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Code of Civil Procedure

S. 10 – Stay of suit – Earlier suit pending before revenue court – Proceedings of subsequent suit instituted in civil court cannot be stayed

The word 'suit' or 'court' referred to in S. 10 of Code is in context to a suit instituted in the civil court only in accordance with S. 9 of Code and any proceedings or suit pending in a different forum, other than, the civil court including a revenue court under the provisions of any other law would not attract the bar of S. 10 of Code. In short, S. 10 of Code gets attracted only where the two suits are of civil nature and are before the same Civil Court or any Civil Court in India provided other conditions are also satisfied.

In the instant case the proceedings were before the two different forums i.e., the revenue court and the Civil Court. The revenue court is seized with the declaration of the rights/status of the parties in respect of the land in dispute whereas the Civil Court is only concerned as to whether the plaintiff of the suit is entitled to injunction which is generally required to be decided on the basis of the possession of the parties irrespective of their title or status over the land in dispute. Thus, as the previously instituted suit between the parties was pending in the revenue court, the proceedings of a subsequent suit instituted in the Civil Court would not be liable to be stayed by invoking the provisions of S. 10 of Code. **(Krishna Bihari Mishra v. ADJ, Kaushambi; 2013 (6) ALJ 193)**

S. 11 – Bar of res-judicata – Applicability

In the present case the respondent's case before the Additional Principal Judge, Family Court was that circumstances have substantially changed under which the respondent is claiming custody of the children. There is material on the record which indicate that respondent got a job of lecturer in Government Girls Inter College, Bareilly in the end of the year 2011 which was a changed circumstance on the basis of which respondent has claimed for custody. It is on the record that at the time when compromise order was passed for custody on 29th October, 2011, the respondent was not receiving any earning and after she being appointed as Lecturer, she was getting salary of Rs.32,000/- per month. Court are of the view that getting a job of lecturer in girls' institution by the respondent and earning of about Rs.32,000/- per month was relevant change in the circumstances on the basis of which respondent could have very well filed the application for custody. In the Application No. 19 of 2012, the respondent has also come with the case that minor is not getting good education and she is not being well looked after. It was further stated by the respondent that at the time when compromise was entered, she was not in-a fit state of mind, he

husband having died less than a year from the aforesaid date.

There is one more reason on account of which Court are of the view that Application No. 19 of 2012 filed by the respondent cannot be held to be barred by Section 11 of C.P.C. or principle of estoppel. There are series of judgments taking the view that the order of custody of a child under the provisions of the 1890 Act are temporary in nature and are in the nature of interlocutory order which cannot be held to be final adjudication. The appointment of guardian to one person and custody of child given at one set of circumstances may no longer be beneficial to the welfare of the child and the custody and guardianship can be changed from time to time looking to the relevant facts and circumstances. In view of the foregoing discussions, Court is of the view that application filed by the respondent could not have been barred by res-judicata or estoppel and the respondent had every right to maintain the application and pray for custody. **(Pushpa v. Anshu Chaudhary; 2013 (6) ALJ 638)**

S. 24(5) – Transfer of cases – Consideration of

The question which arises for consideration is "whether in the facts and circumstances of the present case, the District Judge had jurisdiction under Section 24(5) of the Code of Civil Procedure to transfer the instant Suit No. 2163 of 2009 or the plaint ought to have been returned to the plaintiff under Order VII Rule 10 of the Code of Civil Procedure by the Civil Judge (Jr. Div.) for it to be presented before the Court of Competent pecuniary jurisdiction". The provision of sub-section 5 of S. 24 of the Code of Civil Procedure is relevant which provides that the suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it. The provision is quite clear that if a Court has no jurisdiction to try a suit the District Judge may at any stage transfer it.

The provision of Order VII of the Code of Civil Procedure relate to a plaint. Order VII Rule 10 of the Code of Civil Procedure provides for return of the plaint for being presented to the Court in which the suit should have been instituted. Order VI of the Code of Civil Procedure deals with the pleading which shall mean plaint or written submission. Admittedly in pleadings a party cannot approbate and reprobate and Order VI Rule 17 of the Code of Civil Procedure provides for amendment of plaint.

In the present case by the amendment in valuation of the suit property it has taken the suit out of jurisdiction of the Civil Judge (Jr. Div.). Hence the proper course would be either to allow the amendment and then return the amended plaint to the plaintiff for presentation before the Court having pecuniary jurisdiction. If any other procedure is adopted then the question

under such circumstances would arise whether the suit was properly instituted. In the present case it is the plaintiff who has applied for amendment of valuation having earlier undervalued the suit at the time of its institution. Therefore, when valuation of the suit is to be determined on the basis of the plaint by the Court then the amendment application increasing the valuation of the suit would oust the jurisdiction of the Court where the suit was firstly instituted. It is under these circumstances that it has to be seen whether the suit was properly instituted in the Court of competent jurisdiction. The provision of Order VII Rule 10 of the Code of Civil Procedure has provided for the plaint to be returned to be presented to the Court in which the suit should have been instituted hence in the present case in view of the amended valuation of the suit it should have been instituted in the Court of Civil Judge (Sr. Div.) but it was earlier instituted in the Court of Civil Judge (Jr. Div) but because the amendment would relate back hence it was not a suit presented to the proper Court in which the suit should have been instituted. As soon as the suit was beyond the jurisdiction of the Court the provisions of Order VII Rule 10 CPC came into play.

The District Judge under Section 24(5) of the Code of Civil Procedure can transfer a suit properly instituted from a Court which has no jurisdiction to try it. Such a suit pending before a Court which has no jurisdiction to try it can be transferred by the District Judge but it would be in reference to a suit presented before a Court where it is properly instituted. When the suit is presented before a Court which would have no jurisdiction to try the suit then it would be a suit not properly instituted. The jurisdiction under Section 24(5) of the Code of Civil Procedure conferred on the District Judge would be available only in a suit properly instituted in the competent Court and it would not be available over a suit not properly instituted.

The provision of Order VII Rule 10 CPC are quite specific and deal with a circumstance which has arisen in the present proceedings where when the amendment was allowed to increase the valuation of the suit it related back to the date of institution of the suit before a Court which had no jurisdiction to try the suit and neither the pleadings were completed nor evidence was led hence it was not a case of transfer to proceed from the stage after evidence had been led. The plaint having not been properly presented in the Court where the suit ought to have been instituted was required to be returned to the plaintiff for presentation before the competent Court having pecuniary jurisdiction.

Therefore, in the present case the procedure adopted by the plaintiff by filing the Transfer Application before the District Judge to transfer the case because valuation has increased and the District Judge passing an order on the

transfer application of the plaintiff under Section 24 CPC was not in accordance with the procedure prescribed under the statute. It is settled law that when the statute provides a thing to be done in a particular manner then that thing has to be done in the manner prescribed. The District Judge could not exercise his jurisdiction under Section 24(5) of the Code of Civil Procedure by ignoring the provision of Order 7, Rule 10 of the Code of Civil Procedure. **(Vidya Shanker Tiwari Vs. Surya Kant Tiwari; 2013 (5) AWC 4969)**

S. 151 - Inherent powers – Scope - S. 151 is not substantive provision to get any relief of any kind - It enables Court to overcome failure of justice - Such power however cannot be used in contravention of or by ignoring specific provision

Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited. The consolidation of suits has not been provided for under any of the provisions of the Code, unless there is a State amendment in this regard. Thus, the same can be done in exercise of the powers under Section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of mis-joinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non- consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order IX CPC to set aside an ex parte decree.

An ex-parte decree passed due to the non appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an

appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the Court. An application under Section 151 CPC will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of Order IX CPC may not be attracted, and in such a case the Court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a Court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of Court, the injustice so done must be remedied, in accordance with the principle of *actus curia neminem gravabit* - an act of the Court shall prejudice no person. **(Ramji Gupta & Anr. v. Gopi Krishan Agrawal (D) & Ors.; AIR 2013 SC 3099)**

O. 6 R. 18 – Amendment of Pleadings – Consideration of

Order 6 Rule 18 of the Code of Civil Procedure on grant of permission to amend the pleadings, two conditions have been laid down; one amendment has to be made within time limit granted by the Court or in case no limit is fixed, within 14 days from the date of order and in the case of failure, it cannot be amended, unless time granted by the Court. The putting of the conditions for carrying out an amendment pursuant to the Court's order, appears to be directory in character as the rule has been framed to carry out the amendment in a particular manner. The amendment is always made to improve the pleadings and improvement of pleadings clears the way of decision making process. Procedural laws are enacted to facilitate the process of getting justice from the Court, therefore, in my considered opinion, the procedure contained under Rule 18, Order VI are directory in character and not mandatory. **(Jagdish Vs. Deputy Director of Consolidation and Another; 2013 5 AWC 4639 (All)**

O.8, R.1 Proviso – Written statement – Purpose of establishment of Court to impart substantial justice to parties and not to scuttle justice on technicalities

From the bare reading of the provisions it would transpire that written statement is to be filed within thirty days from the date of service of summons. According to the proviso to this rule, in case the defendant fails to file written statement within thirty days, it may be filed after extension of the time granted by the Court but not later than ninety days from the date of service of summons. Here in this case according to the petitioner, ninety days have yet not expired. Otherwise also, the provisions contained under Rule 1 of Order 8 fixes

the period for filing the written statement by a party. It does not prohibit the Court to extend the time for filing written statement under compelling reasons, if the same could not be filed within the time framed of either 30 days or ninety days as provided under the proviso to Rule 1. The purpose of establishment of the Courts is to impart substantial justice to the parties and not to scuttle the justice on technicalities.

The Apex Court in the case of Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others; 1987(13) ALR 145(SC), has held that judiciary is respected not on account of its power to legalize injustice on technical ground but because it is capable of removing injustice and is expected to do so. In State of U.P. v. Mohd. Nooh; AIR 1958 SC 86, the Apex Court has observed that 'justice should be administered in our Courts in common sense, liberal way and be broad based on human values rather than on narrow and restricted considerations hedged round with hair splitting technicalities.'

The order and rules framed under the C.P.C. are like as path way to achieve the end of justice. The Code prescribes the methods and way to get the justice from a Court of law. It only prescribes the procedure but the end of justice normally cannot be achieved without exchange of pleadings and unless the conduct of the party seeking time to file written statement is malafide, the time should not normally be refused and the inconvenience caused to the Court or the other side be compensated by imposing cost. The power to grant or refuse time is although discretionary but discretion is to be exercised in judicial manner. Here the petitioners have for the first time appeared before the Court on 20.12.2012 and on 10.1.2013 (the first dated fixed), the Court restricted the period upto 1.2.2013 for filing written statement that too after imposing cost of Rs. 100/- while granting adjournment.

The apex Court while interpreting the provisions contained under Rule 1 of Order VIII in Smt. Rani Kusum v. Smt. Kanchan Devi and others; 2005(99) RD 616 (SC)=AIR 2005 SC 3304, has observed as under:

> "Order VIII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the Court and also does not specifically takes away the power of the Court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants

adopting dilatory tactics, delaying the disposal of case causing inconvenience to the plaintiffs and petitioners approaching the Court for quick relief and also to the serious inconvenience of the Court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

Though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words – "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. The power of Court to extend time under Order VIII, Rule 1, is not completely taken away by amendment made to Order VIII, Rule 1, however, departure therefrom would be by way of exception."

This view has again been taken by the Apex Court in the case of Salem Advocate Bar Association, Tamil Nadu v. Union of India; AIR 2005 SC 3353= 2005(34) AIC 249 (SC), where the Apex Court has observed as under:

"21. The use of the word 'shall' in Order VIII, Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provisions, support can also be had from Order VIII, Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce

judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word shall; the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII, Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the Court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII, Rule 1. There is no restriction in Order VIII, Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII, Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the Legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII, Rule 1, section 39. "

The same view has been taken in Kailash v. Nanhku and others; AIR 2005 SC 2441.

In view of foregoing discussions and considering the facts and circumstances of the case, the Court is of the considered opinion that the learned prescribed authority has erred in passing the impugned order, therefore, it cannot be sustained in the eye of law. It is hereby quashed. The writ petition succeeds and is allowed. The petitioners are granted two weeks time to file written statement from the date of receipt of certified copy of the order of the Court. The other side is compensated by imposing Rs.2500/- cost upon the petitioners which is to be paid by the petitioners, to the contesting respondents, while filing the written statement. (**Smt. Muneshra Devi v. Smt. Chandrawati Devi @ Chandra Devi; 2013(121) RD 436)**

O. 9. R. 13, S. 151 – Setting aside of ex parte decree - Stranger to suit cannot apply to set aside such decree - Inherent powers also cannot be exercised to give relief to stranger - Inherent powers cannot be used to re-open settled matters

Person who was never party to the suit cannot file application under O. 9, R. 13 for setting aside an ex parte decree. Court cannot even in exercise of its inherent powers grant such relief to a stranger. Section 151 CPC is not a substantive provision that confers right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The Court can do justice between the parties before it. Similarly the inherent powers of the Court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order IX, CPC to set aside an ex parte decree.

An ex-parte decree passed due to the non appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the Court. An application under S. 151 CPC will be maintainable, in the event that an ex-parte order has been obtained by fraud upon the Court or by collusion. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who in fact was dead at the time that the order was passed. Thus, where a Court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of Court, the injustice so done must be remedied, in accordance with the principle of *actus curia neminem gravabit* - an act of the Court shall prejudice no person. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of the CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised. **(Ramji Gupta & Anr. v. Gopi Krishan Agrawal (D) & Ors.; AIR 2013 SC 3099)**

O.23, R.1 and 13 – Compromise Decree – Meaning and scope

This term "Compromise" has been defined in the Law Lexicon, the Encyclopedic Law Dictionary, 2nd Edition Reprint 2007 by P. Ramanatha Aiyar, page 373 as under:

"Compromise. To adjust by mutual concession; to settle without resort

> to the law: to compound. (as noun) An "adjustment of matters in dispute by mutual concessions." "An agreement between the parties to a controversy for a settlement of the same." (Abbott.) "A settlement of differences by mutual concessions." "The mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counter-claim." (Anderson Law Dict.) "An agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon." (Bouvier.)"

It can thus safely be said that a compromise is an agreement between two or more parties as a settlement of matters in dispute. Privy Council in Trigge v. Lavallee; (1863) 15 PC 271, while construing the term "compromise" held that it is an agreement to put an end to disputes and to terminate or avoid litigation. In such cases, consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim.

The above definition of "compromise" covers the cases wherein about the title of property, there may be a dispute but in respect to property whereof there was no doubt about the ownership of parties that it is rested in one or more of them, if it is brought within the scope of family arrangement, and is allotted to one of the other parties. It may result qua that property that there is a transfer of ownership. In this contest, in Khunni Lal v. Gobind Krishna; (1911) 33 All 356, the Court said, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement.

Following this, in **Hiran Bibi v. Sohan Bibi; AIR 1914 P.C. 44,** their Lordships said:

> "A compromise of this character is, in no sense of the word, an alienation by a limited owner of the family settlement in which each party takes a share of the family property by virtue of the independent little which is, to that extent and by way of compromise, admitted by the other parties."

The question relating to "family arrangement" came to be considered by a Full Bench of this Court in **Ramgopal v. Tulshi Ram and Anr.; AIR 1928 All 64**1 and two questions considered therein were:

> "(1) Does the arrangement amount to a contract

(2) Was the matter "reduced to the form a document?"

The Court observed that it has to determine, whether by a family arrangement dealing with immovable property, there is any transfer of ownership in certain property, for the ownership of certain other property. The Full Bench said that in the usual type of family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to one of the other parties, there is no transfer of ownership as such, is necessary to bring the transaction within the definition of "exchange" in Section 118 of Transfer of Property Act, 1882. The Court said that, therefore, that a binding family arrangement of this type may be made orally. Thereafter, the Court referring to Section 91 of Evidence Act, 1872 and 17 and 49 of Act, 1908 held that a contract, if reduced in the form of a document, where the value of the subject-matter is Rs.100 or upwards, its registration is compulsory. (**Raj Gopal Sharma v. Krishna Gopal Sharma; 2013 (3) ARC 831)**

O. 37, R. 4

Whether, Application filed by Appellant for setting aside decree was justified - Held, Application filed by Appellant for setting aside decree did not disclose any special circumstance in the order under Order XXXVII Rule 4 of CPC. It was stated in affidavit that amount was paid in terms of order passed by Company Judge and proper instructions could not be given to Advocate engaged for defending suit. Therefore, it was not possible to find any fault with view taken by Division Bench of High Court on tenability of Appellant's prayer for setting aside decree. The interest was charged as per the terms of the agreement and the Appellant had always paid the bills in which interest was claimed. Appeal dismissed. **(TVC Skyshop Ltd. Vs. Reliance Communication and Infra. Ltd.; 2013 5 AWC 4589 SC)**

O. 39 – Injunction – Grant of

It is trite law that before passing an order of injunction the Court must take into consideration three relevant factors viz. Prima facie case, balance of convenience and irreparable injury. The Courts while issuing permanent or temporary injunctions, must take utmost care and act in conservative manner while granting relief except in situations which so clearly call for it so as to make its refusal work real and serious hardship and injustice. If the Court is satisfied that the circumstances of the case do not entitle the grant of a perpetual injunction, a temporary injunction has perforce to be refused. One of the pre-requisites for the grant of injunction is that the party seeking relief must establish the right that he claims. If a right is being asserted which prima facie

is not established or is not justiciable, no injunctive relief can be given either temporarily or permanently.

The appellants have failed to make out any prima facie case for ad interim injunction. The balance of convenience also does not lie in their favour as the agency given to them by the defendant has already been revoked. The plaintiffs will not suffer any irreparable injury if ad interim injunction is not granted, while the defendant will be deprived of enjoyment of its own property which has not been transferred to the plaintiffs in any manner whatsoever. In these circumstances, the trial Court has not at all erred in rejecting the plaintiffs' application for ad interim injunction. The appeal sans merit and is accordingly dismissed. **(Rajeev Gambhir and Others Vs M/s. Jindal Poly Films Ltd. and Others; 2013 (5) AWC 5430)**

O.39, R.1 – Temporary injunction - Non-appearance of defendant - Effect - When no one appears for defendant for long time court must either reject temporary injunction application on merit or consider desirability of granting ad interim injunction

It is reported that 13.5.2013 is the next date fixed. On the said date if no one appears for the defendant then the learned Civil Judge (JD) shall hear the plaintiff and either reject temporary injunction application or consider the desirability of granting ad interim injunction to the plaintiff. Learned Presiding Officer shall be careful in future. If at the time of filing of the suit ad interim injunction is not granted and notices are issued (which shall always be both ways) and no one appears for the defendant on the next date then court must either reject temporary injunction application on merit or consider the desirability of granting ad-interim injunction.

Learned District Judges particularly of the district in question i.e. Jaunpur are also directed to impress upon the Presiding Officers of the courts of Civil Judge (Junior Division) and (Senior Division) to adopt balanced approach in the matters of temporary injunction. If ad interim injunction is granted then plaintiff must not be permitted to delay for a single day. However, if notice is issued and ad interim injunction is not granted then defendant must not be permitted to delay and in case defendant does not appear then court shall either reject temporary injunction application on merit or consider the desirability of granting ad interim injunction. Let this case be treated as an illustrative case. **(Usha Devi & anr. v. Civil Judge (JD), Jaunpur & ors.; 2013 (5) ALJ 501)**

O.43, Rr 1(r), 1, 2, 3, & O. 39 - Appeal - Maintainability – Order issuing notices to defendants instead of granting or refusing ex parte injunction in favour of plaintiff is order under provision of O.39, R.3 not appealable

under O. 43, R. 1(r)

In the instant case, what the trial Court did is that it neither passed an ex parte injunction in favour of the plaintiff nor refused to grant it. The trial Court on the basis of material placed before it opined that ex parte there appears to be no prima facie case in favour of the plaintiff so without notice to the defendants it would not be just and proper to grant an ex parte temporary injunction. Therefore, the trial Court chose to proceed under Rule 3 of Order 39 of the Code.

> In Lakhai v. Ram Niwas; AIR 1987 All 345, it was held that (para 7): "The mere order issuing notice on an application for grant of an injunction clearly comes under the provisions of Rule 3 of Order 39. An order under Rule 3 of Order 39 is not appealable under Order 43, Rule l(r).”

Therefore, in view of the legal proposition referred to above, the Court hold that the impugned order is an order under R. 3 of O. 39 CPC and no appeal lies against that order under O. 43, R.l(r) of the CPC. **(Amrik: Singh v. M/s. Bala Ji Rice Mills, Bandda Road, Khutar; 2013 (5) ALJ 458)**

Code of Criminal Procedure

S. 4 - Criminal Trial – Doctrine of prejudice – Unless aggrieved person makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry/result - In judging a question of prejudice, Court must act with a broad vision and look to substance and not to technicalities

Unless in a given situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/enquiry/result. In judging a question of prejudice, the court must act with a broad vision and look to the substance and not to technicalities. **(State Represented by Inspector of Police, Chennai v. N.S. Gnaneswaran; AIR 2013 SC 3673)**

S. 24(8), Proviso—Object of

The objective to be achieved by the aforesaid amendment as per proviso added in Section 24(8) of CrPC seems to extend help the victims and to give more active role in dispensation of the criminal justice and to provide active participation of the victim in the justice delivery system keeping in view the concept of fair trial enshrined under article 21 of the Constitution of India. Prior to the amendment in Section 24(8) CrPC the Apex Court in Delhi Domestic Working Women's Forum Vs. Union of India and Others reported in 1995 (1) SCC 14 felt need to issued direction to provide legal assistance to the victim of sexual assault even before the stage of trial and when the matter was at the stage of investigation.

The Apex Court also directed to prepare a list of Advocate willing to act in such type of case where the victims are the women or the victim of sexual assault. **(Lokesh Singh vs. State of UP; 2013 (83) ACC 379 (All—LB)**

Ss. 62, 63, 64—Service of summons—Mode of

In addition to service of summons by way of speed post and courier service, issuance of summons by way of certificate of posting may be better alternative. **(M/s. Mesh Trans Gears Private Ltd. vs. Dr. R. Parvathreddy; 2013 CriLJ (NOC) 585 (Kar)**

S.125 - Maintenance to wife - Income or landed properties of parents are totally insignificant and irrelevant in deciding right of wife to claim maintenance

What is contemplated under S. 125(a) of CrPC is whether the wife is able to maintain herself. The legislative intent is obviously articulated by employing the expression “herself” at the end of Section 125(a) Therefore, own

means or income of the wife alone need be taken into account, while determining right to get maintenance. However, affluent the parents, that is of no consequence at all unless and until the parental properties devolve upon the daughter**. (Smitha v. Sunil Kumar; (2013 CriLJ 4870)**

S. 125—Maintenance—Proviso of S. 125(3), CrPC does not create bar or affects in any way entitlement of the claimant to arrears of maintenance

The appellants are the wife and son of one Thangavel. By an order dated 12.01.1998 passed by the learned trial court each of the appellants have been granted maintenance @ Rs. 300/- per month w.e.f. 04.02.1993 i.e. date of filing of the application under Section 125 of the Code of Criminal Procedure (CrPC). As the respondent-husband had not complied with the order of payment, in a miscellaneous petition, i.e., C.M.P. No.566/1998 filed by the appellant, the trial court by its order dated21.07.1998 had sentenced the respondent to imprisonment. The default in payment of maintenance was for the period 4.2.1993 to 4.2.1998. On 5.2.2002 another miscellaneous application (Crl.M.P.No.394/2002) was filed by the appellants claiming maintenance for the period 4.2.1993 to 5.2.2002. The same was allowed by the learned Magistrate on 31.12.2002 against which the respondent had filed Crl. R.C.No. 620/2003. The High Court by its order dated 21.4.2004 held that as Crl.M.P. No. 394/2002 was filed on 5.2.2002, under the first proviso to Section 125(3) CrPC, the appellants were entitled to claim arrears for the period of one year preceding the date of filing of the application i.e. from 4.2.2001 to 5.2.2002. Accordingly, the High Court directed the respondent (revision petitioner before it) to pay the arrears for the aforesaid period within two months failing which it was directed that an arrest warrant would be issued against the respondent and the sentence of imprisonment earlier imposed by the learned Magistrate would come into effect.

As the aforesaid order of the High Court had curtailed the entitlement of the appellants to maintenance to a period of one year prior to the date of filing of the Crl. M.P. No. 394/2002, the appellants have filed this appeal. **(Poongodi vs. Thangavel; 2013 (83) ACC 973 (SC)**

S. 125—Maintenance—Entitlement—When not?

Section 125(4) of the Code reads as under-

> "125(4)- No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her

husband, or if they are living separately by mutual consent."

Perusal of Section 125(4) of the Code reveals that wife residing separately, by mutual consent is not entitled to maintenance. The case of the respondent is on higher pedestal. Firstly because the petitioner-got the divorce by mutual consent. Thereafter, she is residing separately by mutual consent. Secondly, she had accepted a lump sum amount of maintenance as a full and final settlement and that stands paid.

