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

Quarterly Digest

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

April – June, 2006

Volume: XII **Issue No.: 2**

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ADMINISTRATIVE LAW:

Subordinate legislation – Must conform not only the provisions of parent Act but also to the provisions of other Acts.

A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature.

The Kerala Abkari Act was enacted to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquors and/or intoxicating drugs in the State of Kerala. While framing the rules for the purposes of the Act, the legislative policy cannot be abridged. The rules must be framed to carry out the purposes of the Act.

By reason of Section 8 of the Act, trade in arrack was prohibited as far back as in the year 1996. By reason of the impugned Rules, the State has not laid down the terms and conditions for employment of a worker. The Act does not contain any provision therefore. Under the common law as also under the provisions of the Specific Relief Act, an employer is entitled to employ any person he likes. It is well settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation unless the same is expressly conferred by the statute. **(Kerala Samsthana Chethu Thozhilali Union v. State of Kerala; (2006) 4 SCC 327)**

Principles of Natural Justice – Would be excluded where doctrine of necessity is applicable

It is not in dispute that the Lok Ayukta was the disciplinary authority. The power to impose punishment on the appellant vested only in him. When the Lok Ayukta appointed one Shri S.K. Arora, a retired Director of Defence Estate, an objection thereto was taken by the appellant himself stating that no person from outside should be appointed as the Inquiry Officer. In the aforementioned situation, the Lok Ayukta had no other option but to take upon himself the burden of holding the departmental proceedings. The appellant, therefore, cannot be permitted to raise any

contention that the disciplinary proceeding should have been conducted by some other officer. It has not been contended that any other officer working in the office of Lok Ayukta was available for conducting such enquiry.

It is true that the principle of natural justice is based on two pillars: (i) nobody shall be condemned without hearing; and (ii) nobody shall be a Judge in his own cause.

It is, however, well known that the principles of natural justice can be excluded by a statute. It can also be waived.

In a case where doctrine of necessity is applicable, compliance of the principles of natural justice would be excluded.

Referring to the doctrine of necessity. Sir William Wade in his Administrative Law stated:

> "But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity, for otherwise there is no means of deciding and the machinery of justice or administration will break down."

It was further stated:

> "In administrative cases the same exigency may arise. Where statute empowers particular minister or official to act, he will usually be the one and only person who can do so. There is then no way of escaping the responsibility, even if he is personally interested. Transfer of responsibility is indeed, a recognized type of ultra vires. In one case it was unsuccessfully argued that only minister competent to conform a compulsory purchase order for land for an airport had disqualified himself by showing bias and that the local authority could only apply for a local Act of Parliament."

In M.P. State Police Establishment v. State of M.P. and Others, (2004) 8 SCC 788, a Constitution Bench of this Court observed that as office of the Lok Ayukta is held by a former Judge of this Court, it would be difficult to assume that such authority would give a report without any material whatsoever. Although no law was laid down in this behalf, but,

evidently those observations are pointers to show that normally a report from such a High Officer should not be disbelieved.

It is not that the Lok Ayukta was not inclined to get the matter inquired into by an outsider. He appointed one Shri S.K. Arora. It is the appellant himself who raised an objection there against. He categorically stated that no outsider should be appointed as an Inquiry Officer although he took a different stand in his first show cause. He, therefore, waived his right. (See Manak Lal v. Dr. Prem Chand, (1957) SCR 575 at 581).

In the aforementioned situation, the Lok Ayukta had no other option but to proceed with the enquiry. Despite the fact that he was the disciplinary authority himself, as well as a witness, he had no other option but to inquire into the charges against the appellant. **(State of U.P. v. Sheo Shanker Lal Srivastava 2006 (2) AWC 1470 (SC))**

ARBITRATION AND CONCILIATION ACT:

Arbitration Act, 1940 – S. 20 – Right to file the application U/s. 20 accrues when differences and disputes arise between the parties – When parties are in dialogue and are corresponding to negotiate the matter the right would not arise unless they fail to resolve the matter themselves.

None of the correspondence referred to by the learned Judges of the Division Bench spells out the existence of any disputes as a result of which the properties could not be distributed prior to 31.5.1987. The High Court has erred in coming to the conclusion that because no distribution of the property had been made till 29.2.1988, it was indicative of the fact that there were disputes and differences between the parties. The High Court has failed to appreciate that merely because parties did not take steps for distribution of the immovable properties it did not automatically follow that disputes and differences had arisen between them in this regard. In fact, from the correspondence on record, it is clear that the parties were making efforts to complete the distribution of the immovable properties as per the terms of the agreement between them.

