competent court of law, he has done everything which is required to be done by him. Thereafter it is the duty of the Magistrate to consider the matter, to apply

his mind and to take an appropriate decision of taking cognizance issuing process or any other action which law contemplates. The complainant has no control over those proceedings. Because of several reasons it may not be possible for the court or the magistrate to issue process or take cognizance but a complainant cannot be penalized for such delay on the part of the court nor he can be non suited because of failure or omission by the Magistrate in taking appropriate action under under the Code. No criminal proceedings can be abruptly terminated when a complainant reaches the court well within the time prescribed by the law. In such cases the doctrine of *actus curiae neminem gravabit* (an act of court shall prejudice none) would indeed apply. In view of the above for the purpose of computing the period of limitation the date must be considered as the date of filing of complaint or instituting criminal proceeding and not the date of taking cognizance by Magistrate or issuance of the process by Court (Supreme Court has overruled all decisions in which it has been held that the crucial date for computing the limitation is taking a cognizance by Magistrate/Court and not of filing of complaint or initiation of criminal proceedings.) **(Japani Sahoo v. Chandra Sekhar Mohanty; 2007 (5) Supreme 604)**

◈ **S. 482 & 401 – Maintainability – Application before High Court U/s. 482 for review of its judgments in revision, held, can not be entertained.**

Section 362 of the Code mandates that no court, when it has signed it judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The High Court rightly observed that the application U/s. 482 of the Code is to be dismissed. (**Mohd. Yaseen v. State of U.P.; (2007) 7 SCC 49)**

◆ **Search & Seizure – Illegality in – Effect of – Held, is not always fatal to the prosecution.**

◆ **Witness – Independent witness – non-examination of independent witness to search – Effect of – Held, is not to fatal of prosecution case.**

It cannot be said as a general principle of law that illegality of seizure would in all cases proof fatal to the case of the prosecution. As held by Hon'ble Supreme Court in Ritesh Kumar Chakarvarty v. State of M.P.; (2006) 12 SCC 321) although the effect of an illegal search may not have any direct effect on the prosecution case, it would all the same have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the fact of each case.

Failure to examine independent witnesses is fatal to the case is not correct legal position. Even where independent evidence is not examined the course of trial the effect is that the evidence of the official witnesses may be approached with suspicion and the court may insist on corroboration of their evidence. If the court below have critically scrutinized the evidence of proseuciton witness applying the rule of caution there is no reason to disagree with their findings. **(Ravindran alias John v. Supdt. of Custom; (2007) 6 SCC 410)**

◆ **Interested person – When the evidence of witness is consistent and corroborated by medical evidence, it is not possible to discard the same on the ground that they were interested person.**

A not trustworthy evidence of a non-eye-witness cannot be a ground to reject consistent evidence of injured eye-witness and independent eye-witness, more so when their evidence is corroborated is medical evidence of the three deceased person and injured eye-witness.

It is well settled that in criminal trial merely because a witness is interested his evidence cannot be discarded if the same is otherwise found to be credible. In the present case the evidence of the witnesses is consistent and corroborated the medical evidence it is not possible to discard the same on the ground that they were interested person. The evidence of witnesses is also corroborated by the evidence of deceased Yusuf. When the witness supported the prosecution case in all material particulars, his statement in court is consistent with the statement made before police and the same is

supported by medical evidence of deceased Yusuf, as such court do not find any reason to disbelieve them.

In this case P.W. 2 cannot be said to be an eye-witness to the actual assault and his evidence to that effect is not trustworthy, but the same cannot be a ground to reject consistent evidence of injured eye-witness and independent eye-witness, more so, when there evidence is corroborated by medical evidence of three deceased person and the injured eye-witness. **(Abdul Rashid Abdul Rahiman Patel v. State of Maharashtra; 2007(5) 451)**

◈ **Where a case rests squarely on circumstantial evidence the inference of guilt can be justify only when all the incriminating facts and circumstances are found to be incompartable is the innocence of the accused or the guilt of any other person – The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances – Conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to the circumstantial evidence laid down by the court as far as back in year 1952.**

Where the case depend upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be search as to negate the innocence of the accused and bring home the offences beyond any reasonable doubt. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover all the circumstances should be complete and their should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent within his innocence. **(Shaik Mastan Vali v. State of Andhra Pradesh; 2007 (5) Supreme 674)**

◈ **Order for deposit of Passport and Visa to ensure attendance of accused is not coercive process.**

In spite of the order of this Court dated 4.3.04 passed in Criminal Misc. Application no. 1838/04 the accused Jarrar Hussain has not put in appearance before the Magistrate so far though there was specific

direction in respect of Jarrar Hussain that he he should surrender before the Magistrate and apply for bail. The order for deposit of Passport and Visa has not been passed as punitive measure but it is only to procure his appearance before the court.

(Karrar Hussain v. State of U.P. and another; Criminal Misc. Application No. 4811 of 2004; Date of Judgment 25.9.2007; Alld. H.C.)

Essential Commodities Act

◆ **S. 3 – Suspension of licence of fair shop – Opportunity of hearing – When not available.**

The power of suspension if exercised bonafidely in public interest does not by itself cause prejudice to a licensee in as much as he has a remedy by filing an appeal against such an order and even otherwise upon the satisfaction of the authority after hearing the objections, the authority can still restore the licence subject to a satisfactory reply being submitted by the licensee.

In his view of the matter, the contention raised on behalf of the petitioner that suspension order without providing opportunity curtails the right of a licensee cannot be accepted. Even otherwise, since there is a remedy by way of appeal and the petitioner has a right to object to the charges on which the licence has been suspended, it is not necessary to read the principles of natural justice by implication at the stage of suspension. The order of suspension is not a final order of termination and, therefore, there is no permanent cessation of the licence. The petitioner has an opportunity to contest the matter and get his licence restored in the even he is able to establish that the grounds of suspension cannot be sustained in law. **(Gopi v. State of U.P. & Ors.; 2007 (5) ALJ 367 DB)**

Evidence Act

◆ S. 18 – Statement – When cannot be regarded as an admission.

Section 18 of the Indian Evidence Act provides that a statement made by certain class of persons is an admission. One of these is a statement made by a party to the proceedings. Raghunandan Singh was not a party in the present proceedings. Therefore his statement cannot be regarded as an admission made by a party. A statement made by a person having a pecuniary interest or proprietary interest in the property in dispute

is also binding upon the parties who have derived their interest from him. **(Sukhdeo Singh and Others v. Deputy Director of Consolidation, Jalaun at Orai and Others; 2007 (103) RD 59)**

◈ S. 18 – Statement – Where cannot be regarded as an admission.made by attesting witness – Sufficient compliance of formal proof of the execution as well as of the attestation of the gift deed.

The question is whether the attestation has been proved. In support of their case that the gift deed was duly executed, evidence of Ram Swarup and of one of attesting witness Ram Prakash was led. Ram Prakash has stated that at the time when Raghunandan Singh had executed the gift deed he was present and another attesting witness Chandi Prasad was also present. He further states that he put his signature on the gift deed and apart from him Chandi Prasad and Raghunandan Singh had also put their signatures in the presence of the Registrar. In my opinion this statement made by the attesting witness is a sufficient compliance of formal proof of the execution as well as of the attestation of the gift deed. (Sukhdeo Singh and Others v. Deputy Director of Consolidation, Jalaun at Orai and Others; 2007 (103) RD 59)

◈ S. 32(1) – Dying declaration – Though such an expression has not been used in any statute – It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting

in his death such statements are admitted on two grounds:- (1) Necessity for victim being generally the only principle eye-witness of crime, (2) The sense of impending death which creates a sanction equal to the obligation to the oath.

Section 32 of the Indian Evidence Act deals with the cases in his statement of relevant fact by person who is dead or cannot be found etc. is relevant. The general rule is that all oral evidence is must be direct viz., if it refers to a fact which could be seen it must be the evidence of witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it, if it refers to a fact which could be perceived by any other sense it must be the evidence of a witness who says he perceives it by that sense. These aspects are elaborated in S. 60. The eight clauses of S. 32 are exception to the general rule against hear say just stated. S. 32(1) is generally prescribed us dying declaration the grounds for admission are the victim being generally the only eye-witness of the crime, the exclusion of the statement might deflect the ends of justice and sense of impending death creates a sanction equal to obligation to an oath. When the party is at the point of death, when every hope of this world

is gone, when every motive of falsehood is silenced and the mind is induced by the most powerful consideration to speak truth, a situation so solemn and so lawful is considered by law as creating an obligation equal to which is imposed by a positive oath administered in a court of justice. Though the dying declaration is entitled to a great weight, it is worthwhile to note that the accused has no power to cross-examination. Such a power is essential for elicitating the truth as an obligation of oath could be. This is the reason the courts insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that statement of deceased was not a result of either tutoring or prompting or production of imagination.The court must be further satisfied that the deceased was in a fit state of mind after clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly it can based its conviction without further corroboration. It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration

is merely a rule of prudence. (Smt. Shakuntala v. State of Haryana; 2007 (5) Supreme 668)

◆ S. 58 & 145 – A pleading in regard to existence of a document may be necessary for advancing case of a party, but when a witness admits a document to be in his own handwriting without anything more, effect thereof may have to be considered having regard to the provisions contain U/s. 145 Indian Evidence Act in terms thereof only requirement would be that his attention is drawn before a writing could be proved.

An admission made by a party can be used against him. When such admission is made by a Karta of the Hindu Undivided Family, who is managing the family property as well as family business affair the same would be a relevant fact. When a claim was made by a plaintiff for rendition of account in the list, issuance of document purported to have been authored by one of the parties is in the opinion of the Court was required to be taken into consideration. It is also a trite common law that when in cross-examination a witness accepts the correctness of a document the same would be relevant. A pleading in regard to existence of a document may be necessary for advancing the case of a party, but when a witness admits a document to be in his own

handwriting without anything more, the effect thereof may have to be considered having regard to the provisions contained in S. 145 of the Indian Evidence Act in terms whereof the only requirement would be that his attention is drawn before a writing can be proved. (Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.; 2007 (5) Supreme 357)

◆ S. 62, 65 & 67 – Secondary evidence – To enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of original documents – Conditions laid down in S. 65 of the Act must be fulfilled before secondary evidence could be admitted – Photocopies marked and taken as secondary evidence in terms of S. 63 of the Act and they ought not to have been receipt a secondary evidence.