In view of the Court that after divorce by mutual consent and when the parties are residing separately and lump sum amount of maintenance as a full and final settlement has already been accepted, petitioner-wife is not entitled to maintenance. **(Vickykumar vs. State of Gujarat; 2013 CriLJ 4020)**

S. 125 – Maintenance Petition – Restoration – Magistrate had power to restore maintenance petition

The proceedings under Section 125, CrPC are not the crime related complaints, but are of primary civil nature for the benefit of destitute wives, children and parents, who are unable to maintain themselves. If the plea that the Magistrate has no power to restore the maintenance petition, is accepted, then, it would frustrate the very intent and purpose of the Legislature in providing expeditious remedy of maintenance allowance to the destitute wives, children and parents of the person concerned, which is not legally permissible. If the Magistrate has the power to order and then to set aside, the ex parte order under Section 125, CrPC in that eventuality, it cannot possibly be said that he has no jurisdiction to restore the maintenance petition. **(Lavinder Par Singh v. Mohinder Kaur; 2013 CrLJ 3701)**

S. 154—Delayed FIR—Consequence of—Creates doubt on the authenticity of the FIR version

It is the clear case of the prosecution that after the incident first of all the injured and the witnesses had gone to the hospital for medical aid in a jeep and when the doctor declared the father dead that the informant had gone to the police station leaving the corpse of the father at the hospital. Informant Pw1 further testified that only he and Rajendra Prasad had gone to the police station immediately after the news of demise of the father was divulged to them. He further deposed that after reaching the police station, he orally narrated the entire incidence to the head constable, who directed him to get himself medical aid first and get the bleeding stopped. PW-1 further deposed that he had informed the head constable regarding the demise of his father orally. He admitted that the head constable and the other police personnel at the police station had even come to the hospital. He further admitted that in the

presence of the constable a medical prescription was also prepared by the doctor. The informant and other persons stayed in hospital for half or quarter to one hour during which period the constables remained present. From these statements and circumstances what is perceived is that it all introduces an element of concoction and fabrication of FIR and into the prosecution story with the aid of police personnel and thereby creates a doubt on the authenticity of the FIR version. **(Vijay Narain Mishra vs. State of U.P.; 2013 (83) ACC 444 (All)**

S. 154(2) – FIR - Supplying copy of FIR to informant, provisions of S. 154(2) are merely directory and not mandatory

The law on this issue can be summarised that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. But the circumstance that Legislature has used the language of compulsive force is always of great relevance.

If Court applies this test to the provisions of Section 154 CrPC, Court reach inescapable conclusion that the provisions of Section 154(2) are merely directory and not mandatory as it prescribes only a duty to give the copy of the FIR. **(State Represented by Inspector of Police, Chennai v. N.S. Gnaneswaran; AIR 2013 SC 3673)**

S. 156(3)—Direction for investigation—Powers and duties of Magistrate—Magistrate directing investigation u/s. 156(3) has to apply his mind to allegations made in complaint

It is mandatory for the Magistrate to apply his mind to the allegations made in the complaint only when the allegations made in the complaint make out the ingredients to constitute an offence, the Magistrate can pass an order of investigation under S. 156(3) of CrPC. Equally, when the ingredients to constitute the offence are not made out in the complaint, the Magistrate cannot direct investigation under Section 156(3) of CrPC. Such an order if passed is without jurisdiction.

Least that is expected of the Magistrate on passing the order under Section 156 (3) of CrPC, is to satisfy himself, that taking the allegations to be true in entirety, as to whether the ingredients to constitute the offence alleged have been made out or not. The least that is expected of the Magistrate while passing an order, directing investigation is to at least give some reasons, as to why he finds substance in the complaint and as to how the complaint

discloses ingredients to constitute the offence alleged. The Magistrates ought to take into consideration that passing such mechanical orders in complaints which do not have any criminal element causes great hardships, humiliation, inconvenience and harassment to the citizens. For no reasons, the reputation of the citizens is put to stake as immediately after said order are passed, innocent citizens are termed as accused. **(State of Maharashtra Through Dy. Commissioner of Police, Nagpur vs. Shashikant S/o. Eknath Shinde; 2013 CriLJ (NOC) 568 (Bom)**

Ss. 190 and 173—Role of Magistrate in taking cognizance

The Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3), CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that they may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No. 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter. The plea that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate had no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial cannot be accepted. In other words, according to plea of appellant there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Session Judge, till the S. 319 stage was reached in the trial. Furthermore, in the event, the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same. **(Dharam Pal vs. State of Haryana; 2013 CriLJ 3900 (SC)**

S. 193—Cognizance of offences—Sessions Judge is entitled to issue summons upon case being committed to him by Magistrate

It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the

case to the Court of Sessions, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Sessions. The language of S. 193 of the Code very clearly indicates that once the case is committed to the Court of Sessions by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of S. 209 will, therefore, have to be understood as the Magistrate playing a passive role in committing the case to the Court of Sessions on finding from the police report that the case was triable by the Court of Sessions. Nor can thereby any question of part cognizance being taken by the Magistrate and part cognizance being taken by the Sessions Judge. **(Dharam Pal vs. State of Haryana; 2013 CriLJ 3900 (SC)**

Ss. 193 and 319—Power of Sessions Court to summon additional accused—Sessions Judge has power to summon additional accused u/s. 319

Sessions Courts has jurisdiction on committal of a case to it, to take cognizance of the offences, of the persons not named as offenders but whose complicity in the case would by evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein. The plea that the Sessions Court would have no alternative, but to wait till the stage under Section 319, CrPC was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session cannot be accepted. **(Dharam Pal vs. State of Haryana; 2013 CriLJ 3900 (SC)**

S. 197—Protection of sanction for prosecution available to Policemen

It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. The Supreme Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of

arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.

The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. The protection given under Section 197 CrPC has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. If the above tests are applied to the facts of the present case, the police personnel concerned must get protection given under S. 197 CrPC because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible to come to a conclusion that the protection granted under S. 197 CrPC is being used by the notice personnel in the present case as a cloak for killing the deceased in cold blood. **(Om Prakash vs. State of Jharkhand; (2013) 3 SCC (Cri) 472)**

Ss.207, 173(5) - Non-Supply of copy of complaint - Non Supply of complaint or contents thereof do not, at all violate principle of fair trial

In the present case the petitioner wants a copy of the complaint which was received by Anti-Corruption Bureau. What is to be borne in mind is that this was a complaint given by some person to the Anti-Corruption Bureau which only triggered the investigation. This complaint simply provided an information to the Anti-Corruption Bureau and is not the foundation of the case or even the FIR. In fact, Anti-Corruption Bureau, thereafter, held its own independent investigation into the matter and collected the material which was forwarded to the home Department and on that basis challan was filed in the Court pointing out the sufficient material emerged on the record as a result of the said investigation to proceed against the petitioner for offences under the

provisions of Prevention of Corruption Act read with Section 109 of the IPC.

In the final report under section 173(5), CrPC, this complaint was never forwarded. Thus, it is not a part of police report and is not in custody of the trial Court prosecution has relied upon the material which was collected during the investigation. It is not a case where some material/documents were collected by the investigating agency during the investigations which are in favor of the prosecution and the prosecution is supporting those documents. Thus, non-supply of the complaint or contents thereof do not, at all, violate the principle of fair trial and therefore, said complaint has no relevancy in the context of this prosecution and in no manner, it would prejudice the petitioner. (**Manjeet singh Khera V. State of Maharastra; (2013 CriLJ 4884)**

Ss. 216 and 228/251—Charges framed can be altered, amended, changed and any charge can be added at any stage upto the stage of conviction

Filing of charge sheet and taking cognizance has nothing to do with the finality of charges, as charges framed after the cognizance is taken by the court, can be altered/amended/changed and any charge can be added at any stage upto the stage of conviction in view of the provisions of Section 216 CrPC. The only legal requirement is that, in case the trial court exercises its power under Sections 228/251 CrPC, the accused is entitled to an opportunity of show-cause/hearing as required under the provisions of Section 217 CrPC. **(Gir Raj Prasad Meena vs. State of Rajasthan; 2013 (83) ACC 958 (SC)**

S. 319 – Summoning of additional accused – Permissibility – Court having recorded satisfaction that there was ample evidence to summon accused persons therefore order would not be improper

The provisions of S. 319 of CrPC do not place any bar on the powers of the Court. No restrictions have been imposed regarding the jurisdiction of the court. The case can proceed under this section if evidence collected/produced in the course of inquiry into, or trial of, an offence, the court is prima facie satisfied that such person has committed any offence for which he can be tried with the other accused. The process issued under this section cannot be quashed only on the ground that even though named in complaint, the police did not charge-sheet. Hon'ble Apex Court has laid down these observations in Suman v. State of Rajasthan, reported in AIR 2010 SC 518, in order to apply S. 319 of CrPC it is essential that the need to proceed against person other than the accused person, appearing to be guilty of offence, arises only on the evidence recorded in the courses of any inquiry or trial.

Now the only question remains that after conclusion of evidence can an application be moved. The wordings of Section 319 are very' clear that

during inquiry or trial, mere closing of prosecution evidence does not mean that trial is over. The statement under S. 319 CrPC, is continuance of the trial and the lower court recorded satisfaction that there is ample evidence to summon these persons as mentioned in the impugned order. The argument raised by the learned counsel for the revisionist that though the court reached to the conclusion that there is ample evidence but has not expressed his satisfaction that it would warrant in conviction. **(Kanta v. State of U.P.; 2013 (6) ALJ 419)**

S. 354 – Penology and Sentencing - Considerations in determining proportionate sentence - Not only rights of victim but also that of society at large have to be kept in view

In Operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which if was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. **(State of M.P. v. Najab Kahn & Ors.; AIR 2013 SC 2997)**

S. 374—Appeal against conviction—High Court concurrence with trial court's view is acceptable only if it is supported by reasons

Disposal of appeal without any proper analysis of-the evidence almost in a summary way by the High Court particularly in a case involving charge under S. 302 of the IPC where the accused is sentenced to life imprisonment is unsatisfactory. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, it cannot be said that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter. Since this exercise is not conducted by the High Court, the appeal deserves to be remanded for a fresh hearing after setting aside the impugned order. (**Majjal vs. State of**

Haryana; 2013 CriLJ 3999 (SC)

S. 378 – Appeal against a acquittal – Bar of limitation – Delay of 2400 days in filing appeal – Appeal would be barred by limitation

Court refers to Article 114 of the Limitation Act, which refers to S. 417 (2) of the CrPC, that the CrPC of 1988 and that is equivalent to present S. 378 CrPC. In that case the period is prescribed as 90 days, but the provisions U/s. 372 CrPC being a new one, which was brought out by virtue of Amending Act No. 5 of 2009 and on consideration of the very Art. 114 of the Limitation Act, we find that it speaks of an appeal from an order of acquittal and thereafter, makes categorization of different appeals under different headings. The Court have to assume that the Legislature at the time of the framing Art. 114 of the Limitation Act in absence of the previous proviso to S. 372 CrPC, had nothing before it to mention that particular provision as one of such occasions on which the law of limitation shall be considered for computing the period of limitation. But, the provision speaks of appeals against acquittal and we are of the opinion that a period of 90 days should be applicable also to appeals U/s. 372 proviso CrPC.

The delay is of 2400 days. Court has already noted that the appellant the petition under S. 5 of the Limitation Act, is a rank outsider, who locus standi to file the appeal. This is one circumstance and disability by which the appeal could not be maintained. **(Nanhe Singh v. State of U.P.; 2013 (6) ALJ 536)**

S. 378—Proviso (as inserted by amending Act of 2009)—Right of appeal—Only victim can file appeal against order imposing 'inadequate compensation' but this right does not depend upon state's appeal against same order

Only a victim has an absolute right to file an appeal challenging imposition of inadequate compensation in addition to the right of appeal against acquittal and also, challenging the conviction based on lesser offence. There is, however, no provision in the entire Code empowering the State Prosecution to file an appeal against an order imposing inadequate compensation.

Thus, in light of different types of right of appeal provided to the victim and to the State/Prosecution, it will not be proper to hold that the right of either of them is dependent upon the other. To put it differently, only victim can file an appeal against an order of imposing 'inadequate compensation' in addition to his right of appeal against acquittal and convicting the accused for a lesser offence and therefore, to club his right and make it dependent upon the exercise

of right of appeal at the instance of the State would be not only be unworkable but would run contrary to the scheme and lead to absurdity.

The correct law, as emerging from the scheme of the Code, would be that the right of a victim of prefer an appeal (on limited grounds enumerated in proviso to S. 372 of the Code) is a separate and independent statutory right and is not dependent either upon or is subservient to right of appeal of the State. Both the victim and the State prosecution can file appeals independently without being dependent on the exercise of the right by the other. **(Bhauben Dineshbhai Makwana vs. State of Gujarat; 2013 CriLJ 4225)**

Ss. 378 and 386—Interference with order of acquittal—Principles for—Appellate court can interfere only in exceptional cases where there are compelling circumstances and judgment of acquittal is found to be perverse

On relying Rohtash v. State of Haryana, the Supreme Court held that only in exceptional cases where there are compelling circumstances and were the judgment in appeal is found to be perverse, can the High Court interfere with the order of acquittal.

Once the prosecution failed to prove the basic ingredients of harassment or demand of dowry and the evidence brought on record was doubted by the trial court, it was not open to the High Court to convict Accused-1 on presumption referring to Section 113-A or 113-B of the Evidence Act. The presumption of innocence of the accused being primary factor, in the absence of exceptional compelling circumstances and perversity of the judgment, it was not open to the High Court to interfere with the judgment of the trial court in a routine manner. **(S. Anil Kumar vs. State of Karnataka; (2013) 3 SCC (Cri) 289)**

S. 386 – Appeal against acquittal - Powers of appellate Court are in no way restricted - Appellate Court can review and re-appreciate evidence

What needs to be examined in the light of the settled legal position is whether the view taken by the trial Court acquitting the accused was a reasonably possible view. If the answer is in the negative nothing prevents the Appellate Court from reversing the view taken by the trial Court and holding the accused guilty. On the contrary, if the view is not a reasonably possible view, the Appellate Court is duty bound to interfere and prevent miscarriage of justice by suitably passing the order by punishing the offender. **(Chinnam Kameswara Rao & Ors, v. State of A.P.; AIR 2013 SC 3602)**

Ss. 397 (2) and 319 – Bar on revisional power under S. 397(2) Applicability

– "Interlocutory order" as mentioned in S. 397 (2) – What is not - Any order which substantially affects right of accused or decided certain rights of parties is not an interlocutory order

An order which substantially affects the rights of the accused or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order as contemplated under S. 397(2) CrPC. When an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction under S. 397 or 401 CrPC, then there should be a bar in invoking the inherent jurisdiction of the High Court under S. 482 CrPC.

The order passed by the trial court in the present case, refusing to issue summons on the application filed by the complainant under Section 319 CrPC cannot be held to be an "interlocutory order" within the meaning of Section 397(2) CrPC. Admittedly, before the trial court the complainant's application under Section 319 CrPC was rejected for the second time holding that there was insufficient evidence against the appellants to proceed against them by issuing summons. The said order passed by the trial court decides the rights and liabilities of the appellants in respect of their involvement in the case, hence was not an interlocutory order. The complainant, therefore, ought to have challenged the order before the High Court in revision under Sections 397/401 CrPC and not by invoking inherent jurisdiction of the High Court under Section 482 CrPC. **(Mohit v. State of U.P.; (2013) 3 SCC (Cri) 727)**

S. 401—Revision against acquittal—Powers of High Court—No power vested in High Court to convert a finding of acquittal into one of conviction

The revisional jurisdiction of the High Court's while examining an order of acquittal is extremely narrow and ought to be exercised only in cases where the trial Court had committed a manifest error of law or procedure or had overlooked and ignored relevant and material evidence thereby causing miscarriage of justice. Re-appreciation of evidence is an exercise that the High Court must refrain from while examining an order of acquittal in the exercise of its revisional jurisdiction under the Code. Needless to say, if within the limited parameters, interference of the High Court is justified, the only course of action that can be adopted is to order a re-trial after setting aside the acquittal. As the language of Section 401 of the Code makes it amply clear there is no power vested in the High Court to convert a finding of acquittal into one of conviction. **(Venkatesan vs. Rani; 2013 CriLJ 4208 (SC)**

S. 427(1)—When discretion of court should be exercised to direct sentences

to run concurrently—Only substantive sentences can be directed to run concurrently and sentences awarded in default of payment of fine/compensation cannot be directed to run concurrently

The present case is concerned more with the nature of power available to the Court under S. 427(1) CrPC, which stipulates a general rule of consecutive running of sentences to be followed except in three situations: one falling under the proviso to sub- section (1) to S. 427; the second falling under sub-section (2) thereof; and the third where the Court directs that the sentences shall run concurrently. It is manifest from S. 427(1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along the judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of S. 427(I). Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises.

The cases against the appellant fall in three distinct categories. The transactions forming the basis of the prosecution relate to three different corporate entities who had either entered into loan transactions with the State Financial Corporation or taken some other financial benefit like purchase of a cheque from the appellant that was on presentation dishonoured. Applying the principle of single transaction referred to above to the above fact situations, it must be held that each one of the loan transactions/financial arrangements was a separate and distinct transaction between the complainant on the one hand and the borrowing company/appellant on the other. If different cheques which are subsequently dishonoured on presentation are issued by the borrowing company acting through the appellant, the same could be said to be arising out of a single loan transaction so as to justify a direction for concurrent running of the sentences awarded in relation to dishonour of cheques relevant to each such transaction. That being so, the substantive sentence awarded to the appellant in each case relevant to the transactions with each company referred to above ought to run concurrently. However, there is no reason to extend that concession to transactions in which the borrowing company is different no matter the appellant is the promoter/Director of the said other companies also. Similarly, there is no reason to direct running of the sentence concurrently in the case filed by State Bank of Patiala against S.P. Ltd. which transaction is

also independent of any loan or financial assistance between the State Financial Corporation and the borrowing companies.

However, the direction regarding concurrent running of sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of fine/compensation shall not be affected by this direction. This is so because Section 427 CrPC does not permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation. **(V.K. Bansal vs. State of Haryana; (2013) 3 SCC (Cri) 282)**

S. 437—Grant of Bail—Ground of long incarceration in jail—It would not ipse dixit make person entitled to be released on bail as a matter of right—Grant of Bail is discretionary and depends upon fact of case

Merely because the convict has served five or one half of the sentence including remission would not ipse dixit make him/her entitled to be released on bail as a matter of right. Grant of bail is discretionary and depends upon facts of each case. If a convict has undergone substantial part of sentence and is not released the very purpose of its filing of appeal may be defeated as he would undergone more than half of the sentence that has been imposed but, at the same time, if an accused is released it may have wrong message to the society that a person who under-trial had remained in custody is released on bail soon after conviction, upon filing an appeal. It is in the said context that the 'balancing text' or the 'balancing process' as laid down in Abdul Rahman Antulay's case is to be applied so that even if there is no strait jacket formula still there is some semblance of uniformity and parameters on the basis of which the parties know that their cases are to be considered and thereafter necessary orders are passed.

The plight of under-trial prisoners to the extent has been certainly taken note of by legislature by inserting S. 36A in the Code but in the case of post conviction cases where a convict seeks suspension of sentence, pending disposal of appeal, complaint can always be made to the Court for long incarceration. But there cannot be an absolute or invariable rule that the convict must necessarily undergo minimum sentence before his case is considered for suspension of sentence or release on bail pending hearing of the appeal. **(Mohd. Mohsin Khan vs. State; 2013 CriLJ 4156)**

S. 438—Anticipatory bail—Grant of—While exercising power u/s. 438, CrPC court bound to strike balance between individuals right to personal freedom and right of investigation of police

While exercising power under S. 438 of the Code, the Court is duty bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under S. 438(1), appropriate conditions can be imposed under S. 438(2) so as to ensure an uninterrupted investigation.

The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution. **(Sumit Mehta vs. State of NCT of Delhi; 2013 (83) ACC 985 (SC)**

Ss. 439,441,448 - Bail application for release of juvenile – Maintainability U/s 439 of Code

Petitioner is a juvenile in conflict with law who is proceeded as one among the accused in a crime involving the offence under section 364 A r/w 34, IPC. Application for his release on bail moved by his father had been turned down by the juvenile Justine Board vide Annexure 4 order Petitioner has therefore moved this application under section 439 of the Code of Criminal Procedure, for short the Code for his release on bail. A preliminary objection was raised by the registry over the entertain ability of the petition.

So far as the release of a juvenile in conflict with law on bail provisions of the Juvenile with law on bail provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, hereinafter referred to as the Act, shall prevail over the provisions of the Code as spelt out by sub section (4) of Section 1 of that Act which reads thus "Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under any such law."

Bail to juvenile in conflict with law is governed by Section 12 of the Act which provides for his release on bail with or without surety. So much so the objection that juvenile cannot be called upon to execute a bond, on his release on bail is totally irrelevant and that does not impinge his right to seek bail or anticipatory bail as provided by law. Court hold that the petition for bail moved by juvenile in conflict with law for his release on bail under section 439of the code of Criminal Procedure is entertain able and it has to be disposed

on its merits. **(Afsal Ibrahim v. State of Kerala; (2013 CriLJ 4945)**

S. 482—Prosecution—In pursuance of issuing summon to petitioner in light of charge sheet—Challenged—On ground that the petitioner had been exonerated in departmental proceedings on identical charges which are subject matter of present prosecution—Validity of

It is well settled that in case of exoneration on merit in departmental proceedings if based on the finding that allegation leveled against the person are found to be not sustainable at all and the person found innocent the criminal prosecution on the same set of facts and circumstances normally could not be allowed to continue. It is also well settled that higher standard of proof is required in criminal case to substantiate the charges beyond all reasonable doubt. However, the departmental proceedings are decided on the preponderance of probability. Admittedly, the documents relied upon by the prosecution has not been filed along with this petition. For what latches and acts of the petitioner the petitioner was found responsible for prosecution during investigation is not before this Court.

The report of inquiry is there but merely by perusing of the inquiry report it cannot be concluded that the report exonerating the petitioner is based on identical charges which are leveled against the petitioner in criminal case. In absence of those records and other cogent evidence collected during investigation, it would not be proper to this Court to quash the entire proceedings pending against the petitioner. **(Mohd. Aslam Khan vs. State of U.P.; 2013 (83) ACC 422 (All—LB)**

Ss. 482, 394, 401 and 319 – Bar on invoking inherent jurisdiction U/s 482 – When there is specific remedy provided by way of appeal or revision, inherent power under S. 482 cannot and should not be resorted to

In other words the inherent power of the High Court can be exercised only when there is no remedy provided in the CrPC for redressal of the grievance. It is well settled that the inherent power of the High Court can ordinarily be exercised when there is no express provision in CrPC under which an order impugned can be challenged. Therefore, when there is a specific remedy provided by way of appeal or revision, the inherent power either U/s. 482 CrPC or S. 151 CPC cannot and should not be resorted to. **(Mohit v. State of U.P.; (2013) 3 SCC (Cri) 627)**

S. 482 - Power to quash charge sheet – Consideration

Law does not prohibit entertaining the petition under S. 482 CrPC for quashing the charge sheet even before the charges are framed or before the

application of discharge is filed or even during its pendency of such application before the court concerned. The High Court cannot reject the application merely on the ground that the accused can argue legal and factual issues at the time of the framing of the charge. However, the inherent power of the court should not be exercised to stifle the legitimate prosecution but can be exercised to save the accused to undergo the agony of a criminal trial. **(Umesh Kumar v. State of Andhra Pradesh; 2013 (6) Supreme 323)**

S.482—Inherent jurisdiction of High Court—Scope of—This jurisdiction should be exercise sparingly and with circumspection to prevent abuse of process of court but not to stifle legitimate prosecution

It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. The Supreme Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But one cannot be oblivious of the fact that there is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is en record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.

The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. The protection given under S. 197 CrPC has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. If the above tests are applied to the

facts of the present case, the police personnel concerned must get protection given under S. 197 CrPC because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible to come to a conclusion that the protection granted under S. 197 CrPC is being used b the police personnel in the present case as a cloak for killing the deceased in cold blood. **(Om Prakash vs. State of Jharkhand; (2013) 3 SCC (Cri) 472)**

Constitution of India

Arts. 14, 19 (1)(a) and Preamble—Representation of People Act, Ss. 97(d), 2(d), 62 and 128—Role of NOTA ("None of the Above")—Statutory right to vote and mechanism of negative rating serves a very fundamental and essential part of a vibrant democracy—Voter must be given an opportunity to choose NOTA button, which will indeed compel political parties to nominate sound candidates of integrity

Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons.

Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand. Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize

themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people. The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy. Various countries have provided for neutral/protest/negative voting in their electoral systems.

Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity. The directions issued herein, especially to incorporate can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate thinks about them. **(People's Union for Civil Liberties vs. Union of India; (2013) 3 SCC (Cri) 769)**

Art. 21—Cross-examination—Accused's right to cross-examine prosecution witnessed—Denial of, would jeopardise accused's right to life and liberty

The ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

The right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any

prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage. **(Sunil Mehta vs. State of Gujarat; (2013) 3 SCC (Cri) 881)**

Art. 21 – Right of reputation – Availability of

Allegations against any person if found to be false or made forging someone else signature may affect his reputation. Reputation is a sort of right to enjoy the good opinion of others and it is a personal right and an enquiry to reputation is a personal injury. Thus, scandal and defamation are injurious to reputation, Reputation has been defined in dictionary as "to have a good name; the credit, honor, or character which is derived from a favourable public opinion or esteem and character by report". Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. International Covenant on Civil and Political Rights 1966 recognises the firth to have opinions and the right of freedom of expression under Article 19 is subject to the right of reputation of others. Reputation is "Not only a salt of life but the purest treasure and the most precious perfume of life." **(Umesh Kumar v. State of Andhra Pradesh; 2013(6) Supreme 323)**

Art. 21 – Prisoners and under trials - Right to speedy and fair trial, an integral part of very soul of Art. 21

In the present case, Hon'ble Supreme Court observed that the first submission which pertains to the denial of speedy trial has been interpreted to be a facet of Article 21 of the Constitution. The present provision is to be tested on the touchstone of the aforesaid constitutional principle. Section 12 of the 1986 Act clearly mandates that the trial under 1986 Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of any other case against the accused in any other court (not being a Special Court) to achieve the said purpose. The legislature thought it appropriate to provide that the trial of such other cases shall remain in abeyance. It is apt to note here that "any other case" against the accused in "any other court" does not include the Special Court. The emphasis is on speedy trial

and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. It is also worthy to note that the Special Court has been conferred jurisdiction under Section 8(1) of the *U.P.* Gangsters Act, 1986 to try any other offences with which the accused may, under any other law for the time being in force, have been charged and proceeded at the same trial.

As far as fair trial is concerned, needless to emphasise, it is an integral part of the very soul of Article 21 of the Constitution. Fair trial is the quaint essentiality of apposite dispensation of criminal justice. On a careful scrutiny of the provision, it is quite vivid that the trial is not hampered as the trial in other courts is to remain in abeyance by the legislative command. Thus, the question of procrastination of trial does not arise. As the trial under the U.P Gangsters Act, 1986 would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus the aforesaid provision does not frustrate the concept of fair and speedy trial which are the imperative facets of Article 21 of the Constitution. The concept of speedy and fair trial is neither smothered nor scuttled when the trial in other courts are kept in abeyance. As far as Article 14 is concerned, the procedure provided in the *U.P.* Gangsters Act, 1986 does not tantamount to denial of fundamental fairness in the trial. It is neither unfair nor arbitrary. **(Dharmendra Kirtahal v. State of Uttar Pradesh and Another; (2013) 8 SCC 368)**

Arts. 21, 22(1), 19(1)(a) and 4—Due process—Right to legal representation—Solemn duty of Advocate—Principles reiterated

To deny employment to an individual because of his political affinities would be offending the fundamental rights under Articles 14 and 16 of the Constitution. The submission of the appellant that her husband was only discharging his duties for litigants belonging to a banned organisation who had sought his assistance, has merit. Those who are participating in politics, and are opposed to those in power, have often to suffer the wrath of the rulers. It may occasionally result in unjustifiable arrests or detentions. The merit of a democracy lies in recognising the right of every arrested or detained person to be defended by a legal practitioner of his choice. Article 22(1) specifically gives this protection to arrested persons. All such accused do have the right to be defended lawfully until they are proved to be guilty, and advocates have the corresponding duty to represent them, in accordance with law. Taking any contrary view in the facts of the present case will result in making the appellant suffer for the role of her husband who is discharging his duty as an advocate in furtherance of this fundamental right of the arrested persons. **(K. Vijaya**

Lakshmi vs. State of A.P.; (2013) 3 SCC (Cri) 330)

Art. 22(4) – UP Gangsters and Ant- Social Activities (Prevention) Act 1986 - S. 12 – Constitutional Validity up-held - It does not infringe any facet of Arts. 14 and 21, 22 (4), 300-A

It is the duty of the Court to uphold the constitutional validity of a statute and there is always a presumption in favour of the constitutionality of an enactment. The burden is on him who challenges the same to show that there has been a clear transgression of the constitutional principles and it is the duty of the Court to sustain that there is a presumption of constitutionality and in doing so, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation. Thus the submissions raised at the Bar are to be considered in the backdrop of the aforesaid "caveat". What has to be seen is whether the provision trespasses the quintessential characteristics of the Organic Law and, therefore, should not be allowed to stand. **(Dharmendra Kirtahal v. State of Uttar Pradesh and Another; (2013) 8 SCC 368)**

Art. 22(5)—Detention order—Challenge at pre-execution stage—Validity of

Confining the challenge to detention order at pre-execution stage only to the five exceptions mentioned in (1992 (1) SCC (Supp) 496), would amount to stifling and imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions, as such powers are untrammelled and vested in the superior Courts to protect all citizens and non-citizens, against arbitrary action. Law is never static, but dynamic and that the right to freedom being one of the most precious rights of a citizen, the same could not be interfered with as a matter of course and even if it is in the public interest, such powers would have to be exercised with extra caution and not as an alternative to the ordinary laws of the land. **(Subhash Popatlal Dave vs. Union of India; 2013 CriLJ 4166 (SC)**

Arts. 22(5), 21, 226, 32—Preventive Detention—Long lapse in execution of order is no ground to quash detention order

If it is held that howsoever the grounds of detention might be weighty and sustainable which persuaded the authorities to pass the order of detention, the same is fit to be quashed merely due to long lapse of time specially when the detune is allowed to challenge the order of detention even before the

order of detention is served on him, the detune would clearly be offered with a double-edged weapon to use to his advantage circumventing the order of detention. On the one hand, he can challenge the order of detention at the pre-execution stage on any ground, evade the detention in the process and subsequently would be allowed to raise the plea of long pendency of the detention order which could not be served and finally seek its quashing on the plea that it has lost its live link with the order of detention. This, would render the very purpose of preventive detention laws as redundant and nugatory. On the contrary, if the order of detention is allowed to be served on the proposed detune even at a later stage, it would be open for the proposed detenu to confront the materials or sufficiency of the material relied upon by the authorities for passing the order of detention so as to contend that at the relevant time when the order of detention was passed, the same was based on non-existent or unsustainable grounds so as to quash the same. But to hold that the same is fit to be quashed merely because the same could not be executed for one reason or the other specially when the proposed detune was evading the detention order and indulging in forum shopping, the laws of preventive detention would surely be reduced into a hollow piece of legislation. **(Subhash Popatlal Dave vs. Union of India; 2013 CriLJ 4166 (SC)**

Art. 102(1)(e) and 191 (i)(e) – Power to make law under, providing disqualifications for membership of parliament/state legislature – Exclusive hold of this power – Legality

Under Articles 102(1)(e) and 191 (1)(e) of the Constitution, Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a Member of either House of Parliament or Legislative Assembly or Legislative Council of the State. The Constitution Bench in Election Commission, AIR 1953 SC 210, held that Article 191 (1) [which is identically worded as Article 102(1)] lays down "the same set of disqualifications for election as well as for continuing as a Member". Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a Member and for a person to be disqualified for continuing as a Member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a Member of Parliament or State Legislature, for the same disqualification, he cannot continue as a Member of Parliament or the State Legislature. This is so because the language of Articles 102(l)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a Member of a House of Parliament or the State Legislature or for a person to continue as a Member of Parliament or the State Legislature has to be

the same. **(Lily Thomas v. Union of India; (2013) 3 SCC (Cri) 641)**

Art. 137 - Review - Maintainability - Principles summarised

The principles relating to review jurisdiction may be summarised as follows:

When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;
(ii) Mistake or error apparent on the face of the record;
(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram;* (1921-22) 49 l A 144 and approved by this Court in *Moran Mar Basselios Catholicos;* AIR 1954 SC 526 to mean "a reason sufficient on grounds at least analogous to those specified in the rule".

When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
(ii) Minor mistakes of inconsequential import.
(iii) Review proceedings cannot be equated with the original hearing of the case.
(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
(vi) The mere possibility of two views on the subject cannot be a ground for review.
(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.
(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition
(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

(Kamlesh Verma v. Mayawati and others; (2013) 8 SCC 320)

Art. 141—Precedents—Binding nature of a Supreme Court's decision—Relevant principles

It is the settled legal proposition that a judgment of the Supreme Court is binding, particularly, when the same is that of a coordinate Bench, or of a larger Bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered, taking note of the ratio decidendi of the same i.e., the general reasons, or the general grounds upon which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. **(Ravinder Singh vs. Sukhbir Singh; (2013) 3 SCC (Cri) 891)**

Art. 226 – CPC, O. 23, R.1 – Subsequent writ petition – Maintainability of

Learned counsel for the respondents has submitted that principle of res judicata will no doubt arise only when issues are determined and are decided by the Court in a previous litigation between the same parties, but he has submitted that the bar to maintainability of subsequent writ petition, when no leave of the Court was sought at the time of withdrawal or dismissal of the first writ petition, is on account of public policy and principles flowing from Rule 1 of Order XXIII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). In support of this contention, he has placed reliance upon a judgment of the Supreme Court in the case of Avinash Nagra v. Navodaya Vidyalaya Samiti and others; (1997) 2 SCC 534. In paragraph 13, it has been held that where the first writ petition challenging the order of termination of service was withdrawn without grant of liberty by the Court to file a second writ petition, the second writ petition for that very purpose would attract the principle of constructive res judicata and would, therefore, not be maintainable. He has further placed reliance upon a judgment of this Court in the case of Shyam Narain Dwivedi v. The State of Uttar Pradesh and others; (1999) I UPLBEC 513. In paragraph 29 of this judgment, reliance was placed upon principle of Order XXIII of CPC and it was held that this principle is applicable in writ proceedings, by way of public policy, if the writ petition is withdrawn without the leave or liberty. In this judgment, learned Single Judge considered large number of earlier judgments including Division Bench Judgment of this Court taking similar view and also judgment of the Supreme Court in the case of Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others; AIR 1987

SC 88. Paragraph 9 of the judgment in the case of Sarguja Transport Service (supra) clinches the legal issue that is clearly in favour of preliminary objection raised on behalf of respondents.

In Court considered view, a party is required to take all available grounds and all available pleas available to him and if he fails to do so, the principle of constructive res judicata comes into play. Otherwise also, only by finding out better or more grounds, the legal position would not change because there is no scope to take a different view than what was taken by this Court earlier in the judgments noted above as well as in another Division Bench Judgment in the case of Ashok Pratap Singh v. State of U.P. and others; (2004) 2 UPLBEC 1909.

In view of aforesaid discussion, the writ petition is dismissed on the preliminary ground as not being maintainable because no liberty was sought for filing another writ petition by the petitioners and nor was it granted when their earlier writ petition was dismissed as not pressed. **(Khurkhur & anr. v. Union of India & others; 2013 (5) ALJ 533)**

Art. 227 - Supervisory jurisdiction

Under Article 227 of the Constitution, in supervisory jurisdiction of this Court over subordinate Courts, the scope of judicial review is very limited and narrow. It is not to correct the errors, in the orders of the Court below but to remove manifest and patent errors of law and jurisdiction without acting as an appellate authority. .For interference under Article 227, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and de hors the factual and legal position on record. It is well-settled that power under Art. 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. **(Smt. Nazama Hashimi v. Jamal Ahmad Khan & Ors.; 2013 (5) AWC 5086)**

Art. 311 – Major punishment – Stoppage of increments with cumulative effect without holding enquiry – Validity of

In view of authority to pronouncement, it has to be held that the order wide which the punishment of stoppage of increments with cumulative effect is passed, is a major punishment and cannot be held without inquiry. **(Tarsem Singh v. Punjab State and another; 2013 (5) SLR 502 (P & H)**

Consumer Protection Act

Ss. 2 (1) (6) and 2(1) (d) - "Consumer"/"Complainant" Words

"Complainant" and "Consumer" in Ss. (2)(1)(b) and 2(1)(d) of above Act – Scope of

Section 2(1)(b) of the Consumer Protection Act, 1986 defines "complainant" and "consumer" is defined under Section 2(1)(d) of the Consumer Protection Act, 1986. From a bare reading of the sections it is clear that person(s) availing services for "commercial purpose" do not fall within the meaning of "consumer" and cannot be a "complainant" for the purpose of filing a "complaint" before the Consumer Forum. Therefore, a consumer within the meaning under Section 2(1)(d) may file a valid complaint in respect of supply of electrical or other energy, if the complaint contains allegation of unfair trade practice or restrictive trade practice; or there is a defective goods; deficiency in services; hazardous services or a price in excess of the price fixed by or under any law, etc. **(Uttar Pradesh Power Corporation Limited and Others v. Anis Ahmad; (2013) 8 SCC 491)**

S. 2(1)(d) – "Consumer" – Electricity matters - Consumer complaint in respect of - When maintainable

From the facts, it is clear that the respondents had electrical connections for industrial/commercial purpose and, therefore, they do not come within the meaning of "consumer" as defined under S. (2) (1) (d) of the Consumer Protection Act, 1986; they cannot be treated as "complainant" nor are they entitled to file any "Complaint" before the Consumer Forum. Admittedly, the complainants made their grievance against final order of assessment passed under Section 126 of the Electricity Act, 2003. None of the respondents alleged that the appellant(s) used unfair trade practice or a restrictive trade practice or there is deficiency in service(s) or hazardous service(s) or price fixed by the appellant(s) is in excess to the price fixed under any law, etc. In the absence of any allegation as stipulated under Section 2(1)(c) of the Consumer Protection Act, 1986, their complaints were not maintainable. Therefore, the complaints filed by the respondents were not maintainable before the Consumer Forum. **(Uttar Pradesh Power Corporation Limited and Others v. Anis Ahmad; (2013) 8 SCC 491)**

Ss. 2(1)(d), 14 - Constitution of India, Art. 311 - Employees' Provident Funds and Miscellaneous Provisions Act, S. 5 - Payment of Gratuity Act, S. 4 - Govt. Servant is not consumer and dispute regarding his retiral benefit, PF, Gratuity cannot be entertained by Consumer Fora

By no stretch of imagination a government servant can raise any dispute regarding his service conditions or for payment of gratuity of GPF or any of his retiral benefits before any of the Forum under the Act. The government servant

does not fall under the definition of a "consumer" as defined under Section 2(1)(d)(ii) of the Act. Such government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum, for redressal of any grievance, may be the state Administrative Tribunal, if any, or Civil Court but certainly not a Forum under the Act. **(Dr. Jagmittar Sain Bhagat v. Dir., Health Services, Haryana & Ors.; AIR 2013 SC 3060)**

S. 12 – Complaint for return of documents - Entertainment of – District consumer forum bereft of jurisdiction to entertain such complaint as only Debt recovery tribunal had jurisdiction to take cognizance of such matter

In this case, learned counsel for the respondents submitted that he has not challenged any proceeding of Recovery of Dept rather he has moved an application to return his record being consumer of the Bank. Therefore, the same is well maintainable.

However, upon perusal of the facts I am of the view that substantially the petitioner has invoked the jurisdiction of the District Consumer Forum to interfere in the proceeding of Recovery of Debt posing as he has cleared of dues, whereas still the loan is due. Therefore, Court of the view that petitioner's complaint is also based on concealment of facts. He has not approached the District Consumer Forum with clean hands. Besides it, Court was further of the view that since substantially the matter relates to recovery of debt, the District Consumer Forum lacks the jurisdiction. (**HDFC Ltd. v. Distt. Consumer Disputes Redressal Forum (I), Lucknow; 2013 (5) ALJ 401)**

S. 23 – Medical Negligence –What amounts

Negligence is attributed when existing facilities are not availed Medical negligence cannot be attributed for not rendering a facility which was not available. If hospitals knowingly fail to provide some amenities that are fundamental for patients, it would certainly amount to medical malpractice.

In this case long acting steroids are not advisable in any clinical condition. However, instead of prescribing to a quick acting steroid, prescription of a long acting steroid without foreseeing its implications is certainly an act of negligence. Negligent action has been noticed with respect to more than one respondent and cumulative incidence has led to death of patient. **(Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Other; 2013(4) CPR 639 (SC)**

Contempt of Court Act

Ss. 2(c), 12—Contempt of Court—Maintainability of review application—Review application in contempt proceedings is not maintainable

Dismissal of contempt application on ground that petitioner failed to bring successor of contemner on record as contemner had been transferred and order passed on merits. Contempt of Courts Act does not contain any provision for review of judgment. So review application in contempt proceedings would not be maintainable. **(Mahaveer Prasad Verma vs. Central Administrative Tribunal, Lucknow; 2013 CriLJ (NOC) 559 (All)**

Ss. 2(c), 12—Contempt proceeding—Maintainability in case of transfer of contemner—Contempt proceedings against transferred contemner is maintainable

Merely because contemner had been transferred during pendency of contempt proceedings he would not deemed to be discharged. Successor Officer can be brought on record if there was enough material to show that even after knowledge of courts order, successor officer had not complied with same. So Successor Officer would not substitute original contemner but would be joined as additional party to be tried. Hence, contempt proceedings against transferred contemner is maintainable. **(Mahaveer Prasad Verma vs. Central Administrative Tribunal, Lucknow; 2013 CriLJ (NOC) 559 (All)**

S. 12 – Liability for contempt – Arises only on wilful disobedience of orders of Court

To hold the respondents or anyone of them liable for contempt this Court has to arrive at a conclusion that the respondents have wilfully disobeyed

the order of the Court. The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the Court is normally made on admitted and undisputed facts. In the present case not only there has been a shift in the stand of the petitioner with regard to the basic facts on which commission of contempt has been alleged even the said new/altered facts do not permit an adjudication in consonance with the established principles of exercise of contempt jurisdiction so as to enable the Court to come to a conclusion that any of the respondents have wilfully disobeyed the order of this Court dated 1.9.2010, Court, accordingly, hold that no case of commission of any contempt of this Court's order dated 1.9.2010 is made out. Consequently, Contempt Petition No. 3/2012 is dismissed. For reasons already recorded, Contempt Petition Nos. 6/2009 and 7/2009 shall also stand closed. **(Noor Saba v. Anoop Mishra & Anr.; 2013(6) Supreme 349)**

S. 12 – Contempt – Punishment for

In the present case, the reports of the District Judge and the ACMM on the basis of which the present proceedings had been initiated or the evidence of witnesses as to what really had happened in the court room and how the judge had been pressurized, were made over to the contemnors, but they do not appear making any statement that the incident had not occurred in the manner as was found during the enquiry conducted by the learned District Judge and they had only made statements on the merits of a criminal case. Court found that the reports had been made by the Judges regarding behaviour of a counsel in pressurizing a court in passing a particular order.

In the present case; the court placed reliance upon the inquiry-report submitted by the District Judge and the enquiry was held so as to testing the report made by ACMM regarding the reported contemptuous behaviour and incident which had occurred in the Court Room and his Chambers on account of not yielding to the illegal pressures of the advocates. It was clearly an act undermining the authority of the court and it was also an act which was as an attempt to scandalise the court so as to put it under pressure and obtain an order from the Presiding judge, only because the counsel had an interest in the litigation. Court holds both the contemnors guilty of the act of contempt.

While Court was hearing the present proceeding, it was submitted time and again that the two contemnors were young advocates and they have their carrier before them and their unqualified apology be accepted. But Court found that such incidents are frequently being reported form almost all judgeships of the State and the advocates appeared not allowing the judges to transact daily

business in different proceedings. The power to punish contempt of courts has been created for upholding the dignity of the Court and the justicing system which court has adopted for ourselves to run the democracy and the power to punish acts of contempt has been inherently given to the High Court and the Supreme Court. Tendering apology may not be allowed to be employed as a ploy forgetting away from punishment after committing acts of contempt. The facts of the case, specially, the evidence recorded by the District Judge indicates that the contemnors and their colleagues were so much annoyed and had become disrespectful to the order of the Court and the Court itself that they had gone berserk and the police had to be called up to bring the situation under control. It was an incident which had paralysed the functioning of the judgeship for 40 days, as admitted by the contemnors. All hell had been let loose only because the Judge was not yielding to the illegal pressures of the contemnors and his companions. **(In Re Sachin Kumar Dixit; 2013 (5) ALJ 442)**

S. 19 – Special appeal against order refusing to initiate proceedings for contempt, is not maintainable

This now takes Court to another question as to whether this appeal is maintainable u/S. 19 of the Act or not, since it was urged that mistake in referring the section should not be an impediment for this court in dispensation of substantial justice and consequently we take up that aspect. An appeal u/S. 19 of the Act is maintainable only when an order is passed not discharging the notice issued to initiate contempt proceedings and not otherwise. This has so been held in para 19 of Smt. Subhwanti Devi. Wrapping up the discussion we are of the view that neither under Chapter VIII, Rule 5 of High Court Rules nor under section 19 of the Act this appeal is maintainable and consequently it is dismissed as such. **(Ramesh Chandra v. State of Uttar Pradesh; 2013 (6) ALJ 221)**

Court Fee Act

S. 7 (iv) (a) – Extension of time for payment of deficit court-fee – Discretion of Court to be exercised in judicious manner

The Court has discretionary power to grant extension of time to make good the deficiency in Court fee, however, the said discretion shall be exercised in a judicious manner and for the ends of justice, it should not be allowed to misuse or abuse of process of law. The power given under Section 149 CPC is the power of judicial discretion to the Court. The said judicial discretion shall be exercised in a reasonable and fair manner. The Court is not bound to exercise the discretion unless the applicant shows sufficient cause for the failure to pay deficit Court fee within time provided by the Court or he is under

bona fide mistake in payment thereof. If the party deliberately to suit his convenience paid insufficient Court fees, the mistake cannot be said to be bona fide but one of choice made by the party in making the deficit Court fee. In that situation, even after pointing out the need to make the Court fee and given time, if the Court fee is not paid, it would be open to the Court either to reject the plaint or refuse to condone the delay for not showing sufficient cause thereon. The Court is required to exercise its judicial discretion keeping the facts and circumstances in each case and not automatically for mere asking that indulgence be shown to the party to make good deficit Court fee. **(Ravindra Kumar Gupta v. Rakesh Kumar Gupta; 2013 (6) ALJ 674)**

Criminal Trial

Chemical examination of viscera—Not mandatory in every case of dowry death

The view expressed in Taiyab Khan was reiterated in Ananda Mohan Sen and Another v. State of West Bengal; (2007) 10 SCC 774. In that case the exact cause of death could not be stated since the viscera preserved by the autopsy surgeon were to be sent to the chemical expert. In fact, one of the witnesses stated that the unnatural death was due to the effect of poisoning but he would be able to conclusively state the cause of death by poisoning only if he could detect poison in the viscera report.

The Court noted that it was not in dispute that the death was an unnatural death and held that the deposition of the witness indicated that the death was due to poisoning. It is only the nature of the poison that could not be identified. In view of this, the conviction of the appellant under Section 306 of the IPC was upheld, there being no charge under Section 304-B of the IPC. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under S. 306 of the IPC takes place; in a case of an unnatural death inviting S. 304-B of the IPC (read with the presumption under S. 113-B of the Evidence Act, 1872) or S. 306 of the IPC (read with the presumption under S. 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary. **(Bhupendra vs. State of M.P.; 2013 (83) ACC 940 (SC)**

Evidence Act

S. 3 - Circumstantial evidence—Principles for appreciation

Court have to consider whether the judgment of conviction passed by the trial court and affirmed by the High Court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the court.

In Padala Veera Reddy vs. State of A.P., 1991 SCC (Cri) 407, this Court opined as under:

> This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis that that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir vs. State of Maharashtra, 1982 SCC (Cri) 431).

In C. Chegna Reddy vs. State of A.P.; 1996 SCC (Cri) 1205, the Court while considering a case of conviction based on the circumstantial evidence, held as under:

> "21. 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 there 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 with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

In Sattatiya vs. State of Maharashtra; (2008) 1 SCC (Cri) 733, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt 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."

In State of Goa vs. Pandurag Mohite; (2010) 4 SCC (Cri) 104, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any 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.

As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else. **(Majenderan Langeswaran vs. State (NCT of Delhi); (2013) 3 SCC (Cri) 266)**

S. 3 - Last seen evidence - Reliability – Last seen evidence not reliable as witness did not make disclosure on same evening even though search was being made

For fixing the identity of the appellant and the co-accused as authors of this crime, the last seen evidence of Km. Vineeta the 7 or 8 years old sister of the deceased and PW-2 Ashok Kumar has been adduced. We find that no reliance could be placed on the testimony of Km. Vineeta as she claims that the appellant Nem Singh alias Mula had beaten her sister with a Daranti, but in

the next line she stated that she was not there at that time. Again in her cross-examination she says that she saw the appellant assaulting her sister with a Daranti. However, there is no incised injury of Daranti on the body of deceased. Also if Vineeta had spoken of the involvement of the appellant and the co-accused in this crime to her mother Meena Devi or to the informant, the witnesses would have first gone to the residence of the appellant and made enquiries about the deceased, rather than blindly searching for her in the field the whole night.