On 29.9.1989, a letter was written by the appellants to the respondent G wherein it is stated that it is not fair to impute impropriety or to say that the stand taken by the appellants is an attempt to bring pressure upon immovable properties of dissolved partnership. It is also stated therein that the respondent will expedite the matter of dissolution of the immovable properties in the same

spirit as was envisaged at the time of dissolving the firm. If this letter-dated 29.9.1989 is taken into account, it would show that Section 20 suit would clearly be within time. The High Court committed an error in construing Article 137 in a manner, which would unduly restrict the remedy of arbitration especially in family disputes of the present kind.

It is a well-settled policy of law in the first instance, always to promote a settlement between the parties wherever possible and particularly in family disputes. Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues. (Hari Shankar Singhania v. Gaur Hari Singhania; (2006) 4 SCC 658)

Section 34 – Award contrary to terms of the Contract – Open to interference by the Court U/s. 34 (2)(b) (ii) as being patently illegal.

This Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31)

> "13. The question, therefore, which requires consideration is – whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be – whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is

directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34". **(Hindustan Zinc Ltd. v. Friends Coal Carbonisation; (2006) 4 SCC 445)**

ARMS ACT:

S. 25 (1A) – Conscious and exclusive possession of incriminating article – SBBL Gun and empty cartridges kept inside house beneath a dari – Accused being the only adult member of the family – Held, that the accused had conscious and exclusive possession of the same.

Thus before an order of conviction and sentence is passed against an accused first it is to be proved that the person had conscious and exclusive possession of the incriminating article. In this case recovery is proved by two police witnesses and one independent witness of the same locality. No license of the SBBL gun and cartridges was produced by the revisionist on the spot. In the cited case exclusive possession of concerned accused was not found proved because there were other adult members in the family or adult son, who committed theft or robbery and thereafter incriminating materials were found in joint possession of the family inside their house but in instant case where only minor son and minor daughter were the family members of the revisionist at the time of the recovery and they were not physically present at that time inside the house when the recovery was being made, it was only the revisionist

alone, who was found present inside the house when recovery of SBBL gun and cartridges were made, the accused being all alone and being the sole adult member of the family and also keeping it not at normal place inside the house beneath a Dari, which was lying inside the house shows that the revisionist had guilty intention to conceal the SBBL gun and the cartridges hence it was found beneath the Dari. His lone presence at the time of recovery and he being the only adult member of the family, the incriminating article was found beneath the Dari inside the room. It shows that the revisionist had conscious and exclusive possession of the incriminating article, therefore, if both the courts below have disbelieved the allegation of the defence that he was not in exclusive and conscious possession of the SBBL gun and cartridges, does not suffer from any illegality. The SBBL gun is not an article to be used by minor son or minor daughter. No other adult member was living in the house of the revisionist in those days by whom the SBBL gun could be used. The license of the gun could not be produced by the revisionist before the police officers making recovery of the gun and the cartridges. All this shows guilty, conscious and exclusive possession of the revisionist. Therefore, the findings made by both the courts below do not suffer from any illegality and the findings have been made on the basis of evidence, considering the facts and circumstances of the case. The findings of both the courts below are consistent and are findings of fact, which do not suffer from any illegality, therefore, it does not call for any interference by this Court. **(Ram Kishan v. State of U.P.; 2006 Cri. L.J. 1772(Alld.))**

S. 25 (1A) – Illegal possession of arms-Before passing an order of conviction conscious and exclusive possession of incriminating articles must proved.

Before an order of conviction and sentence is passed against an accused first it is to be proved that the person had conscious and exclusive possession of the incriminating article. In this case recovery is proved by two police witnesses and one independent witness of the same locality. No license of the SBBL gun and

cartridges was produced by the revisionist on the spot. In instant case at the time of the recovery the revisionist along, who was found present inside the house when recovery of SBBL gun and cartridges were made, the accused being all alone and being the sole adult member of the family and also keeping it not at normal place inside the house beneath a Dari, which was lying inside the house shows that the revisionist had guilty intention to conceal the SBBL gun and the cartridges hence it was found beneath the Dari. His along presence at the time of recovery and he being the only adult member of the family, the incriminating article was found beneath the Dari inside the room. It shows that the revisionist had conscious and exclusive possession of the in criminating article. Therefore, the findings made by both the courts below do not suffer from any illegality and the findings have been made on the basis of evidence, considering the facts and circumstances of the case. (Shariful Hasan Vs. State of U.P., 2006 (2) ALJ 495.)