Secondary evidence of the contents of a doucment cannot be admitted without non-production of the original being first accounted for. In such a manner as to bring it within one or other of the cases provided for in the section. In the present case the original was with one P. Srinibas Rao only when condition prescribed in S. 65 are satisfied documents can be admitted as secondary evidence. (Smt. J. Yashoda v. Smt. K. Shobha Rani; 2007 (5) Supreme 293)

◆ S. 63 & 65 – Secondary evidence – Documents in question photocopies – It can be admitted as secondary evidence only when conditions prescribed U/s. 65 are satisfied.

Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

The admitted facts in the present case are that the original was with one P. Srinibas Rao. Only when conditions of section prescribed in section 65 are satisfied, documents can be admitted as secondary evidence. In the instant case clause (a) of section 65 has not been satisfied. Therefore, the High Court's order does not suffer from any infirmity to warrant interference. (Smt. J. Yashoda v. Smt. K. Shobha Rani; Date of Judgment: 19/04/2007; Appeal (Civil) 2060 of 2007)

◆ S. 115 – Promissory Estoppel – Principle of estoppel does not operate at the level of government policy – A speech made in the Parliament by Minister cannot be treated as a promise or a representation made to a person attracting the principle of promissory estoppel.

Finance Minister's statement referring to a proposal to continue the grant of exemption from payment of sale tax for a period of 10 years is merely a budget proposal which could not give rise to any right to the parties and it did not amount to order or notification extending the period of exemption which was required to found a plea based on promissory estoppel. Plaintiffs are not entitled to found any case of promissory estoppel merely on the basis of the speech made by the Minister in the Assembly of a proposal to ban sale of toddy in the State. **(State of Karnataka & Anr. V.l K.K. Mohandas & etc.; 2007 (5) Supreme 736)**

◆ Whether dedication of property to a samadhi is valid – Held, "No".

As far as 'Will' is concerned, both the Courts below clearly held that it was genuine. However, the Courts below, particularly the Appellate Court held that under Hindu Law endowment could be in favour of idols and not Samadhi. The Appellate Court placed reliance upon the authority of the Supreme Court in *Saraswathi Ammal and another v. Rajagopal Ammal*, wherein it was held that dedication in favour of Samadhi (tomb) is invalid. Similar view has been taken by Supreme Court in *Sundara Kothanor v. Sellam Pillai; 1969 (1) SCWR 669 = AIR SC Millennium Digest Vol. 9 P. 858 Col. 2*. **(Shiv Murat Dass Chela of Baba Bodh Ram Bodh Raj v. District Judge, Azamgarh and others; 2007 (103) RD 256)**

◆ **Joint Hindu family and Joint Hindu Family property – Difference between.**

Needless to say that there is difference between joint Hindu family and joint Hindu family property and that is to be applied in the light of evidence on proper consideration of relevant provision. The Deputy Director of Consolidation is the last Court of fact and therfore, it is expected that more care and attention is to be taken by the revising authority. On the aforesaid consideration, this Court is satisfied that claim of parties has not been properly considered and proper findings have not been recorded and thus, claim of parties needs fresh attention by revising authority. **(Risal v. Dy. Director of Consolidation, Saharanpur and others; 2007 (103) RD 262)**

◆ **Joint family – Severance in status of joind family – Mode of effectuation of – Held, said severance can be caused by any co-owner expressing his unequivocal intention to separate.**

Any co-owner can cause a severance in the status of joint family by expressing his unequivocal intention to separate. Such intention can be expressed even by filing a suit for partition. But, despite such separation and in the joint status, parties may continue to may possess the lands jointly unless a partition of the joint family property takes place by metes and bounds. **(M. Venkataramana Hebbar (Dead) by LRs. v. M. Rajagopal Hebbar and Others; (2007) 6 SCC 401)**

◆ **Will – Genuineness – Disposition in Will unfair, unnatural and improbable – Will made by terminally ill testator just two weeks before his deaths – Minor children disinherited in favour of nice – Non-examination of propounder in the presence of suspicious circumstances – Adverse inference.**

The burden of proof that the Will has been validily executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has singed the Will and that he had put his signature out of his own free-will having a sound disposition of mind and understood of the nature and effect thereof. If sufficient evidence in this behalf is brought on record the onus of propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exist any. In the case of proof of a Will, a signaure of testator alone would not proof the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised the burden would be on caveator. **(Advekka v. Hanamavva Kom Venkatesh & others; (2007) 7 SCC 91)**

Indian Easement Act

◆ **S. 13 – Existence of easement of necessity – When alternative path way is available to the plaintiff for ingress and egress to his property – Plaintiff has no right of easement of necessity.**

Section 13 of the Easements Act 1882, permits easement by necessity and that cannot be claimed if an alternative passage is available, though it may be bit inconvenient or a longer for his ingress and egress.

A Division Bench of Gujarat High Court in the case *Ramesh Chandra Bhikhabhai Patel v. Maneklal Maganlal Patel; AIR 1978 Guj. 62* has observed that the easement of necessity does not survive after the alternative out let is available to the claimant of that right.

Thus in view of above, the plaintiff cannot claim of way through the property of the defendant appellant as easementary right as alternative path way is available to the plaintiff for ingress and egress to his property. Thus the plaintiff has no right of easement of necessity. **(Shambhoo Lal Sah v. Gauri Shanker Sah; 2007 (102) RD 799) P.No. 799 (Para 22, 23, 26 June)**

◆ **S. 34 – Common intention – A common intention may be developed on spot – Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others.**

The recital made in the First Information Report which has been noticed by the Court clearly goes to show that the appellant had sought to attacked the deceased while he was on his Motorcycle. The attack was warded by the PW-4. He suffered an injury. The deceased thereafter ran to the school building which according to the sketch map drawn by the Investigating Officer was at a distance of about 120 ft. from the main road. The deadbody of Uday was found only on the staircase of the school. The FIR as also the evidence of PW-4 & 5 reveals that the deceased was chased by all the accused. The specific role played by appellant has not been disclosed. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence U/s. 34 of IPC. If the names of the other accused persons and the role played by them are known. Specific overt act of the accused is not only known but it is required to be proved. **(Noor @ Noordhin v. State of Karnataka; 2007 (5) Supreme 547)**

◆ **S. 302 – The nature of intention has to be gathered from the kind of weapon used, the part of body hit, the amount of force employed and the circumstances attendant upon death – In view of the used of knife and the extent and place of injury, the offence leading of the death of the deceased who merely tried to pacify the accused and have no role to play in the exchange of words taking place between the parties, false U/s. 302 and not 304.**

In the instant case the accused has used a knife the blade of which had a length of six inches. The injury was caused just below the stomuch and had affected a vital part i.e. Lever. Knife had gone as deep as six centimeter in the body which clearly is indicative of the fact that blows was given with great force and the outcome of injury was that the deceased expired instantously. **(Manu Bhai Ata Bhai v. State of Gujarat; 2007 (5) Supreme 401)**

◆ **S. 302/34 – Two dying declarations, one by the Police and other by the Nayab Tehsildar claimed, but necessity of two dying declaration**

not explained – There is no mention in the dying declaration that it was read over and explained to the deceased – No evidence of the burn injury on in the bed room where the occurrence was purported to have occurred – In the dying declaration the deceased stated that she was brought to the hospital by a neighbour but the official records show that she was brought to the hospital by accused no. 2 i.e. sister-in-law – These infirmities make the dying declaration incredible and conviction cannot be based on summarises and conjectures.

The dying declaration was recorded even before the intimation has reached to the police i.e. 10 p.m. There was a point raised about the marriages of the deceased. Interestingly, the mother of the deceased supported the defence version. According to the Trial Court and High Court the basic question was who recorded dying declaration first. So far as dying declaration purported to have been recorded by Nayab Tehsildar (PW-1) is concerned, he has stated that one Constable accompanied him in the hospital. He did not say that police inspector (PW-3) accompanied him though PW-3 claimed it to be so. With reference to Panchnama it appears that no burn marks were found in the bed room on the other hand burn marks were found in the kitchen. Exh. 30 shows that ASI had received intimation at 6.30 p.m. dying declaration shows it was recorded between 6 to 6.30 p.m. If the information was received at 6.30 p.m. question of recording the dying declaration before that time does not arise. It has not been explained as to what was the necessity of second dying declaration, if there was already a dying declaration in existence recorded by PW-3. The trial court, however held the dying declaration to be credible because the medical officer was present when the dying declaration was recorded. There as no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that eventhough it is not so stated, it has to be presumed that it was read over and explained. This view is clearly unacceptable. So far as the presence of the relatives tutoring aspects is concerned, the High Court held that there cannot be a possibility of tutoring Rubina for falsely implicating appellants in the offence because of the promptness of the dying declaration. The conclusion is clearly based on surmises and conjectures. In view of the aforesaid infirmities the inevitable conclusion is that the acquisition of prosecution have not been established. **(Kulwant Singh @ Kulbansh Singh v.l State of Bihar; 2007 (5) Supreme 404)**

◆ **S. 304A – Negligence and rashness are essential elements U/s. 304A – Rash act is a negligent act done precipitately – Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may injury but done without any intention to cause injury or knowledge that it would probably be caused.**

S. 304A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of S. 299 and 300 IPC. The provision applies only to such act which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements U/s. 304A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the conciousness of a risk that evil consequences will follow with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factor. "Rashness" consists in hazarding in dangerous or wanton act with the knowledge that it is so, and that it may caused injury. The criminality lies in such a case in running the risk of doing such act with rackless or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally are to an individual in particular, which having regard to all the circumstances out of which the change has arisen it was the imperative duty of the accused person to have adopted. In factual scenario of present case it is crystal clear that the appropriate conviction would be U/s. 304A IPC and not U/s. 304 Part II IPC. **(Prabhakaran v. State of Kerala; 2007 (5) Supreme 286)**

◆ **S. 363 – Girl Major as per High School certificate – No need to medical examination to ascertain her age.**

In view of clear evidence of the High School Certificate regarding date of birth of Sangeeta Yadav , there was no necessity for her medical examination for ascertainment of her age; specially when she had expressed her unwillingness for medical examination. The law is that no body can be forced to be medically examined against his or her wishes, and if refusal to undergo medical examination is unjustified , the Court may draw an adverse inference against the defaulting person but

it can not force any one to undergo medical examination against his/her wishes. **(Khaderu Ram Yadav v. State of U.P.; Application U/s. 482 No. 5367 of 2004; date of Judgment 4.10.2007 (All. HC.))**