Likewise, the evidence of Ashok PW-2 on the issue of last seen is not very reliable. He claims to have been passing near the field of Nem Singh at 5 or 5.30 p.m. on the date in question, when he saw Nem Singh misbehaving with Sangeeta who was crying. On his intervention, the appellant Nem Singh had left Sangeeta. On the next day, he claims to have seen the dead body of deceased Sangeeta in the field of Jogendra Singh and to have protested to the appellant Nem Singh as to what he had done and why he had not heeded his advice the previous day to stop misbehaving with Sangeeta. We, however, find that blood was lying on the ground near the head of Sangeeta in the field of Jogendra, where the body was lying. This place was 21 paces from the field of the appellant. Nern Singh. It was more likely that the deceased was murdered in this field of Jogendra itself, instead of her body having been subsequently shifted there, because had the rape taken place in the appellant's field, there was little likelihood of blood being found in Jogendra Singh's field as very little discharge of blood from the nose, mouth and from the vaginal orifice, could be expected in a case of strangulation and rape. PW-2Ashokhas also not mentioned in his 161 CrPC statement that he was passing by that way after harvesting his crops. He suggested that he had left behind his father and one Virendra Singh and four Mazdoors at the field but none of those witnesses either saw the incident or have come forward to give evidence in this case. More importantly as PW- 10, Meena Devi mother of the deceased has stated that Ashok Kumar PW-2 was her Chachera Dewar, and even though she was searching for her missing child the entire night, but this witness did not disclose to her at that time that he had seen the appellant misbehaving with the deceased Sangeeta on the same evening. Therefore, reliance cannot be placed on the evidence of last seen of both these witness. **(Nem Singh v. State of U.P.; 2013 (6) ALJ 512)**

S. 3—Testimony of related witness—Evidentiary value—Evidence of related witness who are also alleged to be interested witness should be scrutinized with care, caution and circumspection

In this case, all the alleged eyewitnesses are closely related to the

deceased Purshottam and the prosecution has chosen not to examine any independent witness despite a number of houses situate in the close vicinity of the house of Purshottam and that itself creates a dent in the version of the prosecution. When relatives, who are alleged to be interested witnesses, are cited by the prosecution, it is the obligation of the court to scrutinise their evidence with care, caution and circumspection. In the case at hand, the entire occurrence took place in and around the house of Purshottam. Five people had been done to death. In such a circumstance, it is totally unexpected that other villagers would come forward to give their statements and depose in the court. It is to be borne in mind that Ram Narayan, Sarpanch of the village, solely on the basis of suspicion, had seen to it that five persons meet their end. Such a situation compels one not to get oneself involved and common sense give consent to such an attitude. Thus, no exception can be taken to the fact that no independent witness was examined. As far as the relatives are concerned, Radhey Shyam, PW 1, is the brother of the deceased; Ram Lal, PW 2, is the brother of Radhey Shyam; Panna Bai, PW 3, is the mother of Purshottam and Nirmala Bai, PW 5, is his wife; and Anita, PW 5; Badribai, PW 8; Manisha, PW 9 and Kaushalya, PW 10, are also close relatives and these witnesses have been cited as eyewitnesses.

In Hari Obula Reddy v. State of A.p'6 a three-Judge Bench has opined that it cannot be laid down as -

> "an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon." (SCC pp. 683-84, para 13)

In Kartik Malhar v. State of Biharl this Court has stated (SCC p.621, para 15) that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that

the real culprits are prosecuted and convicted. That is the normal phenomenon of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this Court shall be careful and cautious while scanning their testimony and we proceed to do so.

Similar is the evidence of the other prosecution witnesses, which has been analysed with great anxiety by the High Court. On a careful perusal of the same, we do not find any reason to differ with the said evaluation solely on the ground that they are related to the deceased persons or that they could not have seen the occurrence. In a case of this nature, it is the relatives who would come forward to depose against the real culprits and would not like to falsely implicate others. They have witnessed the brutish crime committed and there is nothing on record to discard their testimony as untrustworthy. We find that their evidence is reliable and credible and it would not be inapposite not to act upon the same. Nothing has been elicited in the cross-examination to record a finding that the evidence is improbable or suspicious and deserves to be rejected. They have no motive to falsely implicate the accused and, that apart, their testimonies have withstood the rigorous cross-examination in material particulars and received corroboration from the evidence of the doctor. That apart, the weapons seized lend credence to the prosecution story. Quite apart from the above, it is almost well-nigh impossible to perceive that they have any animosity for some reason to see that the accused persons are convicted. Their family members have been done to death in a ghastly manner, and in these circumstances, it cannot e thought that they would leave the real culprits and implicate the accused persons. **(Kanhaiya Lal vs. State of Rajasthan; (2013) 3 SCC (Cri) 498)**

S. 3—Last seen together—Time gap between last seen and death—When inconsequential

The circumstance that has been seriously criticized by learned counsel for the appellant, pertains to the last seen theory. It is submitted by him that as per the testimony of the informant, the appellant along with others had taken the deceased in a Maruti car, but there is no material evidence to suggest that the accused was in the company of the deceased for two days. The learned counsel would further submit that the last seen theory faces a hazard because of the time gap and, hence, should be totally discarded. It is evident from the material on record that the deceased was taken away from Zanda Chowk in a Maruti car. The appellant has been identified by Kantibhai, PW-13, and Durlabhbhai, PW-15, and their evidence remains totally embedded in all

material particulars. It has been proven by the prosecution that the Maruti Zen car belongs to the appellant. There has been no explanation offered by the accused in this regard, though such incriminating materials were put to him. It is also worth noting here that from the testimony of Dr. Pandav Vinodchandra Prajapati, PW-16, who had conducted the autopsy on 28.1.2006 about 10.00 a.m., that the injuries found on the dead body were approximately four days old. Thus, the argument that there is long gap between the last seen and the time of death melts into insignificance inasmuch as the time the deceased was seen in the company of A-I and the time of death is not long and the said fact has been duly established by the medical evidence and we see no reason to discredit the same. It is apt to note here that A-I had said that they were taking the deceased to the house of Gulia but during investigation, nothing was found in the house of Gulia. On the contrary, from the testimony of Madhuben, PW - 14, wife of the deceased, it is evincible that she had talked on telephone to both the accused persons. Thus, the circumstance pertaining to the theory of last seen deserves acceptance. **(Harivadan Babubhai Patel vs. State of Gujarat; 2013 CriLJ 3944 (SC)**

S. 3—Appreciation of evidence—Omissions or Discrepancies in evidence—Minor contractions and omissions do not affect core of prosecution case and cannot be taken as a ground to reject prosecution evidence

It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, it needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission. **(Mritunjoy Biswas vs. Pranab @ Kuti Biswas; 2013 CriLJ 4212 (SC)**

S. 3 – Discrepancies in testimony of witness - Unless material creates doubt about credibility of witness his evidence cannot be discarded

Once Court finds that the eye witness account is corroborated by material particulars and is reliable, it cannot discard his evidence only on the

ground that there are some discrepancies in the evidence of witnesses. As has been held by the Court in State of Rajasthan v. Smt. Kalki and Another; (1981) 2 SCC 752, in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. **(Subodh Nath and Anr. v. State of Tripura; AIR 2013 SC 3726)**

S. 8—IPC S. 300—Act of absconding cannot form fulcrum of guilty mind

Be it noted, the other two witnesses have deposed about the accused running away from the place of occurrence immediately. That apart, the accused had absconded from the village. Court absolutely conscious that mere abscondence cannot from the fulcrum of a guilty mind but it is a relevant piece of evidence to be considered along with other evidence and its value would always depend the circumstances of each case. **(Mritunjoy Biswas vs. Pranab @ Kuti Biswas; 2013 CriLJ 4212 (SC)**

S. 27 – Recovery evidence – Reliability – Dishonestly receiving stolen property – There was not public witness of recovery - Recovery held to be highly doubtful

Now as regards appeal of accused Ghan Shyam Seth is concerned, he admittedly runs a jewellery shop and the police has allegedly recovered five gold items of jewellery from shop on the pointing out of accused Sartaz alias Raju and Sanjay Harijan on 31.8.2002 at about 3.30 p.m.

This recovery is highly doubtful for the following reasons:

i) that there is no public witness of recovery, although the shop of accused Ghan Shyam Seth is situated in dense commercial market;

ii) that no identification of the recovered jewellery items was conducted from the ladies of the complainant's family, because all the items allegedly belonged to mother and niece of deceased, so the male members of his family were not in a position to identify them. This conclusion is further fortified from the fact that in the report dated 29.8.2002 Ex. Ka-2 the complainant has stated that the ladies of the house have informed about the details of the stolen jewellery items;

iii) that full particulars of jewellery items e.g. their shape or weight etc. had not been mentioned in 2nd report furnished by PW-l to

the investigating officer on 29.8.2002, so that they may be correctly identified;

iv) that theft of jewellery items could not be proved by cogent and reliable evidence;

v) that the prosecution has failed to lead any evidence to show that the accused dishonestly received, retained or handled the jewellery items believing them to be stolen;

vi) that had the accused knowledge about the jewellery items to be stolen then he should not have kept them in the same shape and would have certainly melt them.

In view of the aforesaid circumstances, Court were of the considered view that learned trial Court has not correctly appreciated the evidence on record and illegally convicted and sentenced accused Ghan Shyam Seth for the offence punishable u/s. 411, IPC. Thus, his appeal succeeds. **(Sanjay Harijanv. State of U.P.; 2013 (6) ALJ 734)**

S. 32—Dying declaration—Reliability of

The law is well settled that if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. Such view was taken by this Court in Kanaksingh Raisingh Rav v. State of Gujarat; (2003) 1 SCC 73 wherein this Court held:

> "5. ….. The question then is, can a conviction be based primarily on the dying declaration of the deceased in this case? In this regard Court does not think it is necessary to discuss the cases cited by the learned counsel which are noted hereinabove because, in Court's opinion, the law is well settled i.e. if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. In the instant case, the evidence of PW 5, the doctor very clearly shows that the deceased was conscious and was medically in a fit state to make a statement. It is because of the fact that a Judicial Magistrate was not available at that point of time, he was requested to record the statement, which he did. His evidence in regard to the state of mind or the physical condition of the deceased to make such a declaration has not been challenged in the cross- examination. That being so, it should be held that the deceased was in a fit state of mind to make a declaration as held by the courts below. The next question for consideration is whether this

statement is voluntary and truthful. It is not the case of the defence that when she made the statement either she was surrounded by any of her close relatives who could have prompted her to make an incorrect or false statement. In the absence of the same so far as the voluntariness of the statement is concerned, there can be no doubt because the deceased was free from external influence or pressure. So far as the truthfulness of the statement is concerned, the doctor (PW 5) has stated that she has made the said statement which, as noted above, is not challenged in the cross-examination. The deceased in her brief statement has, in clear terms, stated that because of the quarrel between her and the accused, the accused had poured kerosene and set her on fire which, in Court's opinion, cannot be doubted....."

What Court found in the present case is that the dying declaration (Ext. PF) which was recorded by Dr Rajinder Rai (PW 4) was also signed by Manoj (Appellant 1) which indicates that Appellant 1 was present when the statement was recorded. Nothing is on the record to suggest that any of the relation of the deceased was present to influence Dr. Rajinder Rai (PW 4). Thus, Court found that there is no infirmity in the finding of the Sessions Judge as affirmed by the High Court. **(Manoj vs. State of Haryana; (2013) 3 SCC (Cri) 865)**

S. 32(1)—Dying declarations recorded in language not spoken/known by deceased—Effect of—Creates doubt and not admissible

The three dying declarations which were originally recorded in Kannada. According to the learned counsel for the appellant, the deceased had no knowledge of Kannada language and could speak only Telugu. The credibility of the three dying declarations (Ext. P-12, Ext. P-22 and Ext. P-29) i to be doubted. In the first dying declaration (Ext. P-12) dated 14-1-2000 the thumb impression of the victim has been shown. Whereas in the second dying declaration (Ext. P-22) taken on the same day i.e. 14-1-2000 and the third dying declaration (Ext. P-29) given on the next day i.e. 15-1-2000, the victim had stated that she had not given her signatures since her hand was completely burnt. Dr Bhimappa (PW 22), who signed Ext. P-22, in his cross-examination, stated that he was not aware whether Neelamma (the deceased) was talking in Telugu. Dr Dhanjaya Kumar (PW 20), who signed Ext. P-12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that Neelamma was talking in Telugu language. Padmavathi (PW 8), mother of the deceased, in her cross-examination stated that Neelamma (the deceased was not knowing the correct writing in Telugu. But she was writing some Telugu.

The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased Neelamma was talking in Telugu. It has also not been made clear as to who amongst the Tahsildar, PSI or SI or the doctors who had signed Ext. P-12, Ext. P-22 and Ext. P-29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those exhibits and that at the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu and that the deceased understood the contents of the same.

The abovementioned facts create doubt in our mind as to the truthfulness of the contents of the dying declarations as the possibility of the deceased being influenced by somebody in making the dying declarations cannot be ruled out. **(Kashi Vishwanath vs. State of Karnataka; (2013) 3 SCC (Cri) 257)**

S. 32(1)—Multiple dying declarations—Material contradictions and other serious irregularities—Effect of

A comparison of the three dying declarations shows glaring material contradictions. In the first dying declaration (Ext. P-12), she (the deceased) stated that her husband instigated her to pour kerosene on her own body, therefore, she poured the kerosene on her own body and her husband further poured kerosene on her and put on fire using a matchbox. In the second dying declaration (Ext. P-22), she (the deceased) stated that her husband along with L poured kerosene on her body and put on fire by using matchstick. In the third dying declaration (Ext. P-29), she (the deceased) stated that her husband poured kerosene on her and L lit the matchstick and threw upon her body.

Apart from these contradictions, the credibility of the three dying declarations (Ext. P-12, Ext. P-22 and Ext. P-29) is to be doubted for other reasons as well. In the first dying declaration (Ext. P-12) dated 14-1-2000 the thumb impression of the victim has been shown. Whereas in the second dying declaration (Ext. P-22) taken on the same day i.e. 14-1-2000 and the third dying declaration (Ext. P-29) given on the next day i.e. 15-1-2000, the victim had stated that she had not given her signatures since her hand was completely burnt. The witnesses in their cross-examination have stated that they were not aware whether the deceased was talking in Telugu. The doctor PW 20 who signed Ext. P-12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that the deceased was talking in Telugu language. On a careful perusal of the materials on record, it cannot be said that the prosecution in this case has established its case beyond reasonable doubt to base a conviction of the appellant. Hence, he is acquitted.

(Kashi Vishwanath vs. State of Karnataka; (2013) 3 SCC (Cri) 257)

S. 45 – Expert evidence - Admissibility – Court is not bound by evidence of experts which is to a large extent advisory in Nature – Court must derive its own conclusion upon considering opinion of expert which may be adduced by both sides, Cautiously and upon taking into consideration authorities on the point on which he deposes

Court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration difference between an 'expert witness' and an 'ordinary witness'. Opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such evidence could be admitted or how much weight should be given thereto, lies within domain of court. Evidence of an expert should be interpreted like any other evidence. **(Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Other; 2013(4) CPR 639 (SC)**

S. 65 – Secondary evidence – Admissibility – Photocopy of revenue map of village, allegedly prepared by Lekhpal of village sought to be produced – Nothing on record to prove authenticity of said document – Document not admissible as secondary evidence

Where original document is in existence, but produced, secondary evidence by production of copies is not admissible unless conditions are satisfied. The provision has been designed to provide protection to persons who, in spite of their best efforts, are unable to, for the circumstances beyond their control, to place before the Court, primary evidence of a document as required by law. Secondary evidence should not and cannot be allowed unless the circumstances exist to justify as provided under Act, 1872. Further, if the document is to be admitted in secondary evidence, the facts thereof have to be proved. The certified copy of the original can be treated as secondary evidence. But the contents of the documents sought to be marked as secondary evidence cannot be admitted in evidence without production of the original document. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence.

Under what circumstances the secondary evidence relating to document must be proved by primary evidence is an exception to the cases falling under Sections 65 and 66 of Act, 1872. The person seeking to produce secondary evidence relating to a document can do so only when the document is not in his possession. To enable a person to take recourse to Sections 65 and 66 of Act, 1872, it would be necessary to establish that the document sought to be summoned was executed and that the said document is not with him, but in

possession of the person against whom the application is made to be produced for proving against him. Also whenever secondary evidence is to be admitted, very existence of such a document has to be established.

In the instant case, conditions precedent before entertaining secondary evidence were not complied with and that too making the foundation to record a finding crucial to decide the entire plaint case in a particular manner i.e. in favour of plaintiff. It had not been stated anywhere and at least nothing was available from record as to how and when plaintiff had any occasion to obtain a Photostat copy of revenue map, who allowed him to obtain it and wherefrom he got it. There was nothing to prove its authenticity also. Document not admissible as secondary evidence. **(Ram Das Singh v. Duli Chand; 2013 (6) ALJ 590)**

S. 108 – Civil death – Presumption and determination during consolidation proceedings and in mutation - Explained

The Court have considered the arguments of Counsel for the parties and examined the record. The issue relating to civil death of Aas Mohammad arose, in relation to the mutation of his name over the agricultural land before the Consolidation Officer as such it was within the jurisdiction of Consolidation Officer to decide this issue and he was bound to decide this issue. Section 108 of the Evidence Act, 1872, provides that when the question is whether a man is alive or dead and if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. In this case, Taj Mohammad, who is real brother of Aas Mohammad, appeared in the witness box and stated that Aas Mohammad was not heard for more than seven years. Thus the burden to prove that Aas Mohammad was alive was shifted upon respondents-4 and 5. Aas Mohammad did not appear before the Consolidation Officer either in compliance of remand order dated 10.1.1990, by which he was directed to appear before the Consolidation Officer or in compliance of the order dated 18.2.1999 passed by Consolidation Officer, by which he was directed to appear from cross-examination. In such circumstances, the presumption of his civil death was liable to be raised under section 108 of the Evidence Act, 1872, as the presumption remained unrebutted. Supreme Court in LIC of India v. Anuradha; 2004(97) RD 338(SC) = 2004(55) ALR 418, held that the presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. Thus under the law, the consolidation authorities were liable to

raise presumption of law in favour of Taj Mohammad and others. (**Ved Prakash v. Dy. Director of Consolidation, Muzaffarnagar; 2013(121) RD 565)**

S. 113-A – Attractability – Presumption as to abetment of suicide – Arises only if it is shown that her husband or any relative of her husband had subjected her to cruelty as per the terms defined Section 498-A, IPC

Section 113 A only deals with a presumption which the Court may draw in a particular fact situation which may arise when necessary ingredients in order to attract that provision are established. Criminal law amendment and the rule of procedure was necessitated so as to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry. Legislative mandate of the Section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative or her husband had subjected her to cruelty as per the terms defined in Section 498 A, IPC, the Court may presume having regard to all other circumstances of the case that such suicide has been abetted by the husband or such person, though a presumption could be drawn, the burden of proof of showing that such an offences has been committed by the accused under Section 498 A, IPC is on the prosecution. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 CrLJ 4448 (SC)**

Ss. 113-B and 113-A—Presumption under—When revocable

Once the prosecution failed to prove the basic ingredients of harassment or demand for dowry and the evidence brought on record was doubted by the trial court, it was not open to the High Court to convict Accused-1 on presumption referring to S. 113-A or 113-B of the Evidence Act. The presumption of innocence of the accused being primary factor, in the absence of exceptional compelling circumstances and perversity of the judgment, it was not open to the High Court to interfere with the judgment of acquittal by the trial court in a routine manner. **(S. Anil Kumar vs. State of Karnataka; (2013) 3 SCC (Cri) 289)**

General Clauses Act

S.9—Complaint under N.I. Act—Computation of limitation—Applicability of Act—S. 9 of above Act applied and first day of perusal of limitation stipulated in S. 142 of Limitation Act had be excluded

Even though Limitation Act is not applicable to proceeding under Negotiable Instruments Act and as such S. 12 of Limitation Act cannot be applied to compute Limitation under N.I. Act which the aid of Sec. 9 of the

General Clauses Act, 1897 it can be safely held that while calculating the period of one month which is prescribed u/s. 142(b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. **(Econ Antri Ltd. vs. Rom Industries Ltd.; 2013 CriLJ 4195 (SC)**

Guardian and Wards Act

S. 17 – Hindu Minority and Guardianship Act, S. 13 – Custody of child – Entitlement – Welfare of child's is paramount consideration

The provisions of Section 17 of the 1890 Act and Section 13 of the 1956 Act provides that the welfare of the minor is of paramount consideration for taking a decision regarding guardianship and custody. The welfare of a child is neither determined by economic affluence nor a deep mental or emotional concern. The welfare of the child is all round welfare which is to be considered taking into consideration entire facts and circumstances. The physical well being, education, supplying the daily necessities such as food, clothing and shelter is the primary consideration. Welfare of child lies in providing good education to the child to create surroundings which may give an atmosphere to overall development of personality. In an earlier judgment a Division Bench of the Court in the case of Mt. Haliman Khatoon v. Mt. Ahmadi Begum and others, reported in AIR (36) 1949 Allahabad 627, while considering the question of custody under Section 17 of the 1890 Act had occasion to consider claim of custody by mother on one side and paternal aunt on the other side. After considering the claim of both the parties the Division Bench leaning in favour of mother.

As noted above the mother is a natural guardian, father being already dead. The grandfather, appellant No. 2 was working as Electrician who has submitted an application for voluntary retirement and is running a medical store. The grandmother is not a well educated lady. The Additional Principal Judge, Family Court has held that as far as financial capacity of appellants is concerned, they can provide basic needs to the child. As observed above, the financial capacity of a person to provide basic necessities is not the only criteria on the basis of which the decision for appointment of guardian is to be based. The mother is getting salary of Rs.32,000/-per month being working as Lecturer in Government Girls Inter College. The mother being in teaching profession has to be held to be more competent to help the daughter in education and to provide such atmosphere which may allow her to grow as well educated child. Although the right of natural guardian is not absolute but unless the natural guardian is disqualified due to any reason from having the custody of her child, normally natural guardian is not to be deprived of the

custody of the child. The Additional Principal Judge, Family Court has also noted that respondent has only issue, the minor daughter, and she being young lady has to carry on her life looking to her daughter and taking care of her daughter whereas the appellants have their another daughter who lives at nearby place and has also two grand children. The husband being dead, the respondent has better claim to have custody of the minor daughter as compared to the appellants who are grandparents. **(Pushpa v. Anshu Chaudhary; 2013 (6) ALJ 638)**

Hindu Marriage Act

Ss. 5, 13 – Marital relationship - Meaning

Marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them to have children, their up-bringing, services in the home, support, affection, love liking and so on. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 CriLJ 4448 (SC)**

S. 13(1)—Divorce—Ground of irretrievable break down of marriage—Consideration of

At the present juncture, it is questionable as to whether the relief sought by the learned counsel for the appellant, on the ground of irretrievable breakdown of marriage is available to him. The reason is based on the judgment rendered by this Court in Vishnu Dutt Sharma vs. Manju Sharma; (2009) 6 SCC 379.