CIVIL PROCEDURE CODE:

S. 9 – Inter Bank dispute – Banks whether public sector undertakings – Modalities indicated in ONGC case are not administrative in nature.

The view in ONGC-I case (1995 Supp (4) SCC 541) was further elaborated in ONGC v. CCE ((2004) 6 SCC 437) (for the sake of convenience described as ONGC-II). It was noted in ONGC v. CCE ((2003) 3 SCC 472) (for convenience described as ONGC-III) that some

doubts and problems arose in the working out of the arrangements in terms of the order of this Court dated 11.10.1991 in ONGC-II case (1995 Supp (4) SCC 541). It was noted in ONGC-III case ((2004) 6 SCC 437) as follows: (SCC pp. 438-39, para 4).

> "4. There are some doubts and problems that have arisen in the working out of these arrangements which require to be clarified and some creases ironed out. Some doubts persist as to the precise import and implications of the words 'and recourse to litigation should be avoided'. It is clear that the order of this Court is not to the effect that – nor can that be done – so far as the Union of India and its statutory corporations are concerned, their statutory remedies are effaced. Indeed, the purpose of the constitution of the High – Powered Committee was not to take away those remedies. The relevant portion of the order reads: (SCC pp. 541-42, para 3)
>
> '3. We direct that the Government of India shall set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, *to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation.* The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline."

It is abundantly clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee." (Emphasis in original)

The matter was again examined in Chief Conservator of Forests v. Collector ((2003) 3 SCC 472). In paras 14 and 15 it was noted as follows: (SCC pp. 481-82).

"14. Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the high Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and the Union of India, this Court in ONGC v. CCE (1992 Supp (2) SCC 432) called upon the Cabinet Secretary to handle such matters. In ONGC v. CCE (1995 Supp (4) SCC 541) this Court directed the Central Government to set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

> 15.The facts of this appeal, noticed above, make out a strong case that there is a felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government."

To say the least the view expressed by the Division Bench of the High Court is confusing and patently shows that the ratio of the various decisions has not been understood in the proper perspective. To say that the decision in ONGC-I case ((1992) Supp (2) SCC 432) was of an administrative nature though a judicial order shows non-application of mind. Any order passed in a judicial proceeding, (much less an order passed by this Court) can by no stretch of imagination be described as one of "administrative nature". **(Punjab & Sind Bank v. Allahabad Bank; (2006) 4 SCC 780)**

S. 9 & Ss. 17, 18 & 19 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – Civil Courts jurisdiction is barred only in regard to such applications – Jurisdiction of Civil Court is not barred in regard to any suit filed by a borrower against a Bank or any relief.

It is evident from Sections 17 and 18 of the Debts Recovery Act that civil court's jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of civil courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief. It is not disputed that the Calcutta High Court had jurisdiction to entertain and dispose of C.S. No. 7/1995 filed by the borrower when it was filed and continues to have jurisdiction to entertain and dispose of the said suit. There is no provision in the Act for transfer of suits and proceedings, except section-31, which relates to suit/proceeding by a Bank or financial institution for recovery of a debt. It is evident from Section 31 that only those cases and proceedings (for recovery of debts due to banks and financial institutions), which were pending before, any court immediately before the date of establishment of

a tribunal under the Debts Recovery Act stood transferred, to the Tribunal. In this case, there is no dispute that the Debt Recovery Tribunal, Calcutta, was established long prior to the company filing C.S. No. 7/1995 against the bank. The said suit having been filed long after the date when the tribunal was established and not being a suit or proceeding instituted by a bank or financial institution for recovery of a debt did not attract section 31.