◆ **S. 376 & 392 – Proof & Corroboration of – Testimony of prosecutrix – Reliability – Evidence of prosecutrix found full of contradiction without corroboration from any witness – Held, though evidence of prosecutrix can alone sustain conviction of the accused but in the instant case her evidence is so artificial that it cannot be accepted.**

The evidence of prosecutrix (P.W. 3) is full of material contradiction. There is no corroboration whatsoever from any of the witnesses, more particularly in the evidence of P.W. 6 who is a material witness. It is true, the evidence of the prosecutrix itself, if acceptable, is sufficient to establish the charged against the accused but her evidence is so artificial which cannot be accepted. In these circumstances the prosecution miserably failed to establish the charge for the offence punishable under S. 376 IPC. **(Narayan Alias Naran v. State of Rajasthan; (2007) 6 SCC 465)**

◆ **S. 379 – In theft case owner is entitled to custody of ornaments during pendency of case.**

The applicant had moved an application before the trial court for release of the ornaments claiming that he is owner of these ornaments. It has also been alleged that these ornaments were recovered from possession of the accused on the public way . A crowd had collected there and Vijay Kumar and his wife Kusum were also present in that crowd and at that time Kusum identified all these ornaments as of her own. It is to be seen that theft of these ornaments was reported at the police station on 27.10.2001 and this recovery had taken place on 2.11.2001 and the accused at the time of their arrest allegedly confessed to have stolen these ornaments and cash from the house of the applicant Vijay Kumar. It is also to be seen that soon after the above recovery the applicant had moved an application for release of these ornaments supported with the receipt which contained description of those ornaments, and an affidavit in support of the application was also filed.

It may be mentioned that the accused from whose possession these ornaments were recovered has not made any counter claim so far

though the period of about six years has elapsed from the date of recovery. The claim of the applicant was disallowed by the courts below mainly on two grounds. The first ground was that the applicant had not satisfactorily proved his title to the ornaments, and the second ground was that these ornaments were case property and those were to be produced in Court at the time of evidence. Now it is to be seen that so far as the question of title is concerned, the applicant had filed the receipt and the affidavit of the goldsmith to show his title to the ornaments. His title has not been denied by any person, nor any one else claimed title to these ornaments. As such when there is no other claimant except the applicant, the ornaments should be given into his Supurdagi after requiring him to execute a personal bond with two sureties of the amount to be fixed by the court concerned after having an undertaking from the applicant that during the pendency of the case he will keep the ornaments in safe custody and will not transfer them in any manner and will produce the same before the court whenever required to do so; and that if any other claimant appears and if that claim of that person is found to be genuine by the court , he shall return these ornaments for being delivered to that person. **(Vijay Kumar Vs. State of U.P.; Criminal misc. Application No. 14331 of 2006; Date of Judgment 28.9.2007 (All. HC))**

Indian Registration Act

◆ **S. 17 – Deed of family settlement – Registration of – Necessity.**

The deed of family settlement was not required to be compulsorily registered, in terms of S. 17 of Registration Act as by reason thereof, the relinquishment of property was to take effect in future. But there cannot be any doubt whatsoever that before the court rejects a claim of the partition of the joint family, at the instance of all co-owners, it must be establish that there had been a partition by metes and bounds. By reason of the family settlement, complete partition of the joint family property by metes and bounds purported to have taken place. **(M. Venkataramana Hebbar (Dead) by LRs. v. M. Rajagopal Hebbar and Others; (2007) 6 SCC 401)**

◆ **S. 17 – Lease was for uncertain period and was not for more than one year – Its registration under Registration Act not compulsorily required.**

In the nut shell the conclusion of the above discussions is that the decree of the Civil Court was not required to be registered under Section 107 of the Transfer of Property Act. Firstly, no lease was created in favour of the petitioner and the execution of the decree for possesson was postponed on the fulfilment of the conditions mentioned therein during the life time of the petitioner. Secondly, inview of the judgment of this Court in case of B.P. Sinha; AIR 1971 All 297 (supra), the lease was for more than one year and its registration under the Registration Act was not compulsorily required. **(Sudhangshu Kumar Banerjee v. Radhey Charan Shah & Anr.; 2007 (5) ALJ 64)**

◆ **S. 49 – Unregistered document by which a party has agreed to sell immovable property – Not admissible in evidence.**

In view of section 49 of the Registration Act, 1908, read with State amendment incorporated vide U.P. Act No. 57 of 1976 w.e.f. 01.01.1977, whereby words 'or creating swuch right or relationship' have been added to clause (c) of section 49, it is evident that the unregistered document by which a party has agreed to sell immovable property, is not admissible in evidence. In other words, such unregistered agreement cannot be read in evidence. **(Prem Lal v. Kalam Ram; 2007 (102) RD 818)**

Indian Succession Act

◆ **S. 63 – Will – Evidence Act, S. 68 – When will is challenged on ground of coercion, undue influence or fraud – Onus to prove the same lies upon the party which alleges the same.**

The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signautre out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In, the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. See [*Madhukar D. Shende v. Tarabai Shedage; 2002 (93) RD 98 (SC)]*, and *Sridevi and Others v. Jayaraja Shetty and Others;*

[2005 (98) RD 613]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

There are several circumstances, which would have been held to be described by this Court as suspicious circumstances:

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself taken prominent part in the execution of Will which confers on him substantial benefit.

The proof a Will is required not as a ground of reading the document but to afford the Judge reasonable assurance of it as being what it purports to be. **(Niranjan Umesh Chandra Joshi v. Mridula Jyoti Rao and Others; 2007 (103) RD 38)**

Interpretation of Statutes

- **Amended/substituted provision – Mode of construction.**

When a statutory provision is substituted the new provision has to be read and construed with reference to its wording and not with reference to the wording of old provision. **(State of Gujarat v. Shailesh Bhai Mansukh Lal Shah & Others; (2007) 7 SCC 71)**

- **Legal fiction created under Statute – It must be given its full effect.**

The effect of a legal fiction is well-known. When a legal fictin is created under a statute, it must be given its full effect, as has been observed in East End Dwellings Co. Ltd. V. Finsbury Borough Council; [1951 (2) All ER 587] as under:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed, must inevitably have from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imaginatin to boggle when it comes to the inevitable corollaries of that state of affairs."**(Ramesh Chandra Sharma v. Punjab National Bank & Anr.; 2007 (5) ALJ 6)**

Land Acquisition Act

◆ **Effect of renewal of lease – Would not take away the power of the State Government of compulsory acquisition of the land under the Act, but rather it would at best be taken into consideraton for determining the quantum of compensation.**

We have not been shown any law which prohibits compulsory acquisition of the land, under the provisions of Land Acquisition Act, 1894, even after the lease had been renewed, merely because the lease has been renewed. A renewal of the lease in favour of the petitioners would not take away the power of the State Government of compulsory acquisition of the land under the provisions of Land Acquisition Act, 1894. In fact, the renewal of lease would at best be taken into consideration for determining the quantum of compensation. **(Rustom Khusro Sapurji Gandhi and Others v. Amrit Abhijat, District Magistrate, Allahabad and Others; 2007 (103) RD 154)**

◆ **S. 48 – Opportunity of hearing to land owner is necessary before withdrawal of exemption from acquisition of land.**

S. 48 of Act confers powers on State Governments to withdraw from acquisition of any land of which possession has not been taken. Sub-section (2) of S. 48 of the Act provides for compensation for damage suffered by land owner on ground of any notice or proceeding under the Act and sub-section (3) thereof provides for determination of compensatin. Undoubtedly land acquisition relates to taking over land of land owner. It relates to immovable property and it also provides for payment of compensation with regard to acquired land. In circumstances any proceeding relating to title of land and its compensation would have civil consequences as it would relate to rights of the parties. In that view of the matter opportunity is a must.

In the instant case as the State Government had earlier exempted the petitioner's land from acquisition, any withdrawal of such exemption wuld definitely affect the rights of the petitioner and, therefore, petitioner ought to have been given opportunity of hearing before withdrawal of the exemption. **(Neeraj Gupta v. State of U.P. & Ors.; 2007 (5) ALJ 373)**

NDPS Act

◆ **S. 50 – Well settled that the word "person" does not include bag, brief-case etc. – High Court allowing the appeal only on the ground of**

non-compliance of S. 50 of the Act and not examining the other grounds of challenge – Such a judgment is unsustainable.

A bag, brief-case or any such article or container etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, brief-case, suit case, tin box, thaila, Jhola, Gathri, Holdall, cartoon etc. of varying size dimension or weight. However, by carrying or moving alongwith them some extra effort or energy would be required. They would have to be carried either by the hand or hung or soldier or back or placed on head. In common parlence it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, soldier, back or head etc. Therefore it is not possible to include these article within the ambit of word "person" occurring in S. 50 of the Act. **(State of Haryana v. Suresh; 2007 (5) Supreme 269)**

Negotiable Instruments Act

◈ **S. 31 Proviso (b) & (c) – Compliance with requirement of giving a notice – Notice sent by registered post returning unserved – Presumption as to service of notice – Necessity of making averment in the complaint that the service of notice evaded – Held, there is no need to make such averment in complaint for raising presumption as to service of notice in the said situation as in view of S. 27 General Clauses Act & S. 114 of Evidence Act.**

The entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of the service of notice and thereby pre-himself from the penal consequences. It is also to be borne in mind that requirement of giving notice is a clear departure from the rule of Criminal Law. Any drawer who claims that he did not received the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint U/s. 138 of the Act make payment of the cheque amount and submit to the court that he made payment within 15 days of the receipt of summons and, therefore, the complaint case liable to be rejected. A person who does not pay within 15 days of receipt of summons from the court along with the copy of the complaint U/S. 138 of the Act, cannot obviously contend that there goes no proper service of

notice as required under S. 138 by ignoring statutory presumption to the contrary under section 27 of the G.C. Act and S. 114 of the Evidence Act. **(C.C. Alavi Haji v. Palapetty Mohammed & Others; (2007) 6 SCC 555)**

Prevention of Corruption Act

Sanction for prosecution – Necessary of, where the accused on the date of filing of charge sheet did not remain a public servant due to his dismissal, though later he was reinstated.