Even otherwise, in the facts and circumstances of this case (which are being highlighted while dealing with the appellant's next contention), Court cannot persuade ourselves to grant a decree of divorce, on the ground of irretrievable breakdown of marriage, for the simple reason that the breakdown is only from the side of the husband. The wife - Radhika Gupta has consistently maintained, that she was intensely concerned with her future relationship with her husband, and that, her greatest and paramount desire was to rejoin her husband, and to live with him normally in a matrimonial relationship, once again. Since in the present case, the respondent does not consent to the severance of matrimonial ties, it may not be possible for us to accede to the instant prayer, made at the hands of the learned counsel for the appellant. **(Darshan Gupta vs. Radhika Gupta; (2013) 9 SCC 1)**

Indian Contract Act

Ss. 124, 126 – Contract of guarantee and contract of indemnity – Difference between

The distinction between the "contract of guarantee" and "contract of indemnity" comes out from the definitions of two. The phrase "contract of indemnity" is defined in Section 124 of le Act, 1872 which says that a contract by which one party promises to save the other from loss caused to him by the conduct of promiser himself or by the conduct of any other person is called "contract of indemnity". One of the apparent distinctions between two is that a "contract of guarantee" requires concurrence of three persons, namely, the principal debtor, surety and the creditor, while "contract of indemnity" is a contract between two parties and promiser enters into such contract with other party. In other words, a person who is party to a contract, if executes a promise to other party to save him from loss on account of promiser's conduct or by the conduct of any other person, it is a "contract of indemnity", while for the purpose of "contract of guarantee", it requires presence of three parties at least. **(Punjab National Bank v. Ram Dutt Sharma; 2013 (5) ALJ 659)**

Indian Penal Code

S. 97— Private defence—Exercise of right of

Nowhere it is required in law that unless accused specifically pleads or claims exercise of right of private defence he cannot be conferred with such a right. Unambiguous law is that if from the facts and circumstances of the case if the accused is able to establish exercise of right of private defence he has to be conferred the benefit of the same and no special pleading is required for the same. Right of self-preservation is too precious and sacrosanct a right to be denied to the claimant thereof in deserving cases on the technicalities of pleadings and suggestions and while evaluating the evidences in such cases the courts should not construe it narrowly. **(Vijay Narain Mishra vs. State of U.P.; 2013 (83) ACC 444 (All)**

S. 120-B—Criminal conspiracy—If all other accused acquitted, then appellant alone cannot be convicted u/s. 120-B

As far as conspiracy u/s. 120B is concerned, Court inclined to think that the High Court erred in not recording an order of acquittal u/s. 120B as no other accused had been found guilty. The conviction u/s. 120B cannot be sustained when the other accused persons have been acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other alleged co-conspirators. It has been so laid down in Fakhruddin vs. The State of Madhya Pradesh; AIR 1967 SC 1326. Thus, the conviction of the appellant u/s. 120B is set aside. **(Harivadan Babubhai Patel vs. State of Gujarat; 2013 CriLJ 3944 (SC)**

S. 300, 34 - CrPC, S. 221 – Murder - Failure to frame charge under S. 34 – No prejudice shown to be caused to accused thereby - Conviction of accused for murder with aid of S. 34 does not stand vitiated

In Gurpreet Singh v. State of Punjab; (2005) 12 SCC 615, the Court held that no prejudice could be claimed by the accused merely because charge was framed under Section 302 IPC simpliciter and not with the help of Section 34 IPC. The Court found that the eye witnesses had been cross- examined at length from all possible angles and from suggestions that were put to them, the Court was fully satisfied that there was no manner of prejudice caused. What, therefore, needs to be examined is whether any prejudice was caused to the accused persons on account of absence of charge under Section 34 of the IPC. Mere omission of Section 34 from the charge sheet does not ipso facto or ipso jure lead to any inference or presumption of prejudice having been caused to the accused in cases where the conviction is recorded with the help of that provision. It is only if the accused persons plead and satisfactorily

demonstrate that prejudice had indeed resulted from the omission of a charge under Section 34 of the IPC that any such omission may assume importance. The absence of charge under Section 34 of the IPC did not, therefore, affect the legality of the conviction recorded by the High Court. **(Chinnam Kameswara Rao & Ors, v. State of A.P.; AIR 2013 SC 3602)**

S. 302—Sentence—Death sentence or life imprisonment or via media approach—Scope of awarding

It is difficult to practically apply the "rarest of rare" principle since there is a lack of empirical data for making the twofold comparison between murder (not attracting death penalty) and murder (attracting death penalty). It is this inability to make a comparative evaluation and due to a lack of information and any detailed study that the application of the rarest of rare principle becomes extremely delicate thereby making the awarding of a death sentence subjective.

Cases in which the victim was raped and murdered fall in three categories, namely, those in which the death penalty has been confirmed by the Supreme Court and those in which it has been converted to life imprisonment. There is third category consisting of cases in which the Supreme Court has, while awarding a sentence of imprisonment for life, arrived at what is described as a via media and in which a fixed term of imprisonment exceeding 14 or 20 years (with or without remissions) has been awarded instead of a death penalty, or in which the sentences awarded have been made to run consecutively and not concurrently. Special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. Secondly, though a sentence awarded by the Supreme Court relates to a specific case, nevertheless an exercise needs to undertaken to identify some jurisprudential principle for awarding the death penalty.

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what a consecutive sentence mandates is that if the convict is to be released earlier by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter.

A sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The convict is not entitled to any remission in a case of sentence of life imprisonment, as is commonly believed. However, if the convict is sought to be released before the expiry of his life, it can only be by following the procedure laid down in Section 432 CrPC or by the Governor exercising power under Article 161 of the Constitution or by the President exercising power under Article 72 of the Constitution.

Court has held that though Crime Test, Criminal Test and Rarest of Rare Case Test being satisfied against appellant, death sentence awarded by courts below under S. 302 IPC commuted to rigorous imprisonment for life and all the sentences imposed on appellant were to run consecutively. **(Shankar Kisanrao Khade vs. State of Maharashtra; (2013) 3 SCC (Cri) 402)**

Ss. 304-B and 498-A—Conviction under—Sustainability—Mere making demand not enough to bring about conviction u/s. 304-B of IPC, ingredients of Section 304-B not established

In this case the Sessions Judge found that there was no evidence that Parshottam Ram and Krishna Devi made demands for additional dowry from Nath Ram. Accordingly, they were acquitted at the trial stage itself. Therefore, the segregation process, based on the evidence on record, had begun at the trial stage. This is clearly because in a dowry death, some actors play an active role while others play a passive role. Consequently, to sustain the conviction of Bhola Ram, there must be some suggestive evidence and not generic evidence implicating him in the demand for additional dowry from Nath Ram.

It is true that there was a demand of dowry of Rs. 10,000/- which was paid by Nath Ram by borrowing this amount from Nirbhai Singh, but that demand was for the purchase of a car for use by Darshan Ram. Under the circumstances, it can safely be presumed that Darshan Ram made the demand for additional dowry for his benefit. Bhola Ram may have been a silent or a passively conniving participant, but there is nothing on record to suggest that he had either actively made such a demand or that the demanded amount was sought to be utilized for his benefit either directly or indirectly.

Similarly, the evidence on record does not show that the demand of another amount of Rs.30,000/- from Nath Ram just a fortnight before Janki Devi took her life was made by Bhola Ram to purchase articles for the service station being set up by him and Darshan Ram at village Nehianwala. In any event, there is again nothing to suggest that Bhola Ram was in any manner actively concerned in making the demand directly or indirectly from Nath Ram.

Consequently, we do not find any evidence to suggest any active complicity of Bhola Ram in demanding any additional dowry from Nath Ram either for himself or for Darshan Ram or his proposed business venture.

Merely making a demand for dowry is not enough to bring about a conviction under Section 304-B of the I.P.C. As held in Kans Raj a dowry death victim should also have been treated with cruelty or harassed for dowry either by her husband or a relative. In this case, even assuming the silent or conniving participation of Bhola Ram in the demands for dowry, there is

absolutely no evidence on record to suggest that he actively or passively treated Janki Devi with cruelty or harassed her in connection with, or for, dowry. The High Court has, unfortunately, not adverted to this ingredient of an offence punishable under Section 304-B of the I.P.C. or even considered it.

Consequently, in the absence of the prosecution proving the ingredients of Section 304-B of the IPC, the initial burden cast on it has not been discharged. Therefore, the presumption under Section 113-B of the Evidence Act cannot be attracted. **(Bhola Ram vs. State of Punjab; 2013 (83) ACC 935 (SC)**

S. 304-B—Dowry death and cruelty—Proof

In this case, the statements of PW 4 and PW3 (parents of the deceased) were duly corroborated with respect to the demand of dowry and harassment immediately prior to the date of occurrence and the event of her visit a day prior to her death. They were subjected to lengthy cross-examination. Apart from minor discrepancies, which do not go to the root of the case, their statements are corroborated on material particulars so far as the demands of harassment to Jaswinder Kaur is concerned. Their statements indict the series of incidents forming part of the same transaction which culminated in the death of Jaswinder Kaur. The deceased was disrespected by her-in-laws right from the very beginning and from time to time was being harassed on demand of dowry. The sequence of events, discussed above, suggested that cruelty and harassment on account of such demands were present till her death.

From the statements of Dr. Bhalinder Singh (PW2), it is apparent that the death of Jaswinder Kaur was caused by bodily injury which is otherwise than under the normal circumstances. The death took place within few months of the date of marriage i.e. much before seven years of marriage. It is shown that soon before her death she was subjected to cruelty and harassment by her husband in connection with the demand of dowry. Therefore, the present case squarely falls within the meaning of dowry death for the purpose to attract Section 304-B, IPC. Section 113-B of the Indian Evidence Act deals with the presumption of "dowry death" and proclaims that when the question is whether a person has committed a dowry death of a woman and it is shown that soon before her death, such woman had been subjected by such person to cruelty or harassment, for or in connection with demand of a dowry, the Court shall presume that such person had caused "dowry death". It can, therefore, be understood that irrespective of the fact whether the accused had any direct connection with the death or not, he shall be presumed to have committed the "dowry death" provided the other requirements mentioned above are satisfied.

In the present case, Court has noticed that the prosecution has successfully proved the ingredients necessary to attract the Provision of Section 304-B, IPC. Such ingredients having been proved, Section 113-B of the Indian Evidence Act automatically comes into play.

The statement of the accused corroborates the materials particularly in relation to harassment and demand of dowry and death by torture. The accused being the husband and direct beneficiary of the said demand of Maruti Car, Court find no reason to differ with the conclusion of the Trial Court as affirmed by the Appellate Court that the appellant is guilty of the offence u/s. 304-B, IPC. **(Ranjit Singh vs. State of Punjab; 2013 CriLJ 3959 (SC)**

Ss. 304-B and 302—Dowry death—When charge under S. 302 to be added—Explained

A case against the appellant-accused was registered for offences punishable under Sections 498-A, 304-B, 406 and 34 IPC in connection with the unnatural death of the wife of appellant-Accused 1. Accordingly, a charge-sheet was submitted for offences punishable under these provisions of IPC. Subsequently, a supplementary charge-sheet was filed implicating all the appellant-accused under Section 302 IPC. The trial court considered the material evidence on record and concluded that prima facie there was no material to support the charge under Section 302 IPC. Therefore, the trial court went ahead with the trial without framing a charge under Section 302 IPC. While the trial was pending, in Rajbir, (2010) 15 SCC 116, it was directed by the Supreme Court that in matters connected with offences under Section 304-B IPC, the charge under Section 302 IPC should be compulsorily made. Considering this direction, the trial court framed a charge under Section 302 IPC against all accused. In appeal, the High Court declined to interfere and it observed that autopsy report could prove homicidal death. Hence, the present appeal.

The direction issued in Rajbir; (2010) 15 SCC 116 was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. The Supreme Court in Rajbir case meant to say that in a case where a charge alleging dowry death is framed, a charge under Section 302 IPC can also be framed if the evidence otherwise permits. No other meaning can be deduced from the order of the Supreme Court.

The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial

court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge, as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charges of dowry death punishable u/s. 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge u/s. 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case.

That would not, however, prevent the trial court from re-examining the question of framing a charge u/s. 302 IPC against the appellant-accused and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial court comes to the conclusion that there is any room for doing so. However, it shall remain uninfluenced by the observations made by the High Court on merits of the case. **(Jasvinder Saini vs. State (Govt. of NCT of Delhi; (2013) 3 SCC (Cri) 295)**

S. 304 B – The expression "shall be deemed – Carries the same meaning as shall be presumed" the presumed is mandatory

Though the expression "presumed" is not used under Section 304B of IPC, the words "shall be deemed" under Section 304B carry, literally and under law, the same meaning since the intent and context requires such attribution. Section 304B of IPC on dowry death and Section 113B of the Indian Evidence Act, 1872, on presumption, were introduced by the same Act, i.e., Act 43 of 1986, with effect from 19.11.1986, and Section 498A of IPC and Section 113A of the Evidence Act were introduced by Act 46 of 1983, with effect from 25.12.1983.

Being a mandatory presumption on the guilty conduct of an accused under Section 304B, it is for the prosecution to first show the availability of all the ingredients of the offence so as to shift the burden of proof in terms of Section 113B of the Evidence Act. Once all the ingredients are present, the presumption of innocence fades away. This report of the Law Commission of India would be fruitful in this context:

Those who have studied crime and its incidence know that once a serious crime is committed, detection is a difficult matter and still more difficult is successful prosecution of the offender. Crimes that lead to dowry deaths are almost invariably committed within the safe precincts of a residential

house. The criminal is a member of the family: other members of the family (if residing in the same house) are either guilty associates in crime, or silent but conniving witnesses to it. In any case, the shackles of the family are so strong that truth may not come out of the chains. There would be no other eye witnesses, except for members of the family." **(Gurdip Singh v. State of Punjab; 2013 (6) Supreme 296)**

S. 306 – Abetment of suicide

Harassment, of course, need not be in the form of physical assault and even mental harassment also would come within the purview of Section 498A IPC. Mental cruelty, of course, varies from person to person, depending upon the intensity and the degree of endurance, some may meet with courage and some others suffer in silence, to some it may be unbearable and a weak person may think of ending one's life. Court on facts, found that the alleged extra marital relationship was not of such a nature as to drive the wife to commit suicide or that A-1 had ever intended or acted in such a manner which under normal circumstances, would drive the wife to commit suicide. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 (6) Supreme 366)**

S. 307—Attempt to murder—Ground to attract the section—Any act done with intention or knowledge that it may cause death if causes hurt is sufficient to attract S. 307

The relevant portion of Section 307 reads as follows:

> "307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned……"

High Court was of opinion that injuries has not been caused on vital parts of the body. In order to attract Section 307, causing of hurt is sufficient. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word 'hurt' which has been explained in S. 319, IPC and not "grievous hurt" within the meaning of Sec. 320, IPC. Therefore, in order to attract Sec. 307, the injury need not be on the vital part of the body. A gun shot, as in the present case, may miss the vital part of the body, may result in a lacerated wound, that itself is sufficient to attract Sec. 307. High Court is, therefore, in error in reducing the sentence, holding that the injury was not on

the vital part of the body. Period undergone by way of sentence also in our view is not commensurate with the guilt established. **(State of M.P. vs. Mohan; 2013 CriLJ 4007 (SC)**

S. 307—Conviction u/s. 307—Requirements for

To justify the conviction u/s. 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be gathered from other circumstances and may even, be ascertained without any reference at all to actual wounds. It is not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in S. 307, IPC. An attempt in order to be criminal need not be the penultimate act. S. 307, IPC requires an enquiry into the intention and knowledge of the accused and whether or not by this act, he intended to cause death which would amount to murder as defined in S. 300, IPC. It depends upon the facts and circumstances of each case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of the injuries, the parts of the body of the victim where injuries were caused and the severity of the blow or blows are relevant factors to find out intention/knowledge. **(Vijay Kumar Kamat vs. The State (NCT of Delhi); 2013 CriLJ (NOC) 582 (Del)**

Ss. 375 to 376-D—Age of prosecutrix—Method of determination

The facts in this case indicate that the deceased was aged about 11 years on the date of the incident and was studying in the 4th standard. On the age of the girl, there was some dispute. Certificate, Ext. 94 issued by the Handicap Board stated that the age of the girl was 9 years on 6.12.2005. The post-mortem report, Ext. 27 mentions her age as 14 years and the opinion of the Medical Officer, Ext. 29 shows that the approximate age of the deceased was about 14 years. Ramesh, PW 12, the maternal uncle stated that her age was between 10-12 years. PW 13 grandmother of the deceased stated that her age was about 10 years. Taking into consideration all the versions of the witnesses and the documents produced, it is safe to conclude that her age was around 11 years. **(Shankar Kisanrao Khade vs. State of Maharashtra; (2013) 3 SCC (Cri) 402)**

S. 376 - Evidence Act, S. 118 – Rape - Proscutrix is victim of crime and not

accomplice - Her evidence needs no corroboration, and also her evidence has to be given same weight as is given to injured witness

The burden is on the prosecution to prove beyond reasonable doubt that the appellant is guilty of the offence under Section 376, IPC and this burden has to be discharged by adducing reliable evidence in proof of the guilt of the appellant. In the present case, the prosecution seeks to establish the guilt of the appellant through the evidence of PW-5, the prosecutrix. Law is well settled that the prosecutrix is a victim of, and not an accomplice in, a sex offence and there is no provision in the Indian Evidence Act requiring corroboration in material particulars of the evidence of the prosecutrix as is in the case of evidence of accomplice. It was submitted that the prosecutrix is thus a competent witness under Section 118 of the Indian Evidence Act and her evidence must receive the same weight as is attached to an injured witness in cases of physical violence [see State of Maharashtra vs. Chandrapraksh Kewalchand Jain; (1990) 1 SCC 550]. Keeping this principle in mind, in the evidence of PW-5, we find that she has categorically stated that the appellant fell her down, covered her mouth with one hand and restricted her hands with other hand and lifted her petticoat and committed rape on her. It is true that on her medical examination the next day, PW-9 did not find any injury on the person of PW- 5, but PW-5 has explained that she fell on her back in the agricultural field which had a smooth surface and there were wheat and mustard crops in the field and this could be reason for her not suffering injury. **(Ganga Singh v. State of MP; AIR 2013 SC 3008)**

S. 376 – Rape – Not only sex crime – It is violation of woman's privacy which only leads to psychological trauma but also attaches social stigma to victim

Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix. In case of rape be sides the psychological trauma, there is also social stigma to the victim. Majority of rapes are not sudden occurrences but are generally well planned. Social stigma has a devastating effect on rape victim. It is violation of her right of privacy. Such victims need physical, mental, psychological and social rehabilitation. Physically she must feel safe in the society, mentally she needs help to restore her lost self esteem, psychologically she needs help to overcome her depression and socially, she needs to be accepted back in the social fold. Rape is blatant violation of women's bodily integrity. **(Md. Iqbal v. State of Jharkhand; 2013 (5) ALJ 617)**

S. 376 – Rape – Un-corroborated testimony of prosecutrix can be made

basis for conviction

There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses. In Narender Kumar v. State (NCT of Delhi); AIR 2012 SC 2281=2012 AIR SCW 3391, the Court has observed that even if a woman is of easy virtue or use to sexual intercourse, it cannot be a licence for any person to commit rape. **(Md. Iqbal v. State of Jharkhand; 2013 (5) ALJ 617)**

S. 376 (2)(g) – Evidence Act, S. 114-A – Gang rape – Consent of victim – Presumed to be absent

The trial court has thoroughly appreciated the facts of the case and come to the conclusion that in view of the provisions of Section 114-A of Indian Evidence Act, 1872 there is a presumption as to absence of consent in case of gang rape and it will be presumed that the prosecutrix did not give consent, as this presumption is based on the reasoning that nobody can be a consenting party to several persons simultaneously. Thus, consent is not possible in the case of gang rape. There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses. In Narender Kumar v. State (NCT of Delhi), AIR 2012 SC 2281: (2012 AIR SCW 3391), this Court has observed that even if a woman is of easy virtue or use to sexual intercourse, it cannot be a licence for any per- son to commit rape. **(Md. Iqbal v. State of Jharkhand; 2013 (5) ALJ 617)**

S. 498-A - Cruelty to married woman - Intimacy of husband with other woman is not cruelty

Mere fact that the husband has developed some intimacy with another, during the subsistence of marriage and failed to discharge his marital obligations, as such would not amount "cruelty", but it must be of such a nature as is likely to drive the spouse to commit suicide to fall within the explanation to Section 498 A, IPC. In the instant case the accused had developed intimacy with her colleague. He however has not ill-treated the deceased, either physically or mentally demanding dowry and the deceased was living with accused in the matrimonial home till the date, she committed suicide. The woman involved had not be shown to have caused any kind of mental harassment by maintaining any relationship with accused so as to cause any emotional distress on the deceased. No evidence had been adduced or proved to show that the woman had alienated the husband from the deceased. So, Supreme Court has held that the alleged extra marital relationship was not of

such a nature as to drive the wife to commit suicide or that accused had ever intended or acted in such a manner which under normal circumstances, would drive the wife to commit suicide. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 CrLJ 4448 (SC)**

S. 498A - Husband of a woman subjecting her to cruelty - "extra-marital relationship" of such a degree which may amount "cruelty" - Cruelty includes both physical and mental cruelty for the purpose of S. 489A

Court have to examine the correctness or otherwise of the findings recorded by the trial Court, affirmed by the High Court, as to whether the alleged relationship between A-1 and A-2 has in any way constituted cruelty within the meaning of explanation to Section 498A IPC. The facts in this case have clearly proved that the A-1 has not ill-treated the deceased, either physically or mentally demanding dowry and was living with A-1, in the matrimonial home till the date, she committed suicide. Cruelty includes both physical and mental cruelty for the purpose of Section 498A. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 (6) Supreme 366)**

Indian Stamp Act

Ss. 56-A, Board of Revenue has completely lost sight of the legal position that the valuation of the property is to be determined with reference to the status of the property on the date of the execution of the sale-deed/ its registration and not with reference to the further improvement made thereafter

It is the case of the petitioner that before the appellate authority, said contention was specifically raised and has also been noticed in the order impugned. It was the specific case of the petitioner that constructions of the flats had been raised after purchase of the plot in 2010 till the date of fresh inspection in the year 2012. For the purpose reference was also made to the order of the Development Authority sanctioning the map for constructions. The Board of Revenue even after noticing the said fact has only relied upon the inspection report, which records that at present there were constructions of four stories, six flats each, total 24 flats and therefore, the value of the constructions had also to be included in the sale-deed for determining its market value.

According to the learned Counsel for the petitioner, the stand taken is fallacious and is clearly a case of non-application of mind to the legal position, namely that the stamp duty is to be determined with reference to the value of the property on the date of execution of the sale-deed/its registration and not with reference to the further improvement made thereafter on the land. Having noticed the said contention, this Court required the learned Standing Counsel

to demonstrate in the facts of the case as to how the value of these 24 flats could be added without recording a finding as to when these flats were constructed, specifically in the circumstance, when under earlier proceedings the Collector had not found any error in computation of the value of the property with regard to the standing constructions. No reply could be furnished.

The Board of Revenue has completely lost sight of the legal position that the valuation of the property is to be determined with reference to the status of the property on the date of execution of the sale-deed/its registration and not with reference to the further improvement made thereafter. (**Ashok Kumar Garg v. State of U.P.; 2013 (121) RD 680)**

Interpretation of Statutes

Words 'of', 'from' and after' in respect of provision provided in S. 12 of Limitation Act may in given situation, means same thing

It is not possible to hold that the word 'of' occurring in Ss. 138(c) and 142(b) of the N.I. Act is to be interpreted differently as against the word 'from' occurring in S. 138(a) of the NI, Act; and that for the purposes of S. 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in Ex parte Fallon, (1793) 5 Term Rep 283, the words 'of', 'from' and 'after' may, in a given case, mean really the same thing. As stated in Stroud's Judicial Dictionary, Vol. 3 1953 Edition, Note (5) the word 'of' is sometimes equivalent of 'after'. **(Econ Antri Ltd. vs. Rom Industries Ltd.; 2013 CriLJ 4195 (SC)**

Juvenile Justice (Care & Protection of Children) Act

Ss. 2(k), 2(1), 15, 16, 17, 19 & 21 - Constitution of India, Arts. 14, 19, 21 - Law - Provisions of Act fixing 18 years as upper age limit for treating persons as juveniles is valid being based on sound principles, recognised internationally and contained in provisions of Indian Constitution

Following the gross abuse and violence of human rights during the Second World War, which caused the death of millions of people, including children, the United Nations had been formed in 1945 and on 10th December, 1948 adopted and proclaimed the Universal Declaration of Human Rights. While Articles 1 and 7 of the Declaration proclaimed that all human beings are born free and equal in dignity and rights and are equal before the law, Article 25 of the Declaration specifically provides that motherhood and childhood would be entitled to special care and assistance. The growing consciousness of

the world community was further evidenced by the Declaration of the Rights of the Child, which came to be proclaimed by the United Nations on 20th November, 1959, in the best interests of the child. This was followed by the Beijing Rules of 1985, the Riyadh Guidelines of 1990, which specially provided guidelines for the prevention of juvenile delinquency, and the Havana Rules of 14th December, 1990. The Beijing Rules indicated that efforts should be made by member countries to establish with their own national jurisdiction, a set of laws and rules specially applicable to juvenile offenders. It was stated that the age of criminal responsibility in legal systems that recognize the concept of the age of criminal responsibility for juveniles should not be fixed at too low an age-level, keeping in mind the emotional, mental and intellectual maturity of children. India developed its own jurisprudence relating to children and the recognition of their rights. With the adoption of the Constitution on 26th November 1949, constitutional safeguards, as far as weaker sections of the society, including children, were provided for. The Constitution has guaranteed several rights to children, such as equality before the law, free and compulsory primary education to children between the age group of six to fourteen years, prohibition of trafficking and forced labour of children and prohibition of employment of children below the age of fourteen years in factories, mines or hazardous occupations**.**

The Juvenile Justice (Care and Protection of Children) Act, 2000, is in tune with the provisions of the Constitution and the various Declarations and Conventions adopted by the world community represented by the United Nations. The basis of fixing of the age till when a person could be treated as a child at eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000, was Article 1 of the Convention of the Rights of the Child. While generally treating eighteen to be the age till which a person could be treated to be a child, it also indicates that the same was variable where national laws recognize the age of majority earlier. In this regard, one of the other considerations which weighed with the legislation in fixing the age of understanding at eighteen years is on account of the scientific data that indicates that the brain continues to develop and the growth of a child continues till he reaches at least the age of eighteen years and that it is at that point of time that he can be held fully responsible for his actions. Along with physical growth, mental growth is equally important, in assessing the maturity of a person below the age of eighteen years.