The effect of sub-sections (6) to (11) of Section 19 of the amended Act is that any defendant in a suit or proceeding initiated by a bank or financial institution can: (a) claim set off against the demand of a Bank/financial institution, any ascertained sum of money legally recoverable by him from such bank/financial institution; and (b) set-up by way of counter-claim against the claim of a Bank/financial institution, any right or claim in respect of a cause of action accruing to such defendant against the bank/financial institution, either before or after filing of the application, but before the defendant has delivered his defence or before the time for delivering the defence has expired, whether such a counter claim is in the nature of a claim for damages or not. What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of civil courts barred in regard to such suits or proceedings. The only change that has been made is to enable defendants to claim set off or make a counter-claim as provided in sub-sections (6) to (8) of Section 19 in applications already filed by the bank or financial institutions for recovery of the amounts due to them. In other words, what is provided and permitted is a cross-action by a defendant in a pending application by the bank/financial institution, the intention being to have the claim of the bank/financial institution made in its application and the counter-claim or claim for set off of the defendant, as a single unified proceeding, to be disposed of by a common order.

Making a counter claim in the Bank's application before the Tribunal is not the only remedy, but an option available to the borrower/defendant. He can also file a separate suit or proceeding before a civil court or other appropriate forum in respect of his claim against the Bank and pursue the same. Even the Bank, in whose application the counter-claim is made, has the option to apply to the tribunal to exclude the counter-claim of the defendant while considering its application. When such application is made by the Bank, the Tribunal may either refuse to exclude the counter-claim and proceed to consider the Bank's application and the counter-claim together; or exclude the counter-claim as prayed, and proceed only

with the Bank's application, in which event the counter-claim becomes an independent claim against a bank/financial institution. The defendant will then will have to approach the civil court in respect of such excluded counter-claim as the Tribunal does not have jurisdiction to try any independent claim against a bank/financial institution. A defendant in an application, having an independent claim against the Bank, cannot be compelled to make his claim against the Bank only by way of a counter-claim. Nor can his claim by way of independent suit in a court having jurisdiction, be transferred to a Tribunal against his wishes. In this case, the first respondent does not wish his case to be transferred to the Tribunal. It is, therefore, clear that the suit filed by the first respondent against the Bank in the High Court for recovery of damages, being an independent suit, and not a counter-claim made in the application filed by the bank, the Bank's application for transfer of the said suit to the Tribunal was misconceived and not maintainable. The High Court, where the suit for damages was filed by the company against the bank, long prior to the bank filling an application before the tribunal against the company, continues to have jurisdiction in regard to the suit and its jurisdiction is not excluded or barred under Section 18 or any other provision of Debts Recovery Act. **(Indian Bank v. ABS Marine Products Pvt. Ltd.; 2006(3) Supreme 647)**

S. 10 – Rejection of Application for stay of suit- Grounds of.

The landlord if he is to evict the tenant, he will have to institute a suit for eviction, which has been done in the subsequent case. In these circumstances, the order impugned in the revision rejecting the application under Section 10 C.P.C. does not suffer from any illegality or irregularity. Thus the court has specifically taken into consideration and arrived at a conclusion that the question to be determined in the two suits are substantially different and, therefore, the application has been rejected. **(Rakesh Kumar Gupta v. Ashok Kumar Gupta & Ors, 2006(2) ALJ 387)**

S. 11 – Explanation III & IV – *Res-judicata* in Public Interest Litigation – If issues raised in subsequent proceeding had been specifically raised in by one party and denied by the other the principle of *res-judicata* would apply and it would be abuse of process of court to re-examine the issue.

Res judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *memo debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the

same cause) and second, public policy that there ought to be an end to the same litigation. Section 11 CPC is not the foundation of the principle of *res judicata*, but merely statutory recognition thereof and hence, the section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to reagitate the matter again and again. Section 11 CPC recognizes this principle and forbids a court from trying any suit or issue, which is *res judicata,* recognizing both "cause of action estoppel" and "issue estoppel".

The principle and philosophy behind Explanation IV, namely, to prevent "the abuse of the process of the court" (as stated in *Greenhalgh*) through reagitation of settled issues, provides yet another ground to reject the appellants' contentions. In the face of such a finding by the High Court, Explanation IV to Section 11 squarely applies as, admittedly, the litigation in the earlier cases exhausted all possible challenges. Merely because the present petitioners draw semantic distinctions, the issue does not cease to be *res judicata* or covered by principles analogous thereto. If the issues that had been raised/ought to have been raised in the previous case were to be re-examined by the Supreme Court, it would simply be an abuse of the process of the court, which cannot be allowed. Therefore, the previous writ petition operated as *res judicata* for the questions raised in the present petitions.