In a case of this nature doubts have arisen as to the identity of the authority from whom sanction for prosecution is to be sought. In the opinion of Court there should be an unambiguous provision in the law under which the appropriate authority for according sanction is to be determined on the basis of competence to remove the accused public servant from office at the time when the offence is alleged to have been committed. **(B.S. Goraya v. U.T. of Chandigarh; (2007) 6 SCC 397)**

S. 19 – Necessity of section for prosecution – Cognizance of offence taken against accused without applying for sanction would be violation of S. 19 and bad in law.

From the perusal of the aforesaid averments, it is clear that on 27.4.2006 a letter to grant the sanction was written by Arvind Kumar Maurya addressed to the competent authority but the counter affidavit is conspicuously silent whether any sanction was granted or not even though it is mentioned that sanction has not been received as yet. In such a view, it is perceptibly clear that on 27.10.2005 when the cognizance of the offence against the revisionist was taken by the Court no sanction was even applied for. Hence, the cognizance taken by the Special Judge (Anti Corruption) Varanasi was contrary to the provisions of Section 19 of the P.C. Act. **(Smt. Monika Marry Hussan v. State of U.P. and Anr.; 2007 (5) ALJ 219)**

Prevention of Food Adulteration Act 1954

S. 20AA – Benefit of probation claimed by accused if not considered properly by First Appellate Court and High Court – Matter remanded back to High Court to consider acceptibility of plea – Relating of age and decide matter afresh.

If therefore the appellant succees in showing that he was less than 18 years of age on the date of occurrence the applicability of Section 20AA

has to be considered. This plea was not specifically taken before the trial Court and only some documents were filed before the First Appellate Court. The trial Court did not get the opportunity to examine the same. The First Appellate Court did not find any substance in the plea as the documents were not proved. A specific plea was taken before the High Court in the revision petition about unsustainability of the conclusion. It is a case where question relating to age of the accused has not been considered in the proper perspective by the First Appellate Court and the High Court. Since it is a vital issue which has substantial bearing on the subject-matter of dispute, we remand the matter to the High Court to consider acceptability of the plea relating to age and decide the matter afresh in accordance with law. **(Mohd. Yaseen v. State of U.P.; 2007 (5) ALJ 326)**

Service Law

◆ **Departmental Enquiry – Right of employer to hold fresh enquiry – Held, ought to have been given in view of seriousness of charges.**

The charges levelled against the employee are not of a minor or trivial nature and, therefore, it will not be proper to foreclose the right of the employer to hold a fresh enquiry only on the ground that the employee has since retired from service. **(U.P. Cooperative Federation ltd. And Others v. L.P. Rai; (2007) 7 SCC 81)**

◆ **Pay – Equal pay for equal work – Discrimination based on source of recruitment and terms and condition of appointment – Disparity in salary directed to be removed.**

The nature of duties being discharged by the Youth Coordinators who have come on deputation and have been absorbed as such and those who were directly recruited on fixed term are discharging the same duties. The only difference is their source of recruitment. Once the deputationists are discharging the same duties and are being paid salary and other allowances then there is no reason to deny the same benefits who are discharging the same duties and functions. **(Nehru Yuva Kendra Sangathan v. Rajesh Mohan Shukla & Ors;(2007) 6 SCC 9)**

◆ **Dismissal – Appellant dismissed for reporting for duty one day late after leave, although he had a justifiable reason of death of his father – CAT and the High Court both rejecting his application on the ground**

of delay and latches – Supreme Court directing the reinstatement without back-wages.

Dismissal of appellant from service was due to one day's delay in reporting for duty and there was also a justifiable reason of death of his father. Considering of this aspect of the matter court thought it fit to direct the Union of India to consider the case of the Appellant sympathetically and if he could be reinstated in service without back-wages. **(Ishwar Singh v. Union of India & Ors.; 2007 (5) Supreme 212)**

◈ **Rule 4 of the U.P. Government Servant Rules, 1999 – Whether the first proviso to rule 4(1) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, is mandatory or directory – Whether the exercise of discretion to suspend a government servant under rule 4(1) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, without adverting to the first proviso to rule 4(1) is legal and in accordance with law?**

From perusal of Rule 4 it is clear that a Government servant can be suspended by the appointing authority against whose conduct an inquiry is contemplated or pending. The first proviso to the rule makes it obligatory for the appointing authority not to suspend an employee unless the allegations are so serious that in the event they are established then it would warrant the imposition of major penalty. The rule inherently lays down that suspension should not be resorted to by the appointing authority as a matter of routine but only after the appointing authority is satisfied that the allegations are so grave and serious against the government servant that if they are established it would result in removing or dismissing etc., the employee from service. In other words, every omission or error in discharge of duty by the Government servant may not be sufficient to suspend him. No hard and fast rule can be laid down as to what allegation would be serious, which may warrant major penalty. But the appointing authority under the first proviso to the rule is required to apply its own independent mind to the allegations against the employee and then arrive, on the material on record, to a prima facie conclusion that the allegations against the employee were such that it warranted suspension. **(Dr. Arvind Kumar Ram v. State of U.P. and others; Civil Misc. Writ Petition No.35923 of 2007; Date of Judgment6.9.2007 (Alld. HC))**

Specific Relief Act

S. 34, 6 & 5 – Title suit – Establishment of title – Documents that are relevant – City Survey record – Relevance of .

In the suit for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions. Title is not decided by survey records alone. If necessary, a proper identification of the properly leased out to the family of the plaintiff under the 1875 lease deed has also to be made by issuing a Commission for that purpose. **(Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale (D) & Ors; (2007) 6 SCC 737)**

Taxation

◆ **S. 47 – Determination of market value under section 47 of the Act – Market value shall be determined on the basis of general principles for determining market value which are applicable to the land acquisition.**

The rules framed for determining market value under the Stamp Act and circle rates circulated under said rules are relevant only for initiation of proceedings under section 47-A of Stamp Act. However, after initiation of the case the said rules become irrelevant and while deciding the case market value shall be determined on the basis of general principles for determining market value which are applicable to the land acquisition matters. Moreover, future use of the property is not decisive. **(Sarva Hitkarini Sahkari Avas Samiti Ltd., Allahabad and Another v. State of U.P. through Secretary Finance (Stamp and Registration), U.P., Lucknow and others; 2007 (103) RD 191)**

Transfer of Property Act

◆ **S. 5 – Family settlement – Can take place only among those family members who have get right (share) in property.**

Family settlement can take place only among those family members who have got right (share) in the property. Agriculutral land in dispute was admittedly Bhumidhan land of Lallan and his daughters could not have any share in the land during life time of their father Lallan. In view of this, even

if it is assumed that family settlement took place and memorandum of settlement was executed it has got no value as it was simply a transaction of sale, hence, it could be executed through registered sale deed.

Accordingly, I am of the opinion that family settlement or memorandum, of family settlement even if affected and executed was legally not enforceable as it amounted to transfer. **(Smt. Nirmala Devi v. Additional Commissioner Allahabad & Ors.; 2007 (5) ALJ 385)**

◆ **S. 53-A – Protection of section 53-A – When available.**

Both the Courts below have committed glaring and manifest error of law by relying on unregistered agreement dated 21.6.1978, whereby defendant No. 1 allegedly agreed to sell the land to the plaintiffs. Neither the unregistered agreement dated 21.6.1978 of sale of immovable property was admissible in evidence, nor could the suit for specific performance could be decreed on its basis. Both the Courts below have also committed error of law by cancelling the sale deed executed by defendant No. 1 Baisakhi Devi in favour of defendant No. 2 Prem Lal and defendant No. 3 Jhagri, for consideration received by her. Said sale deed was a registered document and the seller was a recorded tenure-holder. Therefore, the suit should have been dismissed by the Trial Court. The Lower Appellate Court has also committed illegality in affirming the decree passed by Trial Court in favour of the plaintiffs. Protection of section 53-A of Transfer of Property Act, 1882, is available to a party as a defence (shield) to protect possession transferred under an agreement but it cannot be used as a sword to get executed the agreement to get it specifically enforced. As such the Lower Appellate Court has taken a erroneous view that since the defendant No. 1 transferred possession at the time of executing the unregistered agreement, as such, the suit can be decreed for specific performance of contract. **(Prem Lal v. Kalam Ram; 2007 (102) RD 818)**

◆ **S. 54 – Agreement to sale – Not signed by party – 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; 2007 (5) ALJ 388)

◆ **S. 122 – Gift – Acceptance is to be of the donee and not of the donor.**

The second finding of the first appellate Court that donor was not shown to have accepted the gift after its execution and till his death is erroneous in law in the sense that under section 122 of T.P. Act acceptance is to be of the donee and not of the donor. **(Shri Kishun v. Hari Narain; 2007 (103) RD 258)**

U.P. Consolidation of Holdings Act

◆ **Reference – Acceptance of – Order taking chalkout land without opportunity is unsustainable.**

The grievance of the Petitioners is that this order of the Deputy Director of Consolidation was passed without hearing them and it is a non-speaking order. According to the petitioners their valuable chak out land plot No. 303 has also been taken out. In paragraph 3 of the writ petition the petitioners have averred that the order of the Deputy Director of Consolidation was passed without notice and opportunity of hearing to the petitioners. The averments of paragraph 3 have been denied in the counter affidavit. No doubt the petitioners did file objections against the reference prepared by the Assistant Consolidation Officer but it does not appear that the petitioners were heard by the Deputy Director of Consolidation. There is no recital in the order that the Deputy Director has heard the petitioners or that the petitioners did not turn up despite notice. Moreover, the order of the Deputy Director of Consolidation is a single line order, which has been quoted above. Such a non-speaking order shows non-application of mind

and cannot be sustained. **(Ram Sewak and Others v. Deputy Director of Consolidation, Jaunpur and Others; 2007 (103) RD 4)**

◈ **S. 5(C)(ii) – Transfer of land by way of sale, gift or exchange – No prior permission of settlement officer, Consolidation is required for transfer, if land in question is not used for purpose of agriculture and not part of consolidation scheme for allotment of chak.**