In any event, in the absence of any proper data, it would not be wise on our part to deviate from the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, which represent the collective wisdom of

Parliament. **(Salil Bali v. Union of India & Anr.; AIR 2013 SC 3743)**

Ss. 2(k) and 7-A—Plea of juvenility—May be raised at any stage irrespective of delay in raising same

Regarding the applicability of the JJ Act, 2000. This issue has been raised for the first time in this Court and the appellant can do so in view of the larger Bench judgment of this Court in Abuzar Hossain vs. State of WB; (2012) 10 SCC 489, wherein it was held that the plea of juvenility can be raised at any stage irrespective of delay in raising the same. But the question that would arise is if the matter came before the Juvenile Justice Board, the maximum sentence that can be awarded in such a case is of 3 years. In the instant case, the punishment awarded is only six months so the cause of the appellant is not prejudiced. **(Ajahar Ali vs. State of W.B.; (2013) 3 SCC (Cri) 794)**

Ss. 2(k) & (1), 15 and 16 – Definition of "Juvenile", "child" or "Juvenile in conflict with law" under – Whether ultra vires Arts. 14 and 21 of the Constitution

There is little doubt that the incident, which occurred on the night of 16-2-2012, was not only gruesome, but almost maniacal in its content, wherein one juvenile, whose role is yet to be established, was involved, but such an incident, in comparison to the vast number of crimes occurring in India, makes it an aberration rather than the rule. If what has come out from the reports of the Crimes Record Bureau, is true, then the number of crimes committed by the juveniles comes to about 2% of the country's crime rate.

On going through the submissions advanced on behalf of the respective parties and also those advanced on behalf of certain non-government organisations and having also considered the relevant extracts from the Report of Justice J.S. Verma Committee on "Amendments to the Criminal Law", the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act, 2000), as amended in 2006, and the Juvenile Justice (Care and Protection of Children) Rules, 2007, are based on sound principles recognised internationally and contained in the provisions of the Indian Constitution. On going through the history of the enactment of the Juvenile Justice Act, 2000 (JJ Act, 2000), and the Rules subsequently framed thereunder in 2007 (JJ Rules, 2007) it is seen there is a definite thought process, which went into the enactment of the aforesaid Act.

In recent years, there has been a spurt in criminal activities by adults, but not so by juveniles. The age-limit which was raised from sixteen to eighteen years in the JJ Act, 2000, is a decision which was taken by the Government, which is strongly in favour of retaining Sections 2(k) and 2(1)

in the manner in which it exists in the statute book.

One misunderstanding of the law relating to the sentencing of the juveniles needs to be corrected. The general understanding of a sentence that can be awarded to a juvenile under Section 15(1)(g) of the JJ Act, 2000, prior to its amendment in 2006, is that after attaining the age of eighteen years, a juvenile who is found guilty of a heinous offence is allowed to go free. It was generally perceived that a juvenile was free to go, even if he had committed a heinous crime, when he ceased to be a juvenile. The said understanding needs to be clarified on account of the amendment which came into force with effect from 22-8-2006, as a result whereof Section 15(1)(g) now makes it clear that even if a juvenile attains the age of eighteen years within a period of one year he would still have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority.

There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and reintegrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future. This being the understanding of the Government behind the enactment of the JJ Act, 2000, and the amendments effected thereto in 2006, together with the Rules framed thereunder in 2007, and the data available with regard to the commission of heinous offences by the children, within the meaning of Sections 2(k) and (l) of the JJ Act, 2000, no interference is necessary with the provisions of the statute till such time as sufficient data is available to warrant any change in the provisions of the aforesaid Act and the Rules**. (Salil Bali v. Union of India; (2013) 7 SCC 705)**

S. 2(1)—Juvenility—Determination of—If school leaving certificate proved, question of medical examination does not arise to determine juvenility

The Court is of the view that no cogent reasons have been stated by the High court to discard the school leaving certificate which was issued on 10.04.2004 by the then Principal of the school. The certificate reveals the date of birth of the accused as 10.05.1991. The school leaving certificate was proved by examining the head mistress of the school. She has recognized the signatures of the principal who issued the school leaving certificate. The evidence adduced by the head mistress was not challenged. Consequently, there is no

reason to discard that document. Further, we notice that there was some confusion as to whether the appellant, whose name is Ranjeet Goswami is the same person Rajiv Ranjan Goswami. The investigating officer's report indicates that they are different persons. Consequently we have to take it that the school leaving certificate produced was in respect of the appellant which has been proved. The Court, therefore, find no reason to reject the school leaving certificate. If that be so, as per the ratio laid down in Ashwani Kumar Saxena (supra) there is no question of subjecting the accused to a medical examination by a medical board. Going by the school leaving certificate since the appellant was a juvenile on the date of occurrence, he can be tried only by the JJ Board. Consequently, the order passed by the High Court is set aside and that of the Sessions Judge, Dumka is restored. The appeal is allowed, as stated above. **(Ranjeet Goswami vs. State of Jharkhand; 2013 (83) ACC 975 (SC)**

Ss. 2(I), 2(k), and 2(p)—Constitution of India, Articles 14 and 21—Juvenile Act should be read in consonance with Right of victim as protected under Articles 14 and 21

On 16.12.2012, a ghastly incident of gang rape took place in a moving bus in the streets of Delhi. In connection with the said incident six accused were arrested on 22.12.2012, one of whom, namely, the first respondent in the present special leave petition was a juvenile on the date of the occurrence of the crime. The victim of the offence died on 29.1.2013. While the Juvenile Justice Board (hereinafter for short "the Board") was in seizing of the matter against the first respondent, the petitioners in the special leave petition approached the Board seeking impleadment in the proceedings before the Board and an interpretation of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter for short 'the JJ Act') so as to enable the prosecution of the first respondent in a regular criminal court. According to the petitioners while the Board did not pass any written orders in the matter it had expressed its inability to decide the question of law brought before it and directed the petitioners to approach a higher Court. Accordingly, on 18.1.2013 the petitioners filed public interest litigation in the High Court of Delhi with the following prayers.

(i) Laying down an authoritative interpretation of Sections 2(l) and 2(k) of the Act that the criterion of 18 years set out therein does not comprehend cases grave offences in general and of heinous crimes against women in particular that shakes the roots of humanity in general.

(ii) That the definition of offences under Section 2(p) of the Act be

categorized as per the grievousness of the crime committed and the threat to public safety and order.

(iii) That Section 28 of the Act be interpreted in terms of its definition, i.e., Alternative Punishment and serious offences having minimum punishment of 7 years imprisonment and above be brought outside its purview and the same should be tried by an Ordinary Criminal Court.

(iv) Incorporating in the Act, the international concept of age of Criminal Responsibility and diluting the blanket immunity provided to the juvenile offender on the basis of age.

(v) That the instant Act be read down in consonance with the rights of victim as protected by various Fundamental Rights including Article 14 and 21 of the Constitution of India.

By order dated 23.1.2013 the High Court declined to answer the questions raised on the ground that the petitioners had an alternative remedy under the JJ Act against the order as may have been passed by the Board. On the very next day, i.e., on 24.1.2013 the Board dismissed the application filed by the petitioners seeking impleadment and the other reliefs. On 19.2.2013 the petitioners had approached this Court seeking special leave to appeal against the order dated 23.1.2013 passed by the High Court of Delhi dismissing the public interest litigation.

Adverting to the facts of the present case, undoubtedly, in the pleadings of the petitioners there is a reference to the first respondent, i.e., the juvenile who is alleged to have committed the offence. There can also be no manner of doubt that if the provisions of the JJ Act are to be construed in the manner that the petitioners seek the first respondent will be affected. The petitioners are in no way connected with the incident in question. But would the above, by itself, render the action initiated by the petitioners non-maintainable on the ground that they have no locus to raise the questions that have arisen being total strangers to the alleged crime, as contended by the Respondents on the strength of the principles noticed above?

The petitioners do not seek impleadment in the inquiry against the first respondent presently pending before the Board or in the trial to which he may be relegated in the event the questions of law are answered in favour of the petitioners and that too within the requisite time span. Such a prayer, i.e., for impleadment was raised and decided against the petitioners by the Board. The said prayer had not been pursued before the High Court. Neither the same has been raised before us. All that the petitioners seek is an authoritative

pronouncement of the true purport and effect of the different provisions of the JJ Act so as to take a juvenile out of the purview of the said Act in case he had committed an offence, which, according to the petitioners, on a true interpretation of Section 2(p) of the Act, is required to be identified and distinguished to justify a separate course of action, namely, trial in a regular Court of Law as a specific offence under the Penal Code and in accordance with the provisions of the Code of Criminal Procedure. The adjudication that the petitioners seek clearly has implications beyond the case of the first respondent and the proceedings in which he is or may be considered just, adequate and may be involved. In fact, interpretation of the relevant provisions of the JJ Act in any manner by this Court, if made, will not be confined to the first respondent alone but will have an effect on all juveniles who may come into conflict with law both in the immediate and distant future. If Court is to view the issue of maintainability of the present proceeding from the aforesaid perspective reference to the case of the first respondent in the pleadings must be understood to be illustrative. If this Court is to interpret the provisions of the Act in the manner sought by the petitioners, the possible effect thereof in so far as the first Respondent is concerned will pale into insignificance in the backdrop of the far reaching consequences that such an interpretation may have on an indeterminate number of persons not presently before the Court. The Court, therefore, of the view that it would be appropriate for us hold that the special leave petition does not suffer from the vice of absence of locus on the part of the petitioners so as to render the same not maintainable in law. The Court, therefore, will proceed to hear the special leave petition on merits and attempt to provide an answer to the several questions raised by the petitioners before us. **(Dr. Subramanian Swamy vs. Raju through Member, Juvenile Justice Board; 2013 (83) ACC 718 (SC)**

Juvenile Justice (Care and Protection of Children) Rules

R.12—Determination of minors age—Procedure for—R. 12 should be basis of determination of age, both for a child in conflict with law and a child who is victim of crime

The manner of determining age (of a minor) conclusively has been expressed in Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3),

matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.

Even though Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix PW 6 (the victim of kidnapping and gang rape) in instant case. **(Jarnail Singh vs. State of Haryana; (2013) 3 SCC (Cri) 302)**

Rule 12(3)—Rule provides that the matriculation certificate is the first document to be considered—Next document is the birth certificate from the school first attended—While deciding the juvenility

The provision of Rule 12(3) makes it clear that the first document to be considered while deciding the question of juvenility is the matriculation certificate, which in the instant case is not available as the revisionists are not matriculates. The next document that can be relied upon is the date of birth certificate from the school first attended. In the instant case, both the parties have produced documents falling in this category, but the dates of birth in these two sets of school records show a very wide variation of several years. Confronted with this situation, the Court below was left with no option but to consider the reliability of the two sets of documents and was, in the circumstances, left with no option but to consider their relative efficacy for deciding the question of juvenility, by considering the oral testimony on record. After dealing with the oral depositions of Raj Kumar Singh (DW-1) in detail, the Court below has, for cogent reasons, discarded the transfer certificates

produced on behalf of revisionists. It was found that a specific date of leaving the school was mentioned in the transfer certificates but in the admission register only the year was mentioned. The Court below has categorically recorded that on the basis of the documents, exhibits Kha-1 and Kha-2 the dates of birth of the revisionists cannot be said to be 5.1.1992 and 2.3.1992 respectively. To Court's mind there is no illegality in the approach. The reasoning and the findings arrived at are neither illegal nor perverse. **(Parashu Ram Singh vs. State of U.P.; 2013 (83) ACC 392 (All)**

Limitation Act

Arts. 64, 65 – Adverse possession – Concept of – Explained

The concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right and, in fact denies the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In order to determine whether the act of a person constitutes, adverse possession, is 'animus in doing that act', and, it is most crucial factor. Adverse possession commences in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, i.e., trustees, guardians, bailiffs or agents, such person cannot set up adverse possession. Burden is on the defendant to prove affirmatively.

An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner, i.e., with the intention of excluding all persons from it, including the rightful owner, he is in adverse possession of it. Where possession could be referred to a lawful title it shall not be considered to be adverse. The reason is that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title.

One who holds possession on behalf of another does not by mere denial of other's title make his possession adverse so as to give himself the benefit of

the statute of limitation. A person who enters into possession having a lawful title cannot divest another of that title by pretending that he had no title at all. Adverse possession is of two kinds. (A) Adverse from the beginning or (B) that become so subsequently. If a mere trespasser takes possession of A's property, and retains it against him, his possession is adverse ab initio. **(State of UP through Estate Officer v. 1st Addl. District Judge, Lucknow & others; 2013 (5) ALJ 316)**

Motor Vehicles Act

S.147(1) – Dishonour of cheque before the date of accident - Cancellation of Policy by Insurance Company on the ground that cheque was dishonored before the date of accident and policy could not be held to be valid on that date – Validity

To clarify the positions, it may be stated that the vehicle which was insured with the appellant met with an accident and a compensation of Rs. 1,24,035 was ordered to be paid to the respondents-claimants along with interest and the owner as also the insurance company were jointly and severally held liable by the Motor Accidents Claims Tribunal (the Tribunal' for short) to pay the amount of compensation to the claimants.

The appellant insurance company assailed the award passed by the Tribunal essentially on the ground that the cover note for the policy of insurance was issued on 7.4.2000 for which a cheque was submitted by the owner. However, the cheque was dishonoured by the bank on 17.4.2000. Subsequently, the vehicle which was insured with appellant insurance company met with an accident on 19.4.2000. The appellant insurance company, therefore, contended that as the policy of insurance could not be held to be a valid document in view of the fact that the cheque towards the policy had been dishonoured even before the accident had taken place, the insurance company was not liable to indemnify the claimants by paying the amount which fell into its share as per the Tribunal's award and it is the owner who is liable to pay the entire amount of compensation to the respondents-claimants.

However, court compliment Ms. Kiran Suri, the learned counsel for the appellant, for cutting short the controversy by fairly pointing out the ratio of the judgment titled United India Insurance Col. Ltd. v. Laxmamma; 2012 ACJ 1307 (SC), wherein it has been held that the insurance company is liable to satisfy the award if the intimation regarding the dishonor of the cheque and cancellation of policy is communicated to the policyholder after the date of the accident. Thus, the defence of the insurance company that the policy of insurance was not valid since the cheque had been dishonoured prior to the

accident would not exonerate them from making the payment of compensation. In this matter, admittedly the accident had taken place on 19.4.2000 and the cheque although had been dishonoured prior to the accident on 17.4.2000, the intimation to the policyholder had been given by the insurance company on 26.4.2000, in view of which the insurance company cannot be allowed to contend that the policyholder was not holding a valid policy of insurance in regard to the vehicle which met with an accident. Admittedly, the policyholder had already issued another cheque substituting the cheque which had earlier been dishonoured. (**National Insurance Co. Ltd. vs. Balkar Ram and others; 2013 ACJ 2416 (SC)**

S. 147 (1) (b)(i) - Motor Insurance – Goods vehicle - Gratuitous passenger – Liability of Insurance Co. - Determination of

In this case the tribunal had fasten the liability and decreed the petition against the respondent owner. Feeling aggrieved with the impugned award the present appeal has been preferred by the owner of the vehicle. Learned counsel for the appellant had invited attention to the Section 147 of the Motor Vehicle Act, (in short hereinafter referred as the Act) which was amended by Act No. 54 of 1994 w.e.f. 14.11.1994. Under Sub Section 1(b) of Section 147 of the Act, the legislature to their wisdom had added the word "injury to any person, including owner of the goods or his authorised representative carried in the vehicle".

While deciding the controversy the Tribunal had overlooked the aforesaid statutory mandate incorporated though amendment in the year 1994 which enable the owner of goods or his/her representative to travel with the goods and make entitled to claim compensation from the insurer. In one other case reported in 2003 (1) T.A.C. 1 (S.C.), New India Assurance Co. Ltd. Vs. Asha Rani and others, Hon'ble Supreme Court elaborately considered different provision with regard to gratuitous passenger and held as under:-

> "(23). The applicability of decision of this Court in Mallawwa (Smt.) & Ors. v. Oriental Insurance Company Ltd. & Ors.; (1999) 1 SCC 403, in this case must be considered keeping that aspect in view. Section 2(35) of 1988 Act does not include passengers in goods carriage whereas Section 2(25) of 1939 Act did as even passengers could be carried in a goods vehicle. The difference in the definitions of the "goods vehicle" in 1939 Act and "goods carriage" in 1988 Act is significant. By reason of the change in the definitions of the terminology, the Legislature intended that a goods vehicle could not carry any passenger, as the words "in addition to passengers" occurring in the definition of goods

vehicle in 1939 Act were omitted. Furthermore, it categorically states that 'goods carriage' would mean a motor vehicle constructed or adapted for use "solely for the carriage of goods". Carrying of passengers in a 'goods carriage', thus, is not contemplated under 1988 Act.

(24) We have further noticed that Section 147 of 1988 Act prescribing the requirements of an insurance policy does not contain a provision similar to clause (ii) of the proviso appended to Section 95 of 1939 Act. The decisions of this Court in Mallawwa's case (supra) must be held to have been rendered having regard to the aforementioned provisions.

(25) Section 147 of 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does not speak of any passenger in a 'goods carriage'.

(26) In view of the changes in the relevant provisions in 1988 Act vis--vis 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. 'a third party'. Keeping in view the provisions of 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger traveling in a goods vehicle, the insurers would not be liable therefor".

In view of above, tribunal seems to have been failed to exercise jurisdiction vested in it and overlooked amended Section 147(1) of the Act. So, the appeal deserves to be allowed. Accordingly appeal is allowed. The impugned award dated 6.5.1999 is modified to the extent it relates to liability assessed with regard to payment of compensation and shall be paid by respondent New India Insurance Company Limited and not by the owner of the vehicle. Award stands modified in above terms. **(Ram Krishna Gupta v. Munni Devi and others; 2013 ACJ 2844)**

Ss. 163-A and 166—Remedies under—Distinction between—Remedy u/s. 163-A is not in addition to remedy u/s. 166 but an alternative course to S. 166

The Motor Vehicles Act, 1988 gives a choice to the claimants to seek compensation on structured formula basis as provided in Section 163A or make an application for compensation arising out of an accident of the nature

specified in section (1) of Section 165 under Section 166 of the said Act. The claimants have to elect one of the two remedies provided in Section 163A and Section 166. The remedy provided in Section 163A is not a remedy in addition to the remedy provided in Section 166 but it provides for an alternative course to Section 166. **(Reshma Kumari vs. Madan Mohan; (2013) 9 SCC 65)**

Ss. 166, 163-A and 168—Fatal accident—Determination of compensation—Multiplier method—Is the best and most satisfactory method for determination of compensation—Hence, must be followed without exception

The determination of compensation based on multiplier method is the best available means and the most satisfactory method and must be followed invariably by the tribunals and courts. A standard method for selection of multiplier is surely better than a criss-cross of varying methods. It is high time that we move to a standard method of selection of multiplier, income for future prospects and deduction for personal and living expenses. The courts in some of the overseas jurisdictions have made this advance.

If the multiplier as indicated in Column (4) of the table mentioned in para 40 of the judgment in Sarla Verma; (2009) 6 SCC 121 read with para 42 of that judgment is followed, the wide variations in the selection of multiplier in the claims of compensation in fatal accident cases can be avoided. The table in Sarla Verma case for the selection of multiplier has been prepared having regard to the three decisions of the Supreme Court, namely, Susamma Thomas; (1994) 2 SCC 176, Trilok Chandra; (1996) 4 SCC 362 and Charlie; (2005) 10 SCC 720 for the claims made under Section 166 of the MV Act. The court in Sarla Verma case said that multiplier shown in Column (4) of the Table must be used having regard to the age of the deceased. The biggest advantage from employing the Table prepared in Sarla Verma case is that the uniformity and consistency in selection of the multiplier can be achieved**. (Reshma Kumari vs. Madan Mohan; (2013) 9 SCC 65)**

Ss. 166 and 168—Power and duty of Tribunal/Court to award compensation—Scope—Held, can award compensation in excess of what is claimed

The Tribunal/court is competent to award compensation in excess of what is claimed in the application u/s. 166 of the Motor Vehicles Act, 1988. The duty of the Tribunal/court is to fix a just compensation and it has now become settled law that the Tribunal/court should not succumb to niceties or technicalities, in such matter. Attempt of the Tribunal/court should be equate, as far as possible, the misery on account of the accident with the compensation

so that the injured/dependants should not face the vagaries of life on account of the discontinuance of the income earned by the victim. **(Rajesh vs. Rajbir Singh; (2013) 9 SCC 54)**

Ss. 166, 168, 169 and 173—Claim proceedings—Reiterated, Tribunal/Court should not succumb to niceties or technicalities

The Tribunal/court should award proper compensation irrespective of the claim made and, if required, even in excess of the claim. This view can be further strengthened by the fact that after amendment of the Motor Vehicles Act, 1988 by Act 54 of 1994 with effect from 14-11-1994, the report on motor vehicle accident prepared by the police officer and forwarded to the Claims Tribunal u/s. 158(6) has to be treated as an application for compensation. In the said report on accident, there is no question of any reference to any claim for damages, different heads of damages or such other details. In this view, it is the duty of the Tribunal/court to build on that report and award just, equitable, fair and reasonable compensation with reference to the settled principles on assessment of damages. On this ground also the Tribunal/court has a duty, irrespective of the claims made in the application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim made in the application for compensation. **(Rajesh vs. Rajbir Singh; (2013) 9 SCC 54)**

Ss. 166 and 168 – Compensation - Permanent partial disability – Functional disability arising therefrom - Loss of a chance /Opportunity - Compensation for loss of future earnings - Yardstick for quantification

In the present case the evidence of the appellant was that at the time of the accident her age was 24 years and that she was an actress who had acted in many TV serials and regional language motion pictures in which she was the lead actress and was even adjudged as the "Best Actress" and the "Best New Corner Artist" in some of them. She had further stated in her evidence that she had been signed on for two films, and TV serials but she could not act in them due to the accident. She had also acted in advertisement films. Further, the appellant had stated in her evidence that at the time of accident she had completed her graduation in Commerce and she was pursuing her studies for her postgraduate degree. Prior to her admission to PG class, she had done PG Diploma Course in Hotel Management. She further stated that while pursuing her studies she was performing in films. She further stated that after the accident, her physical fitness, physical appearance and her zeal to perform in films have been reduced to zero. The vital statistics required of her for modelling had also become disproportionate after the accident. She has

categorically stated that she became permanently handicapped and disabled. She has also stated that prior to the accident she was lean and slim. But due to continued treatment after the accident, she gained 4 to 5 kg.

For a film actress, the physical appearance particularly the facial features are very important to act in the films and in TV serials. It is in the appellant's evidence that on account of the accident her face was disfigured, she has put on weight and has become fat and therefore she is unable to perform the role as an actress in films in future. Having regard to the nature of vocation she has been carrying on and wishes to carry on with in future, the opportunity is lost on account of the disfigurement of her face, to act in the films as an actress either as a heroine or actress in supporting role or any other role to be played in TV serials, albums and also as a model. It is in the evidence of the appellant that as per the District Medical Board of Sambalpur, her permanent disability is 30%. A finding of fact has to be recorded that the appellant's permanent disability should be treated as 100% functional disablement as she cannot act in the films and in TV serials in future at all. Therefore, on account of the aforesaid reasons, she has suffered functional disability. Even though a claimant does not suffer from 100% physical permanent disability, she could suffer from 100% functional disability if she loses the capacity to pursue his work as a result of the accident.

Therefore, the functional disability is a forceful alteration of career option of the appellant who has already undergone physical and mental injuries because of the accident. It would amount to adding distress to injury if one is forced to work with difficulty to earn his/her livelihood so as to reduce the burden of the wrongdoer in terms of compensation. Hence, the finding of fact having regard to the nature of grievous injuries and the appellant's disfigured face and that she was acting as an actress in the films, TV serials, etc. must be that her functional disablement is 100%. This relevant aspect of the matter has been conveniently omitted to be considered both by the Tribunal as well as by the High Court while determining compensation. For that purpose, the appellant's annual income is to be considered for the purpose of computation of just and reasonable compensation. **(Rekha Jain v. National Insurance company Limited and Others; (2013) 8 SCC 389)**

Ss. 166(1) and 165(1) – Claim application – Maintainability of – Use of Motor Vehicle – Meaning of – Held, words 'use of motor vehicle' do not mean that passenger will always remain seated in the bus and will not get down in between his place of departure, to the point of destination

It is well settled that when same words are used in a statute in various

sections, they should be given the same meaning. The words 'arising out of use of motor vehicle' have been used in various sections of Motor Vehicles Act, 1988, and so they have to be given the same meaning.