Section 11 CPC undoubtedly provides that only those matters that were "directly and substantially in issue" in the previous proceeding will constitute *res judicata* in the subsequent proceeding. Explanation III to Section 11 provides that for an issue to be *res judicata* it should have been raised by one party and expressly denied by the other. The spirit behind Explanation IV is that the plea of res judicata also applies "to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time". In *Greenhalgh v. Mallard,* (1947) 2 All ER 255 (CA) it was observed "that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them".

Having examined the prayers of the parties, the cause of action, the averments of parties and the finding of the High Court which were substantially the same, in the earlier writ petition, it is clear that the issue

raised in the subsequent writ petition was specifically raised n the previous writ petition and was forcefully denied by the State. In these circumstances, it cannot be doubted that Explanation III to Section 11 squarely applies. It is clear that the issue was "directly and substantially in issue" in the previous case and hence, the findings recorded therein having reached finality, cannot be reopened in this case. **(State of Karnataka v. All India Manufacturers Organization; (2006) 4 SCC 683)**

S. 11 & 13 of Special Courts (Trial of Offences Relation to Transaction in Securities) Act, 1992 – Effect of overriding provision – Does not override doctrine of Res-judicata.

We are not in agreement with the view taken by the Special Court that Section 13 of the Act overrides the doctrine of res-judicata. Section 13 of the Act provides: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any Court, tribunal or other authority". This was certainly not intended to abrogate all the established principles of law, unless they were directly in conflict with the express provisions of the Act itself. There is nothing in the Act which is inconsistent with the doctrine of res-judicata, per se, as seems to have been assumed by the Special Court.

We are afraid that the Special Court was wrong on all the counts. On the question of res-judicata, the Special Court failed to notice that the doctrine of res-judicata is not merely a matter of procedure but a doctrine evolved by the courts in larger public interest. What is enacted in Section 11 of the Civil Procedure Code ("CPC") is not the fountain-head of the doctrine, but merely the statutory recognition of the doctrine, which rests on public policy.

In the previous suit to which both SCB and Canara Bank were parties, the same issue with regard to '15% arrangement' with HPD was urged by CMF as a non-suiting factory, but was negative both by the Special Court and by this Court. Issue No. 10 in the previous suit was the relevant issue dealing with 15% arrangement

This was an issue raised by CMF, which was defendant No. 1 in that suit (Special Court Suit No. 13/94). The burden of proving this issue was on the defendant and the Special Court answered the issue in the negative and observed that the counsel for defendant No. 1 had admitted that there was no evidence to support this issue. Consequently, the

Special Court held that the issue was answered in the negative i.e. against defendant No. 1. Since the Special Court findings were finally upheld by this Court in the judgment reported in Canara Bank (supra) and a review petition there against was also dismissed, we are of the view that it is not open for this Court to again raise the issue and take a view contrary to what had already been decided in the previous suit, particularly in view of the fact that there has been no new revelatory evidence on this issue. **(Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.; 2006(4) Supreme 238)**

Section 47 – Role of Executing Court – Effort must be to see that the parties are given the fruits of the decree - When executing Court can go behind the decree – If a decree is ambiguous, it is the duty of the Executing Court to construe the decree.

The effort of the executing court must be to see that the parties are given the fruits of the decree. The mandate is reinforced when it is a consent decree and doubly reinforced when the consent decree is a family settlement. Family settlements are governed by a special equity and are to be enforced if honestly made. This would be so even if the terms may have been agreed to on the basis of an error of the parties or originate in a mistake or ignorance of fact as to what the rights of the parties actually are, or of the points on which their rights actually depend. This is because the object of an arrangement is to protect the family from long drawn out litigation and to bring about harmony and goodwill in the family. The courts lean heavily in favour of family arrangements and matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements. **(Manish Mohan Sharma v. Ram Bahadur Thakur Ltd.; (2006) 4 SCC 416)**

S. 47 and O. 21 Rule 2 – Effect of uncertified payment under a decree – An uncertified payment of money or adjustment under a decree which is not recorded by the Court under Order XXI Rule 2 CPC cannot be recognized by executing court.