Intention of introducing Section 5(c)(ii) of the U.P. Consolidation of Holdings Act was that if the land included in consolidation proceeding does not affect allotment of Chak proceeding under Act by transfer by way of sale, gift or exchange, no prior written permission of Settlement Officer, Consolidation as required under Section 5(c)(ii) of Act was required. Intention of Legislature is clear that if any land is not used for the purposes connected with agriculture, horticulture and animal husbandry and not part of the consolidation scheme for allotment of Chak, any transfer could not be declared void as it does not affect consolidation scheme in any way. Restriction by way of introducing Section 5(c)(ii) of U.P. Consolidation of Holdings (Amendment) Act, 1958 was to effect transfer of the land included in the consolidation scheme and not the land which does not affect the consolidation scheme for allotment of Chak and excluded from the consolidation scheme, though it may be in village on notification under Section 4 of the Act. Therefore, provisions of Section 5(c)(ii) of Act and its consequences thereof as contained under Section 45-A(2) shall not affect the impugned sale deed by which a valid title passed to the defendant – appellants. **(Ram Manorath and Ors. v. Surya Pal and Ors.; 2007 (5) ALJ 112)**

◈ **S. 9A(2) – For Co-tenancy right on the basis of land being ancestral – Unbroken identity of holdings has to be established.**

It is well settled principle that in order to entitle a party to claim co-tenancy rights in holding on the ground of it being ancestral, the unbroken identity of holding has to be established through the period and if the identity has changed the claim cannot succeed. **(Ruchha (Dead) through LRs. And Others v. Deputy Director of Consolidation, Gorakhpur and Others; 2007(103) RD 72)**

◈ **S. 9A(2) – Joint Family Property – Inference of – When can be drawn.**

Equally well settled proposition is that even in the joint Hindu Family a member of said family can acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity out of joint family funds for the benefit of the family it cannot be held to be joint family land merely because it was acquired by him when he formed joint family with other members. **(Ruchha (Dead) through LRs. And Others v. Deputy Director of Consolidation, Gorakhpur and Others; 2007(103) RD 72)**

◈ **S. 9A(2) – Finding merely or entries in CH Form 5 is unsustainable finding and liable to be quashed.**

In so far as the question, whether Khatas in dispute were Sirdari or Bhumidhari is concerned, again the finding recorded by all three Courts are based on surmises and conjectures. Consolidation Officer without reference to any material or evidence held all the Khatas to be Bhumidhari Khatas. Settlement Officer Consolidation though has made a reference in the judgment that there is endorsement of Bhumidhari Sanad 1376 F. to 1378F. but without discussing the effect held that Khatas No. 57 and 58 was not Bhumidhari Khatas. The same mistake has been committed by Joint Director of Consolidation without reference to any evidence or material merely on the basis of some entries in CH Form 5, he held all the Khatas except Khata No. 57 to be Sirdari. Before the Court in Writ Petition No. 5982 of 1979, Bhumidhari Sanad with regard to Khata in dispute has been sought to be filed by means of an applications additional evidence.

Although, it is too late in the day to file Bhumidhari Sanad as additional evidence before this Court but since the same has material effect in adjudicating rights of the parties effectively, in the interest of justice, the same is taken on record.

From the aforesaid discussions, it is clear that neither of the consolidation authorities have considered the case of the parties in right perspective.

In view of the aforesaid facts and circumstances, both the writ petitions stand allowed. The impugned order dated 30.4.1979 passed by the Joint Director of Consolidation is quashed. Deputy Director of Consolidation is directed to consider the genuineness or otherwise of the ‘Will’ in the light of oral statement of the witnesses and other evidence and in the light of the observations made herein above. He shall also consider

the effect of Bhumidhari Sanad which shall be filed by the petitioner of Writ Petition No. 5952 of 1979 before him while determining whether Khatas were Sirdari or bhumidhari. **(Ganga Prasad v. Deputy Director of Consolidation and Others; 2007 (103) RD 30)**

U.P. Panchayati Raj Act

◆ **S. 5-A(c) – Employee of IndianTelephone Industries not disqualified from being elected as Pradhan.**

The corporation is a company under section 617 of the Companies Act, 1956. The day-to-day management of the corporation, is with the Board of Directors and not by the Central Government. The Central Government does not have direct control over the services of the employees of the Corporation. The Central Government neither appoints nor directly pays the salary to the employees of the corporation and does not have powers to take disciplinary action against them. The test in such case for deciding whether a person holds office of profit under the State Government or Central Government or the Corporation wholly owned by the State Government or CentralGovernment is the extent of control, the Government exercises over such employee. The disqualification in the matter of election of MLAs and MPs under Articles 101 and 191 and in the matter of language of section 5-A(c) of the U.P. Panchayat Raj Act, 1947, do not make such a difference as the tests laid down by the Supreme Court in both the cases is the same. **(Mrityunjaya Kumar Singh v. Addl. District Judge, Court No. 1; 2007 (103) RD 167)**

U.P. Imposition of Ceiling on Land Holdings Act

◆ **S. 4-A – Determination of nature of irrigated land – Prescribed authority cannot go against khasras of 1378 to 1380F.**

Prescribed authority under Ceiling Act cannot go against Khasras of 1378 to 1380 fasli while determining irrigated nature of land as is evident from section 4-A of the Act. Prescribed authority also mentioned that Naib Tehsildar in his report also mentioned the irrigated nature of the plot. Learned Counsel for the petitioner has argued that the said report was not available. Even if the said report is completely ignored, position remains the same. The findings are based upon entries of Khasras 1378 to 1380 fasli and that is what is required by section 4-A of the Act.

The findings recorded by the Courts below are not at all against the judgment of *jaswant Singh v. State; (1975 RD 81).* In the said authority, it was mentioned that under section 4-A of the Act, it was not permissible for the prescribed authority to make use of any oral evidence in the course of enquiry. Prescribed authority has not placed reliance upon any oral evidence. Even if the report of Naib Tehsildar, Lekhpal etc. is completely ignored, the Khasras of 1378 to 1380 fasli completely proved that the plots in dispute were irrigated.

Moreover, the Division Bench authority of this Court in *Kallu v. State;(1979 ALJ 1113)* held that if part of a plot was irrigated in any of the relevant years then it could be assumed that the nature of the soil of whole plot was such that if efforts had been made then the whole plot could have been irrigated and used for growing corps. **(Smt. Asharfi Devi v. State of U.P. through Collector/D.M., Ghaziabad and Others; 2007 (103) RD 52)**

◆ **S. 4-A – Presumption of source of irrigation – Merely in 1380F same part of plot is shown to be irrigated does not mean that entire plot could not be treated to be irrigated.**

Under Section 4-A of the Ceiling Act which provides for determination of irrigated land it is essential that there must be irrigation facility and decision regarding irrigation facility and growing of crops is basically required to be taken on the basis of Khasras of 1378 to 1380 fasli. Section 4-A contains private irrigation work as one of the relevant sources of irrigation. However, private irrigation work is defined under section 3(14) of the Act and thereunder, it means "a private tube well or a private lift irrigation work operated by diesel or electrict power for the supply of water from a perennial water source completed before August 15, 1972". The date provided falls within 1380 fasli which corresponds to the period from 1.7.1972 to 30.6.1973. Accordingly, if crop in the year 1380 fasli was for the first time irrigated from a private irrigation work then the chances are that the said irrigation work should have been completed after 15.8.1972. Normally from 1st July till 15th August it is rainy season in Uttar Pradesh hence, during that period there is no question of irrigation from any man made source of irrigation or installation of such source during that period. In any case it was essential from the State to lead evidence in this regard which was not done. **(State of U.P. through Collector, Bareilly v. District Judge, Bareilly and Others; 2007 (103) RD 159)**

◆ **Abadi – Found on Chakbandi partal – Recorded in Class 6 – Consolidation authorities have no jurisdiction in the matter.**

During Chakbandi Partal, it was found that the land in dispute is in the shape of Abadi, the same was rightly directed to be recorded as Abadi in class '6'. Once the land in dispute was in the shape of Abadi, the consolidation authoriteis have no jurisdiction in the matter and the consolidation officer wrongly and illegally valued the said land. The Deputy Director of Consolidation also without considering the entire facts and circumstances and without there being any evidence wrongly recorded a finding that the Pattas in favour of the petitioners are illegal and without jurisdiction. Once he himself found that there are partial constructions standing on the land in dispute, which was in the nature of Abadi and since the consolidation authorities have no jurisdiction in respect of Abadi land even if the alleged Pattas were illegal, he ought not to have upheld the order of the Consolidation Officer determining the valuation of the land. He further wrongly held that the said land has rightly been allotted in the chak of the petitioners, though nothing has been brought on record which may go to show that after valuation the said land was ever allotted in the chak of respondent No. 2.

In view of the aforesaid discussions, since the consolidation authorities have no jurisdiction in respect of the land which is in the nature of Abadi, the impugned orders passed by the Deputy Director of Consolidation dated 17.12.2000 as well as 15.9.1993 passed by the Consolidation Officer cannot be sustained and are hereby quashed and that of the order of Settlement Officer Consolidation dated 30.12.1999 is affirmed. **(Ram Deo and Others v. Deputy Director of Consolidation, Basti and Others; 2007 (102) RD 761)**

◆ **S. 33, 39 – Entry procured by playing fraud – No benefit can be given.**

If the entries were procured by playing fraud then no benefit can be given to such person. And in the present case, it appears that the entries are fictious obtained fraudulently by the petitioner with convivance of the Lekhpal. And it can be inferred that the petitioner has not come with clean hands and he himself is guilty for forgery. **(Mustaq Ahmad v. State of U.P. and Others; 2007 (103 RD 64)**

◆ **S. 44 – Presumption as to the correctness of the entry is rebuttable.**

Law: section 44 of U.P. Land Revenue Act, 1901 reads as under:

'44. Presumption as to entries in the annual register. – All entries in the annual register shall, until contrary is proved, be presumed to be true.'