It is admitted fact that the deceased was travelling by the aforesaid bus owned by the appellants and he was going from Jaunpur to Lucknow. The expression 'use of motor vehicles' should be widely construed. The Court should not take only the literal meaning of it. Whenever any person purchases a ticket for travelling by a particular bus such person is ordinarily expected to use that bus from the point of departure to the point of destination. In the present case, the deceased boarded the bus at Jaunpur and was travelling up to Lucknow. The accident took place in between Jaunpur and Lucknow. The words 'use of motor vehicles' do not mean that the passenger will always remain seated within the bus and will not get down in between for any purpose, such as to attend to call of nature or for refreshments. After attending to the call of nature, the deceased was required to board the bus again to reach the destination. There may be a case of breakdown of a bus, in which event the Corporation has a duty to arrange another bus for the passengers to reach to the place of destination without any extra charge.

Hence, it cannot be said that at the time of accident the deceased was not using the motor vehicle, or that the accident did not take place, arising out of the use of the motor vehicle. The argument of learned counsel for the appellants in this regard is without any substance and has no force. The point is decided accordingly. (**U.P. State Road Transport Corporation v. Rajendra Kumar Gupta; 2013 ACJ 2307)**

Ss. 168, 166, 173 - Personal injury cases - Just and reasonable compensation – Duty of courts and Tribunal while awarding

The Court is required to keep in mind justice, equity and good conscience which must be the primary, relevant and important aspects for awarding just and reasonable compensation to an unfortunate victim, the appellant herein who has sustained grievous injuries to her body and whose future prospects are completely doomed. Further, the Tribunal and the courts while awarding compensation for bodily injuries, must realise that the possession of one's own body is the first and most valuable of all human rights and that all other possessions and ownership are the extensions of the basic right. Bodily injuries should be equated with the deprivation which entitles a claimant to damages and the amount of damages varies in accordance with the gravity of injuries. **(Rekha Jain v. National Insurance Company Limited and Others; (2013) 8 SCC 389)**

Ss. 171 and 168(3) – Interest – Penal Interest – Grant of – Tribunal has no power to impose penal interest

Learned counsel for the appellants has argued that the Tribunal has erred in awarding the penal interest at the rate of 9 per cent which is not permissible under the Motor Vehicles Act. It is not disputed that the Tribunal has power to award interest either from the date of presentation of the petition or from a later date. In the present case, the Tribunal, as per the provisions of section 168(3), directed the amount of award to be paid within 30 days of the date of announcing the award. The Tribunal has further ordered that if the amount of the award is not paid within 30 days then the appellants shall be liable to pay the interest at the rate of 9 per cent per annum. In Court's opinion, the interest for non-payment within the stipulated time could not be termed as penal interest but a concession granted to the appellants to pay the amount of the award within 30 days with 6 per cent interest. The Tribunal had the power to grant even 9 per cent interest from the date of the petition. (**UPSRTC; v. Rajendra Kumar Gupta; 2013 ACJ 2307)**

Quantum – Deductions - Whether GPF, Life Insurance Premium or repayment of loans may be excluded from income for purpose of computation of compensation – Held "No"

In the present case, the accident occurred on 20.1.2003. The deceased was 19 years old and was a student of engineering course. The Tribunal determined the compensation by taking his annual income to be Rs.15,000 and deducted 1/3rd towards personal expenses. In Arvind Kumar Mishra's case, the Bench proceeded on the assumption that after completion of the Engineering course, the appellant could have been appointed as Assistant Engineer and earn Rs.60,000 per annum. However, keeping in view the degree of disability, his estimated earning was taken as Rs.42,000 per annum and accordingly the amount of compensation was awarded. By applying the same yardstick and having regard to the age of the parents of the deceased, i.e., 45 and 42 respectively, court feel that ends of justice will be served by awarding a lump sum compensation of Rs.7,00,000 to the appellants.

In the result, the appeal is partly allowed. The impugned judgment is modified and it is declared that the appellants shall be entitled to compensation of Rs.7,00,000 with interest at the rate of 6% per annum on the enhanced amount with effect from the date of filing petition under Section 166 of the Act. **(Radhakrishna and another v. Gokul and others; 2013 ACJ 2860)**

Narcotic Drugs and Psychotropic Substances Act

Ss. 8, 21, 22, 32 (b), 50 – Possession of heroin – Conviction – Non compliance of provisions of Act – Sentence of 15 years imprisonment and fine of Rs. 1.5 lacs awarded without considering aspect mentioned in S. 32(b) of Act – Conviction set aside

Failure to "inform" the suspect about the existence of his said right would cause prejudice to him. Failure to comply with Section 50 would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce:

In order to prevent abuse of provisions of the NDPS, Act, which confer wide powers on the empowered officers, the safeguards provided by the legislature have to be observed strictly. The object of section 50(1), NDPS, Act is to check the misuse of power, to avoid harm to innocent persons and minimise the allegations of planting or foisting of false cases by the law enforcement agencies.

In the light of the aforesaid strict mandatory provision of section 50 of NDPS, Act it cannot be said that the submission made by learned counsel for the appellant is without substance. Learned A.G.A has conceded the fact that incriminating evidence and circumstance occurred against the appellant have not been put to him during his examination under section 313 CrPC.

It is known to all concerned that examination of accused under section 313 CrPC is not an idle formality rather it attaches with it a legal sanctity and if the conviction of the appellant/accused is based on the incriminating evidence which have not been put to him during his examination under Section 313 CrPC the conviction of accused would be bad in law. The perusal of the statement of the accused recorded under Section 313 CrPC shows that a question was put to him that the evidence has come against him that 1 kg of heroin was recovered from his possession of which he had no licence. Be it known that the case of prosecution was that ½ kg heroin was recovered from his possession. The appellant has been tried on the charges of recovery of 1.2 kg heroin. It has never been the case of prosecution that 1 kg Heroine was recovered from the possession of applicant Nawab. Non compliance of the provision contained under Section 313 CrPC is a evidence of non application of judicial mind by the Presiding Officer who has conducted the trial.

The perusal of impugned judgment makes it clear that without considering aspect mentioned in section 32(b) of NDPS Act, the sentence of 15 years imprisonment and a fine of Rs 1.5 lakh has been awarded to the applicant

which is a matter to be dealt with in detail at the time of final disposal of the criminal appeal. Suffice it to say, at this stage, that there does not appear the rational and proper application of judicial mind of learned trial court in the matter of ascertaining the quantum of sentence to the appellant. **(Nawab Maujjan Shekh v. State of U.P.; 2013 (5) ALJ 488)**

S. 15—Conscious possession—Proof

From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. Accordingly to Section 35 of the Act, the Court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise. It is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872. **(Gian Chand vs. State of Haryana; 2013 CriLJ 4058 (SC)**

S. 15—Possession of contraband—Non-examination of independent witness—Effect—Mere non-joining of an independent witness cannot cast doubt on prosecution case

Mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. In the instant case at the time of recovery of poppy husk from possession of accused some villagers had gathered there. The Investigating Officer in his cross-examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. S. 114 of the Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim *omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. **(Gian**

Chand vs. State of Haryana; 2013 CriLJ 4058 (SC)

S. 50—Applicability—Contraband recovered from hanging on back of accused, provision of S. 50 of above Act not applicable

Since in the present case, contraband was recovered from the bag hanging on the back of the appellant, therefore, provision of Sec. 50, NDPS cannot be pressed in service. In the present case, PW1 and PW3, in so many words, stated that since it was morning time and place wherefrom appellant was arrested, was 500 meters inside the forest area, therefore, no independent public witness was available. In Court opinion, reason for no independent public witness seems to be properly explained. **(Raj Kumar vs. State of Uttarakhand; 2013 CriLJ 4112 (Uttara)**

Negotiable Instruments Act

S.138 – Offence under – Essential ingredients required

In order to constitute an offence under Section 138 of the Negotiable Instruments Act, 1881 the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque should has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have

committed an offence under Section 138 of the NI Act. (**Aparna A. Shah v. Sheth Developers Private Limited; (2013) 8 SCC 71)**

S. 138—Quashing of order for issuance of process—Determination of

Under Section 138 of the NI, Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the NI, Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case "except in case of Section 141 of the NI, Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage.

Under these circumstances, the appeal deserves to be allowed and process in Criminal Case No. 1171/SS/2009 pending before the Court of learned Metropolitan Magistrate 13th Court, Dadar, Mumbai deserves to be quashed, accordingly, quashed against the appellant herein. **(Mrs. Aparna Shah vs. M/s. Sheth Developers Pvt. Ltd.; 2013 (83) ACC 576 (SC)**

Ss.138(b) and 142—Complaint—Limitation—Consideration of—Prosecution based on second or successive dishonor of cheque is permissible so long it satisfies the requirements stipulated u/s. 138 of the Act

It is also noticed by their Lordships that neither Section 138 nor Section 142 of the Act or any other provision contained in the said Act prevents the holder or the payee of the cheque from presenting the cheque for encashment for any number of occasions within a period of six months from the date of its issuance or within a period of its validity, whichever is

earlier. Therefore, it appears that the payee or the holder has a right to present the same as many number of times for encashment within a period of six months or within its validity period, whichever is earlier.

In the result, their Lordships overruled the decision in Sadanandan Bhadran's case (supra) and held that the prosecution based on second or successive dishonour of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the Act. **(M.S.R. Leathers vs. S. Palaniappan; 2013 (83) ACC 678 (SC)**

S.141 – Interpretation of Statutes – Particular statutes or Provisions – Penal statutes or provisions – Interpretation of - They should be construed strictly

Considering the language used in Section 138 and taking note of background agreement pursuant to which a cheque is issued by more than one person, Court is of the view that it is only the "drawer" of the cheque who can be made liable for the penal action under the provisions of the NI Act. It is settled law that strict interpretation is required to be given to penal statutes." (**Aparna A. Shah v. Sheth Developers Private Limited; (2013) 8 SCC 71)**

S.141 and 138 – Offence U/s. 138 – Joint account–holders – Prosecution of non signing of joint account holder – Each and every account holder cannot be prosecuted unless he had signed on cheque

Under Section 138 of the NI Act, in case of issuance of cheque from joint accounts, a joint account-holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account-holder. The said principle is an exception to Section 141 of the NI Act. The culpability attached to the dishonor of a cheque can, in no case "except in case of Section 141 of the NI Act" be extended to those on whose behalf the cheque is issued. It is reiterated that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the NI Act. (**Aparna A. Shah v. Sheth Developers Private Limited; (2013) 8 SCC 71)**

Payment of Gratuity Act

Ss. 4(6)(a) and (d) – Forfeiture of Gratuity – Gratuity can be forfeited if there was damage or loss suffered by the employer because of wilful omission or negligence of the employee which act led to his termination

The question as to whether in all cases where the penalty of compulsory retirement is imposed, the gratuity is to be forfeited. Answer to this is to be found in Section 4(6) of the Payment of Gratuity Act, 1972. This sub-section reads as under:- "(6) Notwithstanding anything contained in sub-section(1) (a)

the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. (b) the gratuity payable to an employee may be wholly or partially forfeited, (c) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or (d) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provide that such offense is committed by him in the course of his employment."

This sub-section gives the instances when the gratuity can be forfeited and the forfeiture can be whole or partial. Court has concerned herein with Clauses (a) and (d). The gratuity can be forfeited if there is damage or LPA-566-2012 - 12 - loss suffered by the employer because of wilful omission or negligence of the employee which act led to his termination. In that case, the forfeiture has to be to the extent of damage or loss caused. The gratuity can also be forfeited if the misconduct by the delinquent employee constitutes an offence involving moral turpitude and when such an offence is committed by him in the course of his employment. **(UCO Bank & others v. Anju Mathur; 2013 (5) SLR 518 (P& H)**

Practice and Procedure

Absence of counsel for accused—Court should not decide criminal case in absence of counsel for accused

It is settled law that Court should not decide criminal case in the absence of the Counsel for the accused as an accused in a criminal case should not suffer for the fault of his Counsel and the Court should, in such a situation must appoint another Counsel as an *amicus curiae* to defend the accused. **(Shridhar Namdeo Lawand vs. State of Maharashtra; 2013 (83) ACC 722 (SC)**

Practice and Procedure – Explanation of each days' delay is not necessary

Before this Court, is learned Counsel for the petitioner submitted that two revisions were filed against the same order, one by his father and one by himself and that the appeal of the father was allowed whereas the appeal of the petitioner was rejected on the ground of delay. This fact has not been disputed by the respondents. Further, the Court finds that it is not necessary for the petitioner to explain every days' delay. It is sufficient if plausible explanation is given explaining the delay. If the petitioner is directed to explain every day's delay then the Court will also require the petitioner to explain every hour's

delay or every second's delay. Such approach of the authority is perverse.

A general approach should be considered while considering the section 5 applications and if a plausible explanation has been given, the same should be accepted. In the instant case, the delay is for the period of 4 months, which has been sufficiently explained. (**Vijai Shekhar v. Chief Revenue Officer; Basti; 2013 (121) RD 680)**

Prevention of Corruption Act

Ss. 13(2) r/w Sec. 13(1)(e)—CrPC, Ss. 207, 173(5), (6) and (7) and 154—IPC, Sec. 109—Anonymous complaint giving rise to investigation and prosecution for corruption—Non supply of such complaint to accused—Effect—Anonymous complaint of corruption need not be revealed

The petitioner wants a copy of the complaint which was received by the Anti-Corruption Bureau. What is to be borne in mind is that this was a complaint given by some person to the Anti-Corruption Bureau which only triggered the investigation. Thus, this complaint simply provided an information to the Anti-Corruption Bureau and is not the foundation of the case or even the FIR. In fact, Anti-Corruption Bureau, thereafter, held its own independent investigation into the matter and collected the material which was forwarded to the Home Department and on that basis challan was filed in the Court pointing out that sufficient material emerged on the record as a result of the said investigation to proceed against the petitioner for offences under the provisions of Prevention of Corruption Act read with Section 109 of the IPC. In the final report under Section 173(5) CrPC, this complaint was never forwarded. Thus, it is not a part of police report and is not in custody of the trial court, unlike the situation in V.K. Sasikala; (2012) 9 SCC 771. No reliance is placed on the documents by the prosecution either. It is not even a document which would support the case of the petitioner in any manner.

One fails to see to how the accused persons are prejudiced by non-disclosure of the name of the person who sent the complaint as well as the original copy of the complaint received by the Anti Corruption Bureau. Situations are many where certain persons do not want to disclose the identity as well as the information/complaint passed on them to the Anti Corruption Bureau. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their life.

Court also emphasized that in the instant case the prosecution has relied upon the material which was collected during the investigation. It is not a case where some materials/documents were collected by the investigating

agency during the investigations which are in favour of the prosecution and the prosecution is suppressing those documents. Court was of the opinion that non-supply of the complaint or contents thereof do not, at all, violate the principle of fair trial. The said complaint has no relevancy in the context of this prosecution and in no manner, it would prejudice the petitioner. **(Manjeet Singh Khera vs. State of Maharashtra; (2013) 3 SCC (Cri) 905)**

Probation of Offenders Act

S.5—Benefit of—Benefit of above Act cannot be extended to accused considering heinous crime that he had committed and social conditions prevailing in society

In the instant case, as the appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a roadside Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the appellant. **(Ajahar Ali vs. State of W.B.; (2013) 3 SCC (Cri) 794)**

Protection of Women from Domestic Violence Act

S.12 - Scope – Complaint regarding domestic violence cannot be thrown just because allegation occurred – When Act was not in force

Considering the wide nature of redressed provided under the Act as defined in S. 8 thereof, court fine that the nature of the complaint lodged by the respondents in the present case cannot be thrown out just because such allegations commenced from the year, 2002 when the Act did not come into force as I find that the omissions or commissions as alleged in the application are continuing in nature and therefore, as it continued even on the date of filing of the application, it cannot be said that the application should be thrown out in limine. **(Binod Bihari Tripathy & Anr. V. Pravati Rani Tripathy & Ors.; 2013 Cri LJ 4937)**

Provincial Small Cause Courts Act

S. 15 (2) – Jurisdiction – Court of small causes – Small causes court has preferential jurisdiction and not of exclusive jurisdiction

The language of provisions of statute as noticed above, makes it clear that the Legislature has laboured to specify the cases which shall not be cognizable by Courts of Small Causes when there is already a Court having jurisdiction to try such suits but in view of the Scheme of Act 1887 and Sections 15 and 16 of Code of Civil Procedure, it is clear that the Court of Small Causes is a Court of preferential jurisdiction and not of a exclusive jurisdiction. It cannot be said

that a Civil Court on regular side lacks inherent jurisdiction to try suits of nature specified in S. 15(2) of Act 1887. **(Gurmala v. Mohd, Ishaq; 2013 (6) ALJ 619)**

Ss. 15 and 23 – Jurisdiction – small cause court has no jurisdiction to consider validity of sale–deed - Matter could only be examined in regular suit

Small Cause Court is a Civil Court and its jurisdiction over suits of civil nature. Since the procedure to be followed is slightly summary in nature than that followed by Civil Court in regular suit, on the intricate questions of civil nature, the law requires, to some extent that they should be decided by Civil Courts following detail intricate procedure.

Small Cause Court thus has no jurisdiction to consider validity of sale-deed in the proceedings arising in Small Cause Court Suit and that matter has to be examined only in regular suit. Appropriate course would be to direct for return of plaint to plaintiffs so as to be presented before regular court in regular suit proceedings. **(Gurmala v. Mohd, Ishaq; 2013 (6) ALJ 619)**

Service Laws

Appointment – Antecedents/character – Criminal proceeding – Candidate's acquittal in criminal proceedings – Relevance of manner of acquittal: technical or honourable – Accused not "honourably acquitted" - Screening committee is entitled to cancel their candidature

A careful perusal of the policy leads to the conclusion that the Screening Committee would be entitled to keep persons involved in grave cases of moral turpitude out of the police force even if they are acquitted or discharged if it feels that the acquittal or discharge is on technical grounds or not honourable. The Screening Committee will be within its rights to cancel the candidature of a candidate if it finds that the acquittal is based on some serious flaw in the conduct of the prosecution case or is the result of material witnesses turning hostile. It is only experienced officers of the Screening Committee who will be able to judge whether the acquitted or discharged candidate is likely to revert to similar activities in future with more strength and vigour, if appointed, to the post in a police force. The Screening Committee will have to consider the nature and extent of such person's involvement in the crime and his propensity of becoming a cause for· worsening the law and order situation rather than maintaining it. If the Screening Committee's decision is not mala fide or actuated by extraneous considerations, then, it cannot be questioned. Furthermore, this policy framed by the Delhi Police does not merit any interference as its object appears to be to ensure that only persons with

impeccable character enter the police force.

Although the question of co-relation between a criminal case and a departmental enquiry does not directly arise here, but, support can be drawn from the principles laid down by the Supreme Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the government service. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. The expressions "honourable acquittal", "acquitted of lame" and "fully exonerated' are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted'.

The Supreme Court has held that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was "honourably acquitted". Since the purpose of the departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of government service, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it. **(Commissioner of Police v. Mehar Singh; (2013) 7 SCC 686)**

Departmental enquiry - Criminal proceedings – Relative scope of a departmental/domestic enquiry and a criminal trial

Although the question of co-relation between a criminal case and a departmental enquiry does not directly arise here, but, support can be drawn from the principles laid down by the Supreme Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the government service. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where

there is no indication of the witnesses being won over. The expressions *"honourable acquittal", "acquitted of blame"* and *"fully exonerated"* are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted".

The Supreme Court has held that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was "honourably acquitted". Since the purpose of the departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of government service, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. **(Commr. of Police v. Mehar Singh; (2013) 3 SCC (Cri) 669)**

Disciplinary Proceeding – Punishment - Disciplinary Authority or the appellate authority in appeal - Has to decide the nature of punishment to be given to the delinquent employee keeping in view the seriousness of the misconduct conducted by him - Courts cannot assume and usurp the function of the Disciplinary Authority

Disciplinary Proceeding - Quantum of punishment-Judicial review - Only where penalty imposed appears to be shockingly disproportionate to the nature of misconduct - Such penalty order needs to be set aside and matter should be left to the disciplinary/appellate authority to take a decision afresh-Not for the Court to substitute it's decision by prescribing the quantum of punishment. Disciplinary Proceeding – Punishment - Judicial review - Interference permissible only when punishment imposed by the Disciplinary Authority is found to be shocking to conscience of the Court - Where punishment is set aside - Court should remit back the matter to Disciplinary Authority or the appellate authority with direction to pass appropriate order.

Disciplinary Proceeding-Charges of misconduct identical or co-delinquent foisted with more serious charges-Co-delinquent accepts the charges indicating remorse with unqualified apology-Lesser punishment to him would be justified-Such comparison permissible in case of delinquent only and not by

citing cases of other employees. **(Lucknow K Gramin Bank (Now Allahabad U.P. Gramin Bank) and another Vs. Rajendra Singh; (2013 (139) FLR 290) (SC)**

Constitution of India, Art. 14,, 15, 16 - All India Institute of Medical Sciences Ss. 5, 13, 14 – Reservation – Specialty and super specialty posts in AIIMS –Validity of

In this case, Issue regarding reservation at super-specialty posts in AIIMS- been considered in Indra Sawhney's case by a Nine- Judge Bench of this Court, Decisions in Indra Sawhney's, Jagadish Saran's and Dr. Pradeep Jain's cases, disallowing reservation in speciality and suprer speciality courses. In view of decision of Nine-Judges Bench in Indra Sawhney's case, no different view can be taken. **(Faculty Association of AIIMS v. Union of India & Ors.; 2013 (5) SLR 508 (SC)**

Constitution of India, Art. 16 – Compassionate appointment – Not to be treated as temporary as same would defeat its purpose

In this case petitioner appointed on compassionate ground terminated for unauthorized absence treating his appointment as temporary. So court has held that compassionate appointment not to be treated as temporary as same would defeat its purpose. **(Sunil Kumar Singh v. Banaras Hindu University, Varanasi; 2013 (6) ALJ 486)**

Constitution of India - Art. 300-A - Family Pension – Grant of – Parents have been included in the definition of "Family" for the purpose of grant of death cum-retirement gratuity as well as for pension

Referring and relying upon the said judgement, a Division Bench of this Court in State of Punjab and another Vs Kharak Singh Kang and another; (1998) 118 PLR 403 held similar provision, which had not included the dependent parents in the definition of family, as violative of Article 14 of the Constitution of India. Tracing the history of family pension in the State of Punjab, the Division Bench observed that in 1951 Scheme of family pension, the father and mother were included in the definition of 'Family' for the grant of family pension. It was specifically provided that the family "includes only wife, legitimate child, father or mother, dependent upon the deceased for support". Even today, under Rule 6.16-B of the Punjab Civil Services Rules, as applicable to Haryana, the father and mother (including adopted parents....) are included in the definition of family for the purpose of determining entitlement to the payment of death-cum-retirement gratuity. Similarly, they are also eligible for the grant of "wound and other Extraordinary Pensions" as contemplated in Chapter VIII of the said Rules. Under Rule 8.34, it has

been specifically provided that- "if the deceased government employee has left neither a widow nor a child, an award may be made to his father and his mother individually or jointly and in the absence of the father and the mother, to minor brothers and sisters....".

It is, thus, clear that the parents have been included in the definition of 'Family' for the purpose of grant of death-cum-retirement gratuity as well as for pension as contemplated under Chapter VIII. **(Smt. Geeta Devi v. The Financial Commissioner & Principal Secretary to Govt. Haryana and others; 2013 (5) SLR 646 (P&H)**

Constitution of India, Art. 309, 21 – Compassionate appointment – Right to re-marry – Cannot be curtailed under provisions of Dying-in-Harness Rules

Appointment made under sub-rule (3) of 5 is subject to the condition that said person has to maintain other member of the family of the deceased, who were dependent on deceased immediately. Sub-rule (4) of Rule 5 clearly proceeds to mention that where a person is unable to maintain the other member of the family of the deceased, as per sub-rule (3) of Rule 5 then his service may be terminated under U.P. Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time. The only obligation cast upon the person at the time of offering employment under Dying in Harness Rules, 1974 is that a person shall maintain other member of the family who were dependent on deceased, and in case a person is unable to maintain the family member of the deceased then services of a person may be terminated as per U.P. Government Servant (Discipline & Appeal) Rules, 1999. Affidavit as has been so taken from the petitioner that she would not re-marry is not at all subscribed by rules, Re-marriage is a personal choice of employee and same cannot at all be curtailed in any manner whatsoever, under the provisions of Dying in Harness Rule, 1974 as on compassionate appointment being offered she will have to comply with the obligation that which has been east upon her i.e. to maintain the family members of deceased and in the event of failure to maintain, she can be subjected to the disciplinary proceeding and nothing beyond the same. Authority concern could not insist employee to file undertaking that she would not re-marry in future and taking of such an undertaking would be clearly violative of Article 21 of the Constitution of India, inasmuch as right to marry a person of owns choice has been curtailed. Petitioner is free to solemnize the re-marriage, but she will have to keep in mind sub-rules (3) and (4) of Rule 5 of 1974 Rules. The petitioner to show her bona fides has contended before this Court that 1/3rd of her salary would be paid to her mother-in-law each every month after she contracted marriage.

(Ankita Srivastava v. State of U.P.; 2013 (6) ALJ 699)

Ss. 4(6)(a) and (d) – Forfeiture of gratuity - Gratuity can be forfeited if these is damaged or loss suffered by the employer because of wilful omission negligence of the employee which act led to his termination

The next question is as to whether in all cases where the penalty of compulsory retirement is imposed, the gratuity is to be forfeited. Answer to this is to be found in Section 4(6) of the Payment of Gratuity Act, 1972. This sub-section reads as under:-

"(6) notwithstanding anything contained in sub-section (1)

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee may be wholly or partially forfeited,

(c) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(d) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provide that such offense is committed by him in the course of his employment."

This sub-section gives the instances when the gratuity can be forfeited and the forfeiture can be whole or partial. We are concerned herein with Clauses (a) and (d). The gratuity can be forfeited if there is damage or loss suffered by the employer because of wilful omission or negligence of the employee which act led to his termination. In that case, the forfeiture has to be to the extent of damage or loss caused. The gratuity can also be forfeited if the misconduct by the delinquent employee constitutes an offence involving moral turpitude and when such an offence is committed by him in the course of his employment. **(UCO Bank and others v. Anju Mathur; 2013 (5) SLR 518 (P&H)**

Specific Relief Act

S.2 (b) – Stamp Act – Sec. 2(24) – Term "settlement" – Meaning

Under some statutory provisions also definition of "settlement" has been provided. In Section 2(b) of Specific Relief Act, 1963, the "settlement" has been defined as under:

> "settlement" means an instrument other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925) whereby the destination or devolution of successive interests in moveable or immovable property is disposed of or is agreed to be disposed of."

Section 2(24) of Indian Stamp Act, 1899 also define "settlement" as under:

> "Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made-
>
> (a) in consideration of marriage,
> (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
> (c) for any religious or charitable purpose;
>
> and includes an agreement in writing to make such a disposition and, where, any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition."

In **Sita Ram v. Board of Revenue; AIR 1979 All 301**, the Court observed that the expression "settlement" means a non-testamentary disposition of property by an instrument in writing, containing even a declaration of trust, for distribution of property among the settlor's family or his dependent or those for whom the settler desires to provide or for religious or charitable purpose. In other words, settlement among members of family in respect of the property jointly owned by them is kind of compromise/ mutual concession and arrangement between the members of family to settle their rights in respect of the member of the family.

In Law of Evidence by Sarkar 13th Edition page 1128 he has explained a family arrangement by observing that, "a family arrangement has been defined as an arrangement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigating or by saving its honour."

The Court find that there was a settlement or family arrangement between the members of family in 1969 which has been proved by independent

witnesses also and admitted by most of the members of family. The plaint assertions in this regard have not been contested or contradicted by appellants by filing any written statement. They have not adduced any evidence otherwise before court below. The plaintiffs have also proved that settlement/arrangement agreed between members of family in 1969 was given effect to and the parties also incurred stakes by raising construction etc. over property that came to their share. This shows that settlement reached to the extent of division/ partition by metes and bounds. The defendants-appellants have not stated or pleaded anywhere, since they have not filed any written statement, that these facts were not in their knowledge or having acquired the knowledge, they ever protested or raised their objection etc. to such arrangement. In fact, till the filing of suit and even thereafter, so far as defendants-appellants are concerned, they have not contradicted any statement of fact asserted and proved by plaintiffs through their pleadings and evidence before courts below. The defendants who have actually contested the matter, have felt satisfied with the decree passed by courts below and have not chosen to challenge the same.

Though it has been argued that all the members of family were not present at the time when 1969 settlement took place but it is also true that the said settlement has not been disputed by any other member who allegedly was not present at the time, though whatever was settled between parties, was actually given effect to. There is no pleading on the part of any of the defendants or the alleged absentee(s) that he/they did not have the knowledge of said settlement and, therefore, could not raise any objection thereto. **(Harey Krishna Agrawal v. Jairaj Krishna (Dead) and Others; 2013 (3) ARC 845)**

S. 16(c) - Readiness and willingness to perform obligation – Test as to – Held, no strait-jacket formula can be laid down but depends on overall conduct of Parties to agreement prior and subsequent to filing of suit

The principles of law on the basis of which the readiness and willingness of the plaintiff in a suit for specific performance is to be judged finds an elaborate enumeration in a recent decision of this Court in J.P. Builders v. A. Ramadas Rao; (2011)1 SCC 429: (2011)1 SCC (Civ) 227. In the said decision several earlier cases i.e. R.C. Chandiok v. Chuni Lal Sabharwal; (1970)3 SCC 140, N.P. Thirugnanam v. R. Jagan Mohan Rao; (1995)5 SCC 115, and P.D. Souza v. Shondrilo Naidu; (2004) 6 SCC 649, have been noticed. To sum up, no straitjacket formula can be laid down and the test of readiness and willingness of the plaintiff would depend on his overall conduct i.e. prior and subsequent to the filing of the suit which has also to be viewed in the light of the conduct of the defendant. Having considered the matter in the above perspective we are left with no doubt whatsoever that in the present case

Plaintiff-1 was, at all times, ready and willing to perform his part of the contract. On the contrary it is the defendant who had defaulted in the execution of the sale document. The insistence of the defendant on further payments by the plaintiff directly to him and no to the Income Tax Authorities as agreed upon was not at all justified and no blame can be attributed to the plaintiff for not complying with the said demand(s) of the defendant. (**Satya Jain (Dead) Through L.Rs. v. Anis Ahmed Rushdie (Dead) Through L.Rs.; (2013)8 SCC 131)**

S.20 – Exercise of discretion under - Norms for

The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasized that efflux of time and escalation of price of property. By itself, cannot be a valid ground to deny the relief of specific performance. (**Satya Jain (Dead) Through L.Rs. v. Anis Ahmed Rushdie (Dead) Through L.Rs.; (2013)8 SCC 131)**

Tort

Negligence – Jurisprudential concept of negligence differs in civil and criminal law

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. **(Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Other; 2013(4) CPR 639 (SC)**

Transfer of Property Act

S. 76(c)—Mortgagee's plea that he is not liable to pay agricultural income tax—Mortgagee not stopped from taking this plea which is purely based on legal and statutory interpretation even if he made some payment towards agricultural income tax

Merely because some payments were made towards either sales tax or agricultural income tax by the mortgagee, that cannot be held to have stopped the appellants from raising a plea purely based on legal and statutory construction that the liability to pay agricultural income tax was on the mortgagor. **(Rukmini Amma vs. Rajeswary (Dead) Through LRs.; (2013) 9 SCC 121)**

U.P. Gangsters and Anti-Social Activities (Prevention) Act

S. 12 – Background and purpose of legislation

Reference to the Statement of Objects and Reasons and to the Preamble of the U .P. Gangsters Act, 1986 is meant to appreciate the background and purpose of the legislation. The Statement of Objects and Reasons and the Preamble make it quite clear that the legislature felt the compulsion to make special provisions against gangsterism and anti-social activities. The present Act deals with gangs and gangsters to prevent organised crime. **(Dharmendra Kirtahal v. State of Uttar Pradesh and Another; (2013) 8 SCC 368)**

U.P. Recruitment of Dependent of Govt. Servants Dying-in-Harness Rules

R. 8 – Compassionate appointment – Grant of – Setting of standard of physical fitness by appointing authority – Not unjustified – Appellant unable to clear physical fitness test – He cannot claim as a matter of right

It is accepted position that the respondent appeared in the test and could not qualify. Once he did not qualify in the physical test, the High Court could not have asked the department to give him an opportunity to hold another test to extend him the benefit of compassionate appointment on the post of Sub Inspector solely on the ground that there has been efflux of time. The respondent after being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over. **(State of U.P. v. Pankaj Kumar Vishnoi; 2013 (6) ALJ 270)**

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

S.3 (j) – Landlord – Who is – vis-a-vis tenant, agent or attorney satisfied definition of landlord u/s 3 (j)

Vis-a-vis tenant, the agent or attorney, who satisfies definition of "landlord" under Section 3(j), would be a person who holds authority as agent or attorney, to represent the true owner of property, to do or not to do, or to act or not to act, in a particular manner, as authorized by owner. Attorney and agent by himself cannot claim to be the owner of property and simultaneously claim that they satisfy definition of "landlord".

Who can institute suit for ejectment is not specifically mentioned but from a careful reading of scheme it does not appear that a suit for ejectment cannot be filed by a mere agent or attorney even though the real owner/landlord has not joined the proceedings. If a tenant has been inducted by the owner, it is difficult to accept that his tenancy can be terminated by an agent or attorney, unless so permitted by the owner.

Further when there are more than one person satisfying the definition of "landlord", it is the landlord who has better rights or title over property who would exclude others. In order to attract S.3 (f) the plaintiff seeking ejectment of tenant has to show that there is denial of title of landlord. The word "title" here goes not to the authority of landlord to collect mere rent but here the title is something more than that. It is for this reason, and knowing it well that without possessing status of landlord, having semblance of ownership over property in dispute the petitioner would not succeed.

Therefore, the term "landlord", as defined, has to be read in the context and that is how the definition clause also provides. It depends on the cumulative reading of statutory provisions, the intention, object and import of statute, and the purpose making provision. No universal principle can be applied here at. **(Vinod Kumar Agrawal v. XVth ADJ, Allahabad; 2013 (6) ALJ 110)**

S. 20 (2) (f) – Suit for ejectment – Who can file – Suit for ejectment cannot be filed by mere agent or attorney even though real owner/landlord has not joined proceedings

Vis-a-vis tenant, the agent or attorney, who satisfies definition of "landlord" under Section 3(j), would be a person who holds authority as agent or attorney, to represent the true owner of property, to do or not to do, or to act or not to act, in a particular manner, as authorized by owner. Attorney and agent by himself cannot claim to be the owner of property and simultaneously claim that they satisfy definition of "landlord".

Therefore, the term "landlord", as defined, has to be read in the context and that is how the definition clause also provides. It depends on the cumulative reading of statutory provisions, the intention, object and import of statute, and the purpose making provision. No universal principle can be applied here at. **(Vinod Kumar Agrawal v. XVth ADJ, Allahabad; 2013 (6) ALJ 110)**

S. 21(1)(a) – Release application – Question of Hardship – Determination of

In court view Section 21(1-A) of the Act is fully applicable. Further, the facts stated in the order of the Trial court and the Appellate courts clearly establish the bonafide need of the landlord and comparative hardship. In court view, the present case is a clear-cut case where there was a bonafide need of the landlord and hardship. A Government servant arranges to construct a house during the period of service and let it out only with a view that whenever he will retire, he will get his own house vacated and live in his own house. With this object, Section 21(1-A) has been enacted. But in the case in hand, after the retirement, the landlord could not get his own house vacated and, therefore, could not reside in his own house and has been compelled to live in rented accommodation at a different place and lastly died leaving behind his widow. What more can be hardship of a landlord. The whole purpose of Section 21(1-A) is being frustrated. The findings recorded in this regard are findings of fact and in the facts and circumstances cannot be said to be perverse, which require interference and judicially reviewed by this Court.

The Apex Court in the case of **Mohd. Ayub and another v. Mukesh Chand, reported in (2012)2 SCC 155: 2012(1) ARC 264** has held that the landlord's requirement need not be a bare necessity. The hardship which the landlord will suffer by not occupying his own house will be far greater than the hardship the tenant will suffer by having to move out to another place.

In view of the above, I do not find any merit in the writ petition. In the result, the writ petition fails and is dismissed. **(Shanti Devi (Smt.) And 4 Ors v. Shyam Nath Nagar And 6 Ors.; 2013(3) ARC 874).** It is well settled that if rent has not been paid to landlord directly, only such rent can be given credit which is deposited with any authority in accordance with law and not the illegal or unauthorized payment made where it was not permissible or possible. In the case in hand, the aforesaid deposit, therefore, could not have been held to be a valid deposit. Unless valid deposit is made U/s. 30(1), no benefit U/s. 20(4) can be claimed. **(Smt. Mithlesh Kumari Agrawal & Others Vs. VIth ADJ & Others; 2013 (5) AWC 4421)**

Wakf Act

S. 83 – Dispute relating to wakf property and management and peaceful enjoyment of Mosque and madarassa and assets relating to Wakf – Wakf Tribunal and not Civil Court has got jurisdiction to decide those disputes

The Court took the view that the dispute that arises for consideration in regard to the management and peaceful enjoyment of the Mosque and madrassa and the assets which relate to Wakf. Nature of the relief clearly shows that the Wakf Tribunal has got jurisdiction to decide those disputes. The Court, therefore, said that it found no error in the Wakf Tribunal entertaining O.S. No.53 of 2003 filed by the appellant and the High Court committed an error in holding otherwise. Consequently the impugned order passed by the High Court was set aside and the matter was remitted to the High Court to consider the revision on merits. **(Akkode Jumayath Palli Paripalana Committee v. P.V. Ibrahim Haji and others; AIR 2013 SC 3530)**

Words and Phrases

"Against her will"—Meaning of

S. 375 IPC defines the expression "rape", which indicates that the first clause operates where the woman is in possession of her sense, and therefore, capable of consenting but the act is done against her will. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. **(Kaini Rajan vs. State of Kerala; (2013) 9 SCC 113)**

"Consent"—Meaning of

Inference of consent can be drawn on basis of evidence or probabilities of the case, having regard to relevant circumstances. **(Kaini Rajan vs. State of Kerala; (2013) 9 SCC 113)**

"Consortium"—Meaning of

In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. **(Rajesh vs. Rajbir Singh; (2013) 9 SCC 54)**

"Corpus possessions" and "animus possidendi" - Meaning of

The essentials of possession in the first instance include a fact to be established like any other fact. Whether it exists in a particular case of not, will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by

others then he has possession. Thus the possession in order to show its existences must show "corpus possessionis" and an "animus possidendi".

Corpus possessionis means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depend on (1) the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it; (2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negativity his control, for example the continuance in occupation of one who denies his right; and (3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, than upon the physical capacity of an individual to exclude others. The animus possidendi is the conscious intention of an individual to exclude others from the control of an object. **(State of UP through Estate Officer v. 1st Addl. District Judge, Lucknow & others; 2013 (5) ALJ 316)**

"Consumer" – Meaning of

"Consumer" as defined under Section 2(15) of the Electricity Act, 2003 includes any person who is supplied with electricity for his own use by a licensee and also includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, irrespective of the fact whether such person is supplied with electricity for his own use or not. Per contra, under Section 2(1) (d) of the Consumer Protection Act, 1986 those who are supplied with electricity for commercial purpose and those who do not avail services for consideration, irrespective of electricity connection in their premises do not come within the meaning of "Consumer" **(Uttar Pradesh Power Corporation Limited and Others v. Anis Ahmad; (2013) 8 SCC 491)**

"Extra marital affair"- meaning

Extra-marital affair is a term which has not been defined in the Indian Penal Code and rightly not ventured since to give a clear definition of the term is difficult, as the situation may change from case to case. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 Cr.L.J. 4448 (SC)**

"Just compensation"—Meaning of

The expression "just compensation" has been explained in Sarla Verma; (2009) 6 SCC 121, holding that the compensation awarded by a Tribunal does

not become just compensation merely because the Tribunal considered it to be just. "Just compensation" is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. **(Rajesh vs. Rajbir Singh; (2013) 9 SCC 54)**

"Personal liberty"- Meaning of

The liberty of an individual cannot be allowed to live on the support of a ventilator. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty".

In essence, liberty of an individual should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose his own. The cry of liberty is not to be confused with or misunderstood as unconcerned 'senile shout for freedom.

The protection of the collective is the bone marrow and that is why liberty in a civilised society cannot be absolute. It is the duty of the courts to uphold the dignity of personal liberty. It is also the duty of the court to see that the individual who crosses the boundaries carved out by law is dealt with appropriately. it is quite clear that no individual has any right to hazard others' liberty. **(Dharmendra Kirtahal v. State of Uttar Pradesh and Another; (2013) 8 SCC 368)**

"Stridhan"—Meaning of

In Smt. Rashmi Kumar vs. Mahesh Kumar Bhada; 1997 (Suppl.) ACC 30 (SC), it has been held by the Apex Court gifts received by the married women in course of her marriage would fall within the definition of 'Stridhan' property when gifts are made by her husband or her parents or by relatives either of her husband or of his parents. It is immaterial whether it is made before the marriage or at the marriage or after the marriage. These gifts are at the women's own disposal. She may spend, sell, divide or give it away of her own volition. It is her absolute property with right to use at her own pleasure. Husband and his family members, have no control over her 'Stridhan' property.

Since, in view of the decision of 'Rashmi Kumar' (supra), the properties gifted to a wife before the marriage, at the time of marriage or at the time of giving farewell or thereafter are exclusively her stridhana properties with all rights to use at her own pleasure, the husband has no control over such property. **(Smt. Radha vs. State of U.P.; 2013 (83) ACC 790 (All)**

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Statutory Provisions

English translation of Rajaswa Anubhag-I, Noti. No. Pramukh Sachiv-148/0ne-l·2013·9- 1(1)-2010·07, dated June 12, 2013, published In the V.P. Gazette, Extra., Part 4, Section (Kha), dated 12th June, 2013, p, 3

In exercise of the powers under Section 128 and 344 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (V.P. Act No. I of 1951) read with Section 127-B of the said Act and Section 21 of the Uttar Pradesh General Clauses Act, 1904 *(V.P.* Act No. I of 1904) the Governor is pleased to make the following rules with a view to amending the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952-

1. **Short title and commencement.-(**1) These rules may be called the Uttar Pradesh Zamindari Abolition and Land Reforms (Twentieth Amendment) Rules, 2013.

(2) They shall come into force with effect from the date of their publication in the Gazette.

2. **Amendment of Rule 114**.-In the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952, in Rule 114, in sub-rule (4) for clause *(e)* the following clause shall be *substituted,* namely-

"(e) The Panel Lawyers shall be entitled to a flat rate of fee per case, irrespective of the number of date fixed therein as given below:

(1) For the court of Tahsildar and Consolidation Officer situate at Tahsil
headquarters or within the tahsil- Rs 115

(2) For the court of Collector, Additional Collector, Assistant Collector First Class (excluding Tahsildar), Settlement Officer Consolidation and all the Civil Courts, excluding High Court - Rs 175

(3) For the court of the Commissioner, the Additional Commissioner, Deputy Director, Joint Director and Director of Consolidation - Rs 260

(4) For the Board of Revenue, U.P. - Rs 400

(5) For the High Court - Rs 1150

Provided that the Collector or the Government may in exceptional or intricate cases requiring an abnormal time and labour allow a higher fee subject to the following maximum;

(1) For the court of Tahsildar, Consolidation Officer and Civil

Court situate at Tahsil headquarters or within the tahsil - Rs 175

(2) For the Court of Collector, Additional Collector, Assistant Collector First Class (Excluding Tahsildar), Settlement Officer Consolidation, Deputy Director of Consolidation and all the Civil Courts at District Head Quarters excluding High Court - Rs 260

(3) For the court of the Commissioner, the Additional Commissioner - Rs 400

(4) For the Board of Revenue, U .P. - Rs 635

(5) For the High Court - Rs 2300

Exceptional or intricate cases will be decided by the Collector."

English translation of Kar Evam Nibandhan Anubhag-7, Noti. No. KN.-VII-641111- 700(111)-2013, dated August 1, 2013, published in the V.P. Gazette, Extra., Part 4, Section (Kha), dated l st August, 2013, pp. 2-3 [AP.340]

In exercise of the powers under clause (a) of sub-section (1) of Section 9 of the Indian Stamp Act, 1899 (Act No. 2 of 1899) as amended in its application to Uttar Pradesh read with Section 21 of the General Clauses Act, 1897 (Act No. 10 of 1897) and in supersession of Government Notification No. K.N. 5-3730/XI-2004-500(85)-2003, dated July 6, 2004 and No. 3066/XI-5-2009-500(lOO)-2008, dated June 12,2009 (2004-LLT-V-148[103]), the Governor is pleased to remit with effect from the date of publication of this notification in the Gazette, the duty chargeable under clause (a) of Article 23 (Conveyance) and under sub-clause (vi) of clause (a), sub-clause (ii) of clause (b) and sub-clause (ii) of clause (c) of Article 35 (Lease) of Schedule 1- B of the said Act of 1899 on the instrument of Conveyance/Lease of immovable property belonging to all the Government Department and the organisations working under them, whether Government or Semi-Government such as a Development Authority constituted under the Uttar Pradesh Urban Planning and Development Act, 1973 (President's Act No. 11 of 1973) as re-enacted with modification by the Uttar Pradesh President's Act (Reenactment with Modification) Act, 1974 (U.P. Act No. 30 of 1974), an Industrial Development Authority constituted under the Uttar Pradesh Industrial Area Development Act, 1976 (U.P. Act No. 6 of 1976), the Uttar Pradesh Awas Evarn Vikas Parishad established under the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (U.P.Act No. 1 of 1966), the Uttar Pradesh State Industrial Development Corporation registered under the Companies Act, 1956 (Act No. 1 of 1956), the Uttar Pradesh Krishi Utpadan Mandi Parishad constituted under

the Uttar Pradesh Krishi Utpadan Mandi Adhiniyarn, 1964 (Act No. 25 of 1964), SUDA, registered under the Societies Registration Act, 1860 (Act No. 21 of 1860) and a Zila Panchayat constituted under the Uttar Pradesh Kshetriya Panchayats and Zila Panchayats Act, 1961 (Act No. 43 of 1961) and a local body constituted under the Uttar Pradesh Municipal Corporation Act, 1959 (U.P. Act No. 2 of 1959) or under the Uttar Pradesh Municipalities Act, 1916 (U.P. Act No. 2 of 1916) and the Industrial Estate, administered by the Directorate of Industries and under control of the Industrial Development Department, Government of Uttar Pradesh executed by themselves to transfer an immovable property within a period of six month from the date of issuance of allotment letter in favour of an allottee to the extent of the amount of duty chargeable on the amount that exceeds the amount of duty chargeable on the consideration as setforth in such instrument of Conveyance/Lease, In case of Lease, Consideration means the amount or value of the rent reserved for first eleven years and the amount or value of such fine or premium or advance as setforth in the lease:

Provided that the remission in stamp duty shall also be available to such allottee as has executed the agreement to sell/lease within six months from the date of issuance of allotment letter and got the sale/lease deed executed in pursuance of the said agreement, within three months from the date of the issuance of the possession letter or up to the date of getting actual possession, whichever is earlier.

Explanation-An case at the time of execution of conveyance/lease deed the Institution make any amendment or change in the allotted immovable property, the stamp duty shall be adjusted.

LEGAL QUIZ

Q. 1 If a Transfer Application is filed against an officer, neither the file is summoned not there is any stay order, what the officer should do? Is he bound to decide the matter or not?

Ans. There is no specific law to deal with such matter. However, any of the following options may be exercised:

1. May postpone the date and ask the party to bring transfer order or stay order if any. It may be specifically mentioned that if such party fails to do so the judgment may be pronounced.
2. May postpone the date fixing the case for fresh hearing and await the order to be passed on such transfer application.
3. May proceed to deliver the judgment.

There is no compulsion to deliver the judgment in such case on date fixed for judgment.

Q. 2 Whether the formal arrest is necessary for issuance of P.T. Warrant?

Ans. The formal arrest is not necessary for issuance of P.T. Warrant because such prisoner is already confined in prison and is produced before another court for answering charge etc. By issuance of production warrant accused is transferred from the custody of one court to another court. See: Md. Daud alias Md. Saleem v. Superintendent, Jail, Moradabad; 1993 ALJ 430 Alld. (DB)

Q. 3 Whether the accused is to be produced on P.T. Warrant within 24 hours of formal arrest?

Ans. Yes, if the formal arrest of accused is effected then he should be produced before the Magistrate within 24 hours.

The production warrant is not the custody warrant for the purpose of Section 167 Cr.P.C. It is also pertinent to mention that if the date of appearance on production warrant has not been expired or the date of appearance on production warrant has not been expired or the date has not been mentioned in the production warrant, in such circumstances order of production warrant shall be complied. See: Nabbu v. State of U.P. and others, 2006 Cr.LJ 2260 Allahabad.

Q. 4 Whether Magistrate can award lesser punishment after complying the provisions and conditions laid down in the special Act if such special Act makes provision for awarding lesser punishment than that of minimum punishment. See: Section 25 (1B) and provision of the Arms

Act.

Q. 5 Whether the Magistrate can impose fine only or I.R.T. with fine only in Section 304-A?

Ans. Section 304-A I.P.C. provided "whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two year, or with fine, or with both"

Recently Apex Court propounded that if the accused are found guilty of rash and negligent driving, courts have to be on guards to ensure that they do not escape the clutched on law very lightly. The sentence imposed by the Courts should have deterrent effect on potential wrong- doers and it should commensurate with the seriousness of the offence. Of course the courts are given discretion in the matter of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system. See:

i. State of Karnataka v. Sharanappa Banagouda; 2002 (45) ACC 39 (SC)
ii. Satnam Sing v. State of Rajasthan; (2000) 1 SCC 662
iii. Ratan Sing v. State of Punjab; 1979 ACRR 485 (SC)

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