The aforesaid section provides presumption as to the correctness of the entries of the Revenue Record. However, the expression 'until contrary is proved' used in the aforesaid section, makes it clear that the presumption as to the correctness of the entry is rebuttable. **(Lal Chand (Deceased) and Others v. Jarnail Singh (Deceased); 2007 (102) RD 767)**

◆ **S. 57 – Entries in records of last settlement – Presumed to be correct under rebutted by cogent evidence.**

Court has held in a decision as reported in *Lalbihari and Others v. Ram Adhar and Others; 1985 (3) LCD 415,* that as per provisions of section 57 of the U.P.L.R. Act, 1901, entries in concurred records of latest settlement are presumed to be correct unless rebutted by cogent evidence. The appellant has failed to produce any cogent evidence in support of their claim. **(Anjuman Islamia, Lakhimpur v. Chandra Prakash Pitaria and Others; 2007 (103) RD 76)**

U.P. Zamindari Abolition and Land Reforms Act

◆ **S. 143 – Effect of declaration U/s. 143 – Once the person lost their tenancy rights in the land, the declaration U/s. 143 was of no consequence.**

The fact, however, is specifically pleaded that the land was let out to S.B. Sugar Mills for non-agricultural purposes. The execution of the lease was in contravention of the provisions of section 156 of the Act of 1951 and that as a consequence void transfer, under section 167, the plaintiffs lost their rights and land vested in the State Government free from all encumbrances with effect from the date of transfer. The declaration under section 143 of the U.P. Act of 1950 does not give any facts with regard to recommendation on which such declaration was made. Once the plaintiff lost their tenancy rights in the land, the declaration under section 143 of the U.P. Act of 1950, was of no consequence at all. **(U.P. State Sugar Corporation Ltd., Lucknow and Another v. Vinod Chand Gupta and Another; 2007 (102) RD 824)**

◆ **S. 198(4) – Proceeding for cancellation of Patta – Not maintainable after 25 years.**

Under section 198(4) of the Act application for cancellation of Patta may be filed. However, if a case is taken that patta was in fact never granted then such question can not be decided in proceedings under section 198(4) of the Act. For cancellation of Patta, proceedings after 25 years may not be maintainable. However, the Supreme Court in *U.P. State Sugar Corporation v. D.D.C.; 2000 (91) RD 165 SC,* has held that jurisdiction to grant Patta may be seen in consolidation proceedings or regular suit also and proceedings under section 198(4) of the Act are not the only remedy for cancellation of Patta. The fact as to whether Patta was granted or not can be adjudged only in regular suit. (Jog Raj Singh v. State of U.P.; 2007 (103) RD 210)

◆ S. 229(B) – Finding recorded in mutation proceedings cannot be considered in regular suit.

The learned Commissioner was not correct in holding that finding recorded in mutation proceedings could not be set aside in the regular suit under secton 229-B of U.P.Z.A. & L.R. Act unless there was some very strong basis for the same. Orders passed on mutation applications are summary in nature and subject to the result of the regular suit hence in the regular suit findings recorded in mutation proceedings cannot be considered. (Shri Kishun v. Hari Narain; 2007 (103) RD 258)

◆ S. 331-(1-A) – Objection under – Regarding jurisdiction of civil court not to be entertain by Appellate or Revisional Court unless the objection was taken before the trial court at the earliest possible opportunity.

Even otherwise, section 331-(1-A) of the Act provides that objection regarding jurisdiction of the Civil Court shall not be entertained by any Appellate or Revisional Court unless the objection is taken before the Court in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. It is, therefore clear that both the two conditions namely that the objection must be taken before the Court of first instance at the earliest possible opportunity and secondly there was a consequent failure of justice have to be satisfied. (Ram Kunwar Singh and Others v. Pramod Kumar and Another; 2007 (103) RD 264)

Adverse possession over Gaon Sabha land – Claim of Sirdari rights – Person cannot get in view of retrospective amendment made in S. 210 of U.P.Z.A. & L.R. Act of 1977 – If any right created under original Act wiped out by retrospective amendment.

A plain reading of the aforesaid provision goes to show that even after the subsequent amendment/substitution of new section 210 by Amendment Act of 1977 petitioner cannot get sirdari rights over Gaon Sabha land by adverse possession.

Placing reliance on the above quoted provisions it has been urged that provisions of Limitation Act having been made applicable to the proceedings under the Z.A. Act by virtue of section 341 and no suit for ejectment having been filed within the period of limitation prescribed under Z.A. Act, his ejectment by way of suit by Gaon Sabha would be barred in view of section 3 of the Limitation Act and as such he is entitled for a declaration as a sirdar having perfected his rights by adverse possession. The argument has been advanced in total ignorance of the fact that by 1976 amendment section 210 brought on Statute book was made retrospective i.e. as if it was the right from the enforcement of the Act itself. The effect of retrospective operation is that at no point of time Statute conferred any right on the petitioner to perfect rights over the Gaon Sabha land by prescription or adverse possession. That being the position any right, even if created in the petitioner under the unamended Act stood wiped out by operation of law brought on statute book with retrospective operation.

The effect of retrospective operation of amendment is there never existed any provision under the U.P.Z.A. & L.R. Act under which a person over unauthorized occupation over Gaon Sabha land could perfect rights by adverse possession i.e. to say there was no provision under the Act recognizing or creating any right in any person by virtue of his being in possession over the Gaon Sabha land. That being the position, the suit for ejectment of an unauthorized occupant under section 209 of the Act could be filed by Gaon Sabha at any point of time, and limitation would not come in way. ***(Rakshpal Singh v. Board of Revenue at Allahabad and Ors.; 2007 (103) RD 49)***

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PART – II

Important Act & Rules

The Uttar Pradesh Civil Procedure Mediation Rules, 2007.

In exercise of the rule making power conferred under Part X of the Code of Civil Procedure, 1908 and clause (d) of sub section (2) of Section 89 of the said Code, and all other powers enabling it in this behalf, the High Court of Judicature at Allahabad makes the following Rules:

1. Title and commencement**:**

(i) These rules may be called the Uttar Pradesh Civil Procedure Mediation Rules, 2007.

(ii) They shall come into force from the date of their publication in the official Gazette.

2. Extent:

These Rules shall apply to all court annexed mediation with regard to any suit or other proceeding filed/pending in any Court subordinate to the High Court of Judicature at Allahabad. The mediation in respect of any suit or other proceeding may be referred to the Mediation and Conciliation Centre set up in the District. Upon such a reference being made to the Mediation and Conciliation Centre, these rules will apply.

3. Appointment of mediator from the panel under Rule 4 by agreement of the parties:

(a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.

(b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

(c) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

4. Panel of mediators:

(a)(i) The District and Sessions Judge in each District shall, for the purpose of appointing mediators to mediate between parties in suits or other proceeding, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the approved list of mediators on their respective Notice Board with copy to each Bar Association in the District Courts.

(a)(ii) Copies of the said panels referred to in clause (a)(i) shall be forwarded to all the outlying Courts subordinate to the District & Sessions Judge concerned and to the Bar associations attached to each of the outlying Courts:

(b) The consent of the persons whose names are included in the panel shall be obtained before empanelling them on proforma as set out in schedule-1.

(c) The panel of names shall contain detailed annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

(d) The panel of mediator appointed under Clause (a) shall normally be for a period of three years from the date of appointment and further extension of the panel of mediators or any mediator shall be at the discretion of the District & Sessions Judge with the prior approval of the High Court.

(e) The District & Sessions Judge with prior approval of the High Court, may in his discretion, from time to time, add or delete any person in the panel of mediator.

Rule 5: Qualifications of persons to be empanelled under Rule 4:

The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 4, namely:

(a) Retired on superannuation District and Sessions Judges and retired on superannuation Additional District & Sessions Judges of the Uttar Pradesh Higher Judicial Service.

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts

(c) Experts or other professionals with at least fifteen years standing;

(d) Persons and institutions who/which are themselves experts in the mediation and have been approved & recognized by the High Court.

6: Disqualifications of persons:

The following persons shall be deemed to be disqualified for being empanelled as mediators:

(i) any person who has been adjudged as insolvent or is declared of unsound mind.

(ii) or any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

(iii) any person who has been convicted by a criminal court for any offence involving moral turpitude;

(iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority, which are pending or have resulted in a punishment.

(v) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.

(vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings.

(vii) such other categories of persons as may be notified by the High Court.

7: Venue for conducting mediation:

The mediator shall conduct the mediation at one or other of the following places:

(i) Venue of the Lok Adalat or permanent Lok Adalat.

(ii) Any place identified by the District Judge within the Court precincts for the purpose of conducting mediation.

(iii) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

(iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

8: Preference

The Court shall, while nominating any person from the panel of mediators referred to in Rule 4, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

9: Duty of mediator to disclose certain facts:

(a) When a person is approached in connection with his proposed/possible appointment as a mediator, he shall disclose in writing any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

(b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a).

10: Cancellation of appointment:

Upon information furnished by the mediator under Rule 9 or upon any other information received from the parties or other persons, if the Court, in which the suit or other proceeding is pending is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the

mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator subject to approval of the High Court.

11: Removal or deletion from panel:

A person whose name is placed in the panel referred to in Rule 4 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if:

(i) He resigns or withdraws his name from the panel for any reason;

(ii) He is declared insolvent or is declared of unsound mind;

(iii) He is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(iv) He is a person who has been convicted by a criminal court for any offence involving moral turpitude;

(v) He is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by appropriate disciplinary authority which are pending or have resulted in a punishment;

(vi) He exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

(vii) The Court, which empanelled, upon receipt of information, if it is satisfied, that it is not possible or desirable to continue the name of that person in the panel.

Provided that, before removing or deleting his name, under clause (vi) and (vii), the Court concerned shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order which shall be given effect to after its approval by the District & Sessions Judge concerned.

12: Procedure of mediation:

(a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely

(i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;

(ii) he shall hold the mediation conference in accordance with the provisions of Rule 7;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;

(v) each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved.

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

(vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

(c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that

nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

13: Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908:

The mediator shall not be bound by the Code of Civil Procedure 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

14: Non-attendance of parties at sessions or meetings on due dates:

(a) (i) The parties residing in India shall be present personally or may be represented by their power of attorney holders at the meetings or sessions notified by the mediator.

(ii) The parties not resident in India may be represented by their counsel or power of attorney holders at the sessions or meetings.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.

15: Administrative assistance:

In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

16: Offer of settlement by parties:

(a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

17: Role of mediator

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

18: Parties alone responsible for taking decision:

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

19: Time limit for completion of mediation:

On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either suo moto, or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

20: Parties to act in good faith:

While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

21: Confidentiality, disclosure and inadmissibility of information:

(1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding

the documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.

(4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to :

(a) views expressed by a party in the course of the mediation proceedings;

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) proposals made or views expressed by the mediator;

(d) admission made by a party in the course of mediation proceedings;

(e) the fact that a party had or had not indicated willingness to accept a proposal;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

22: Privacy:

Mediation sessions and meetings are private; only the concerned parties or their counsel or power of attorney holders can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

23: Immunity:

No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for any civil or

criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

24: Communication between mediator and the Court

(a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.

(b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

(c) Communication between the mediator and the Court shall be limited to:

(i) Communication by the mediator with the Court concerned about the failure of party to attend;

(ii) with the Court concerned with the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through mediation;

(iv) that the parties:

a. have settled the dispute or disputes; or

b. have failed to arrive at a settlement; or

c. are not willing for a settlement through mediation

25: Settlement Agreement:

(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

(4) The mediator shall fix the date on which the parties to the litigation should appear before the Court concerned and within that period he shall

(a) submit the agreement where an agreement is reached between the parties; or

(b) report the result of his efforts in settling the dispute to the Court

26: Court to fix a date for recording settlement and passing decree:

(1) On the parties appearing before the court on the dated fixed by the mediator, or such other day, not being beyond seven days from the date fixed by the mediator, the court concerned shall hear the parties and if it is satisfied that the parties have settled their disputes voluntarily and that the settlement is not collusive, then it shall pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(2) (i) If the settlement disposes of only certain issues arising in the suit or proceeding, the Court shall record the settlement in respect of those issues if they are severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, then the court may pass a decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled.

(ii) if the issues are not severable, then in that event, the Court shall wait for a decision of the Court on the other issues, which are not settled.

27: Fee of mediator and costs:

(1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

(2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.

(3) Where there are two mediators as in clause (b) of Rule 3, the Court shall fix the fee payable to the mediators, which shall be shared equally by the two sets of parties.

(4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

(5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

(8) Where a party is entitled to legal aid under section 12 of the Legal Services Authority Act, 1987, the concerned Legal Services Authority under that Act shall pay the amount of fee and costs payable to the mediator.

28: Ethics to be followed by mediator

The mediator shall:

(1) Follow and observe these Rules strictly and with due diligence;

(2) Not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) Uphold the integrity and fairness of the mediation process;

(4) Ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) Satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

(6) Disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) Avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) Be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

(9) Conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) Recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

(11) Maintain the reasonable expectations of the parties as to confidentiality;

(12) Refrain from promises or guarantees of results.

Rule 29: Transitory provisions:

Until a panel of mediators is prepared by the District Court, the Courts referred to in Rule 4, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 5 and

is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute.

SCHEDULE-1

..JUDGESHIP MEDIATION AND CONCILIATION CENTER

(CONSENT TO BE FURNISHED FOR EMPANELMENT)

NAME:

FATHER'S NAME:

ADDRESS:

(a) OFFICE:

(b) RESIDENCE:

TELEPHONE NO. (a) OFFICE:

(b) RESIDENCE:

ACADEMIC QUALIFICATIONS:

PROFESSIONAL QUALIFICATIONS & EXPERIENCE:

TECHNICAL EXPERIENCE, IF ANY:

SPECIAL QUALIFICATION OR EXPERIENCE IN MEDIATION:

ENROLMENT NUMBER WITH DATE AND THE BAR COUNCIL:

I.....,do hereby submit that I am willing to be empanelled as a mediator in.....judgeship and give my consent for my empanelment under Rule 4 of the Uttar Pradesh Civil Procedure Mediation Rules, 2007. I assure that during my term as mediator, I shall follow ethics as prescribed in Rule 28 of the said Rules while performing my duties as mediator.

Full Signature

Date

SCHEDULE - 2

..JUDGESHIP MEDIATION AND CONCILIATION CENTER

(CASE SHEET FURNISHED BY THE COURT TO THE CENTRE)

1. Date of Referral:
2. Name of the Presiding Officer referring the matter:
3. Case Number:
4. Category of Case:
5. Name of Parties:
6. Contact information of Parties:
7. Names and Contact Information of Counsel
8. List of documents Annexed to case Sheet:

(To be prepared and signed by the Reader of the Court concerned)

SCHEDULE - 3

.....JUDGESHIP MEDIATION AND CONCILIATION CENTER

(WRITTEN NOTICE TO THE PARTIES AND THEIR COUNSEL)

1. The referral of the case by the Court for mediation.
2. The date of referral.
3. Information about the process of mediation.
4. Name of the mediator.
5. That the parties may object to the mediator appointed giving their reasons for doing so within a fixed time.
6. Date and time of mediation session.

(TO BE PREPARED, SIGNED AND ISSUED BY THE SENIOR MOST CLERK IN THE CENTRE IN CONSULTATION WITH THE MEDIATOR)

SCHEDULE - 4

.....JUDGESHIP MEDIATION AND CONCILIATION CENTER
(INFORMATION SHEET FURNISHED TO THE PARTIES)

Case Name:

Case Number:

Name of Mediator:

1. This mediation is being conducted with the purpose of arriving at an acceptable resolution by setting the dispute in a co-operative manner. Parties should participate in this in good faith.

2. The Mediator will inform the parties of the time and date of the mediation sessions.

3. (a) The parties residing in India agree to

   (i) attend the mediation sessions personally; or

   (ii) be represented at the mediation sessions by their constituted attorney with authority to settle the dispute.

   (Strike off whichever is not applicable)

(b) The parties not resident in India agree to be represented at the mediation sessions by their constituted attorney or Counsel with authority to settle the dispute.

4. The Mediator shall respect the confidentiality of information that the parties request him/her to keep confidential.

5. The parties shall not rely or introduce as evidence in any proceedings the view, suggestions or admissions expressed or made by a party, the proposals made by the Mediator and indication of acceptance by a party during the course of the mediation proceedings.

6. The parties agree not to call the Mediator as a witness or as an expert in any proceeding relating in any way to the dispute, which is the subject of mediation.

7. If the parties reach a settlement, they shall sign an agreement to that effect and this shall be filed into the Court.

8. The entire process is a voluntary process and until parties reach settlement and sign an agreement, any party is free to opt out of the process.

9. If the parties fail to reach settlement, the matter shall be referred back to the Court.

(To be signed & dated by each party and the learned Counsel identifying them.)

SCHEDULE - 5

.....JUDGESHIP MEDIATION AND CONCILIATION CENTER
(SETTLEMENT AGREEMENT)

This SETTLEMENT AGREEMENT entered into on

.....between.....identified by

Sri.....,Advocate and .....identified by

Sri.....,Advocate

WHEREAS

1. Disputes and differences had arisen between the parties hereto and ..... (case no.) was filed on .....(date of institution) before .....(give particulars of the court concerned)
2. The matter was referred to mediation vide an order dated .....passed by .....(name and designation of the Presiding Officer concerned)
3. The parties agreed that Sri .....(name of the Mediator) would act as their Mediator.
4. Meetings were held during the process of Mediation from .....to .....and the parties have with the assistance of the Mediator voluntarily arrived at an amicable solution resolving the above-mentioned disputes and differences.
5. The parties hereto confirm and declare that they have voluntarily and of their own free will arrived at this Settlement/Agreement in the presence of the Mediator.
6. The following settlement has been arrived at between the Parties hereto:

   A.....

B.....

C.....

7. By signing this agreement the parties hereto state that they have no further claims or demands against each other with respect to .....(Case No.) and the parties hereto through the process of Mediation in this regard have amicably settled all disputes and differences.

Parties Full Signature with date

Counsel's Full Signature with date:

(Additions/alterations in the form as per requirement are permitted)

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2- ;g ekeyk U;k;ky;---------- -----ds vkns'k fnukafdr ----------

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(a) ----------

(b) ----------(c)----------
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SCHEDULE - 6

.....JUDGESHIP MEDIATION AND CONCILIATION CENTER
REPORT TO COURT

1. Court Case No.:
2. Referred by:
3. Date of Referral:
4. Mediators: (a)
   (b)
   (c)
5. Date(s) of Mediation Sessions:
   (i) Mediation completed. Agreement enclosed
   Or
   (ii) Mediation completed. No agreement.
   Or
   (iii) Parties not willing for the mediation.
6. The parties have been directed to appear before the Court on.....

Signed by Mediator(s):

Dated:

* * *

HIGH COURT OF JUDICATURE AT ALLAHABAD

District & Outlying Courts of Uttar Pradesh					
S. N.	**District Court**	**Outlying Courts & Courts Sitting at Headquarters**	**District Judge**	**Administrative Judge**	**Email Address**
1.	Agra	Fatehabad	Mr. Rajesh Chandra-I	Hon'ble Mr. Justice Mirza Imtiyaz Murtaza	dcagr@allahabadhighcourt.in
2.	Aligarh	Atrauli	Mr. Ashok Kumar Rastogi-I	Hon'ble Mr. Justice Vimlesh Kumar Shukla	dcali@allahabadhighcourt.in
3.	Allahabad		Mr. Nirvikar Gupta	Hon'ble Mr. Justice Janardan Sahai	dcall@allahabadhighcourt.in
4.	Ambedkar Nagar at Akbarpur	Tanda	Mr. Ashok Pal Singh	Hon'ble Mr. Justice Devi Prasad Singh	dcamb@allahabadhighcourt.in
5.	Auraiya	Bidhuna	Mr. Lalta Prasad-III	Hon'ble Mr. Justice A K Roopanwal	dcaur@allahabadhighcourt.in
6.	Azamgarh	Mohammadabad	Mr. Vimal Kishore	Hon'ble Mr. Justice Rakesh Tiwari	dcaza@allahabadhighcourt.in
7.	Baghpat		Mr. Ram Nath	Hon'ble Mr. Justice S C Nigam	dcbag@allahabadhighcourt.in
8.	Bahraich	Kaisarganj	Mr. Bashisth Prasad Shukla	Hon'ble Mr. Justice S N Shukla	dcbah@allahabadhighcourt.in
9.	Ballia		Mr. Virendra Singh	Hon'ble Mr. Justice Tarun	dcbal@allahabadhighcourt.in

				Agarwala	
10.	Balrampur	Utraula	Mr. Swaroop Narain Dwivedi	Hon'ble Mr. Justice Amar Nath Varma	dcblr@allahabadhighcourt.in
11.	Banda	Atarra	Mr. Subhash Chandra Mangla	Hon'ble Mr. Justice V D Chaturvedi	dcban@allahabadhighcourt.in
12.	Barabanki	Ramsanehighat, Haidergarh	Mr. Piyush Kumar	Hon'ble Mr. Justice Alok Kumar Singh	dcbri@allahabadhighcourt.in
13.	Bareilly	Aonla, Baheri	Mr. Shiva Kailash Pandey	Hon'ble Mr. Justice Ashok Bhushan	dcbry@allahabadhighcourt.in
14.	Basti	Khalilabad	Mr. Kaleem Ullah Khan	Hon'ble Mr. Justice S S Kulshrestha	dcbas@allahabadhighcourt.in
15.	Bhadohi at Gyanpur		Mr. Narendra Kumar Rajoria	Hon'ble Mr. Justice Ajai Kumar Singh	dcbha@allahabadhighcourt.in
16.	Bijnor	Nagina, Nazibabad	Mr. Subhash Chandra Agarwal	Hon'ble Mr. Justice Devendra Pratap Singh	dcbij@allahabadhighcourt.in
17.	Budaun	Bisauli, Sahaswan, Gunnaur	Mr. Nalin Mohan Lal	Hon'ble Mr. Justice Rakesh Sharma	dcbud@allahabadhighcourt.in
18.	Bulandshahar	Khurja, Anoopshahar	Mr. Arun Kumar Jain	Hon'ble Mr. Justice S P Mehrotra	dcbul@allahabadhighcourt.in
19.	Chandauli	Chakia	Mr. Dina Nath-II	Hon'ble Mr. Justice R K Rastogi	dccha@allahabadhighcourt.in
20.	Chitrakoot	Mau	Mr. Vijai Prakash Pathak	Hon'ble Mr. Justice Anjani	dcchi@allahabadhighcourt.in

				Kumar	
21.	Deoria		Mr. Kashi Nath Pandey	Hon'ble Mr. Justice Vineet Saran	dcdeo@allahabadhighcourt.in
22.	Etah	Kashganj	Mr. Ashok Kumar Chaudhari	Hon'ble Mr. Justice Arun Tandon	dceth@allahabadhighcourt.in
23.	Etawah		Mr. Hriday Narayan Mishra	Hon'ble Mr. Justice S K Jain	dcetw@allahabadhighcourt.in
24.	Faizabad		Mr. Rajendra Prasad Shukla-I	Hon'ble Mr. Justice Sanjay Misra	dcfai@allahabadhighcourt.in
25.	Farukkhabad	Kayamganj	Mr. Sarvesh Kumar Pandey	Hon'ble Mr. Justice G P Srivastava	dcfar@allahabadhighcourt.in
26.	Fatehpur	Khaga	Mr. Anil Kumar Srivastava-III	Hon'ble Mr. Justice Sabhajeet Yadav	dcfat@allahabadhighcourt.in
27.	Firozabad	Shikohabad	Mr. Yogesh Chandra Gupta	Hon'ble Mr. Justice Ravindra Singh	dcfir@allahabadhighcourt.in
28.	Gautambuddha Nagar		Mr. Syed Nazim Husain Zaidi	Hon'ble Mr. Justice Dilip Gupta	dcgau@allahabadhighcourt.in
29.	Ghaziabad	Hapur, Garhmukteshwar	Mr. Radhey Shyam Chaubey	Hon'ble Mr. Justice Anjani Kumar	dcgzd@allahabadhighcourt.in
30.	Ghazipur	Mohammadabad, Saidpur	Mr. Ashok Srivastava	Hon'ble Mr. Justice K N Ojha	dcgzp@allahabadhighcourt.in

31.	Gonda		Mr. Chandra Nath Misra	Hon'ble Mr. Justice Abdul Mateen	dcgon@allahabadhighcourt.in
32.	Gorakhpur	Bansgaon	Mr. Amar Sinha	Hon'ble Mr. Justice R K Agrawal	dcgor@allahabadhighcourt.in
33.	Hamirpur	Rath, Maudaha	Mr. Anil Kumar Agarawal	Hon'ble Mr. Justice Sushil Harkauli	dcham@allahabadhighcourt.in
34.	Hardoi		Mr. Shri Kant Tripathi	Hon'ble Mr. Justice Allah Raham	dchar@allahabadhighcourt.in
35.	Hathras	Sadabad	Mr. Vinay Kumar Mathur	Hon'ble Mr. Justice M K Mittal	dchat@allahabadhighcourt.in
36.	Jalaun at Orai	Kalpi, Konch, Jalaun	Mr. Surendra Kumar	Hon'ble Mr. Justice R N Misra	dcjal@allahabadhighcourt.in
37.	Jaunpur	Sahaganj	Mr. Shiva Nand Misra	Hon'ble Mr. Justice S K Singh	dcjau@allahabadhighcourt.in
38.	Jhansi	Garotha, Moth, Mauranipur	Mr. Sayeed Ahmad Siddiqui	Hon'ble Mr. Justice Amar Saran	dcjha@allahabadhighcourt.in
39.	Jyotibaphule Nagar	Hasanpur	Mr. Nand Lal Agarwal	Hon'ble Mr. Justice Barkat Ali Zaidi	dcjyo@allahabadhighcourt.in
40.	Kannauj	Chhibramau	Km. Manju Nigam	Hon'ble Mr. Justice Pankaj Mithal	dcknj@allahabadhighcourt.in
41.	Kanpur Dehat	Bhognipur	Mr. Ram Lakhan Kesharwani	Hon'ble Mr. Justice Shiv Shanker	dcknd@allahabadhighcourt.in
42.	Kanpur Nagar		Mr. Subhash	Hon'ble Mr. Justice	dcknr@allahabadhighcourt.in

			Chandra-I	Sushil Harkauli	
43.	Kaushambi		Mr. Suresh Kumar Srivastava	Hon'ble Mr. Justice Shiv Charan Sharma	dckau@allahabadhighcourt.in
44.	Kushi Nagar at Padrauna	Kasia	Mr. Subodh Kumar	Hon'ble Mr. Justice S U Khan	dckus@allahabadhighcourt.in
45.	Lakhimpur Kheri	Mohammadi	Mr. Raj Mani Chauhan	Hon'ble Mr. Justice Rajiv Sharma	dclak@allahabadhighcourt.in
46.	Lalitpur	Mehrauni	Mr. Virendra Vikram Singh	Hon'ble Mr. Justice R K Agrawal	dclal@allahabadhighcourt.in
47.	Lucknow	Malihabad, Mohan Lal Ganj	Mr. Ashok Kumar Mathur	Hon'ble Mr. Justice K K Misra	dcluc@allahabadhighcourt.in
48.	Maharajganj	Pharenda	Mr. Mohd. Tahir	Hon'ble Mr. Justice Vikram Nath	dcmhr@allahabadhighcourt.in
49.	Mahoba	Charkhari	Mr. Sudhir Kumar Saxena	Hon'ble Mr. Justice V C Misra	dcmhb@allahabadhighcourt.in
50.	Mainpuri		Mr. Ramesh Shanker	Hon'ble Mr. Justice Sudhir Agarwal	dcmai@allahabadhighcourt.in
51.	Mathura	Chhata	Mr. Yogendra Kumar Singhal	Hon'ble Mr. Justice Krishna Murari	dcmat@allahabadhighcourt.in
52.	Mau		Mr. Mushaffey Ahmad	Hon'ble Mr. Justice Shishir Kumar	dcmau@allahabadhighcourt.in
53.	Meerut	Mawana, Sardhana	Mr. Brahma	Hon'ble Mr. Justice Sunil	dcmee@allahabadhighcourt.in

			Nand Shukla	Ambwani	
54.	Mirzapur	Chunar	Mrs. Sandhya Bhatt	Hon'ble Mr. Justice A P Sahi	dcmir@allahabadhighcourt.in
55.	Moradabad	Thakurdwara, Sambhal, Chandausi	Mr. Suresh Chandra Chaurasia	Hon'ble Mr. Justice K S Rakhra	dcmor@allahabadhighcourt.in
56.	Muzaffarnagar	Kairana, Budhana	Mr. Ram Das Nimesh	Hon'ble Mr. Justice Prakash Krishna	dcmuz@allahabadhighcourt.in
57.	Pilibhit		Mr. Ram Autar Singh-II	Hon'ble Ms. Justice Bharati Sapru	dcpil@allahabadhighcourt.in
58.	Pratapgarh	Kunda	Smt. Jaya Shree Tewari	Hon'ble Mr. Justice Abdul Mateen	dcpra@allahabadhighcourt.in
59.	Raebareli	Dalmau	Mr. Pitamber Singh	Hon'ble Mr. Justice D V Sharma	dcrae@allahabadhighcourt.in
60.	Rampur		Mr. Narendra Kumar Jain	Hon'ble Mr. Justice Vijay Kumar Verma	dcram@allahabadhighcourt.in
61.	Saharanpur	Deoband	Km. Ujjwala Garg	Hon'ble Mr. Justice Rajes Kumar	dcsah@allahabadhighcourt.in
62.	Sant Kabir Nagar*		Mr. Tanveer Ahmad Siddiqui	Hon'ble Mr. Justice S K Singh	dcsan@allahabadhighcourt.in
63.	Shahjahanpur	Tilhar, Puwan	Mr. Rajeshwar Prasad Pandey	Hon'ble Mr. Justice V C Misra	dcsha@allahabadhighcourt.in
64.	Shravasti		Mr. Ramesh Chandra-	Hon'ble Mr. Justice K K Misra	dcshr@allahabadhighcourt.in

			I		
65.	Siddharth Nagar	Bansi	Mr. Vishnu Chandra Gupta	Hon'ble Mr. Justice Vinod Prasad	dcsid@allahabadhighcourt.in
66.	Sitapur	Biswan, Mahmoodabad	Mr. Shyam Shankar Tiwari	Hon'ble Mr. Justice S S Chauhan	dcsit@allahabadhighcourt.in
67.	Sonbhadra	Anpara, Duddhi	Mr. Mahendra Dayal	Hon'ble Mrs. Justice Saroj Bala	dcson@allahabadhighcourt.in
68.	Sultanpur	Kadipur, Musafirkhana	Mr. Chandra Bhal Srivastava	Hon'ble Mr. Justice Amar Nath Varma	dcsul@allahabadhighcourt.in
69.	Unnao	Purva	Mr. Dinesh Gupta	Hon'ble Mr. Justice Ran Vijai Singh	dcunn@allahabadhighcourt.in
70.	Varanasi		Dr. Chandra Dev Rai	Hon'ble Mrs. Justice Poonam Srivastava	dcvar@allahabadhighcourt.in

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