Order XXI Rule 2 applies to a specific set of circumstances. If any money is payable under a decree, irrespective of the nature of decree, and such money is paid out of court, the decree-holder, has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly, if a decree, irrespective of its nature, is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certify such adjustment to that court which has to record the adjustment accordingly. If the payment or

adjustment is not reported by the decree-holder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Then comes sub-rule (3) which provides that a payment or adjustment which has not been certified or recorded under sub-rule (1) or (2), shall not be recognized by the court executing decree.

An uncertified payment of money or adjustment which is not recorded by the court under Order XXI Rule 2 cannot be recognized by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment o4r satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognize them and will proceed to execute the decree.

Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the court executing the decree while Order XXI Rule 2 deals with the procedure which a court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of court or adjustment in any other manner by consensual arrangement. Since Section 47 provides that the question relating to the execution, discharge or satisfaction of the decrees shall be determined by the court executing the decree, it clearly confers a specific jurisdiction for the determination of those questions on the executing court. **(Padma Ben Banushali & another v. State of A.P. and others, 2006(3) Supreme 675 SC)**

S. 92 – Three conditions must be fulfilled before allowing an application U/s. 92 – Nothing in the order to suggest that conditions were fulfilled – Recall of the order allowing application was proper.

In application under Section 92 CPC three conditions must be fulfilled. The suit must relate to a public charitable or religious trust and secondly the foundation of the suit is on an allegation of breach of trust and a direction of the court is required for administration and lastly the relief claimed are those which are detailed in the said provisions. Such a suit is of specific nature and, therefore, the very foundation of the suit

would fall if it does not stand the real test regarding applicability of the provisions of Section 92 CPC. The order passed on 7.9.2005 has been recalled by means of the impugned order, which is annexed along with an affidavit filed in support of the stay application. I have perused the order-dated 7.9.2005. Nothing has been said by the Incharge District Judge, Etah regarding applicability of the three conditions before the application under Section 92 CPC was allowed granting permission to file the suit under Section 92 CPC. In the circumstances, in the event, the District Judge, Etah recalled the said order in exercise of powers under Section 151 CPC, no illegality has been committed which calls for an interference in exercise of revisional powers. **(Rishi Kumar Jain & Ors. v. Suresh Chandra Shah & Ors., 2006(2) ALJ 380).**

S. 100 – Scope of 2nd Appeal – The scope of Section 100, Civil Procedure Code, has been drastically curtailed and narrowed down. The High Court would have jurisdiction of interfering under Section 100 CPC only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal.

Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 CPC only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved.

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

When Section 100 CPC is critically examined then, according to the legislative mandate, the interference by the High court is permissible only in cases involving substantial questions of law. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100.

Judges must administer law according to the provisions of law. It is the bounden duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire inclination and notion of justice would lead to confusion, disorder and chaos. Indiscriminate and frequent interference under Section 100 CP. In cases which are totally devoid of any substantial question of law is not only against the legislative intention but is also the main cause of huge pendency of second appeals in the High Courts leading to colossal delay in the administration of justice in civil cases in our country.

The primary cause of the accumulation of arrears of second appeals in the High Court is the laxity with which second appeals are admitted without serious scrutiny of the provisions of Section 100 CPC. It is the bounden duty of the High Court to entertain second appeal within the ambit and scope of Section 100 CPC. The question, which is often, asked that why a litigant should have the right of two appeals even on questions of law. The answer to this query is that in every State there are number of District Courts and courts in the District cannot be final arbiters on questions of law. If the law is to be uniformly interpreted and applied, questions of law must be decided by the highest Court in the State whose decisions are binding on all subordinate courts. **(Gurdev Kaur and others v. Kaki and others, 2006(3) Supreme 631 SC)**

S. 114 and Order 47 – No review on the ground that all the aspects could not be highlighted and argued properly – Rehearing not permissible in review.

Section 114 CPC does not even adumbrate the ambit of interference expected of the court. The parameters are prescribed in Order 47 CPC which permit a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient

reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulates a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. That is amply evident from the Explanation to Order 47 Rule 1. **(Haridas Das v. Usha Rani Banik; (2006) 4 SCC 78); 2006(3) Supreme 125 SC)**

S. 115 – Objection invited on an application U/s. 92 of CPC – Order does not amount to case decided.

Besides the order inviting the objections on the application 5C-2 fixing a subsequent date, will not amount to a case decided and, therefore I am of the considered view that the revisional powers cannot be invoked. The impugned order is only an interlocutory order and the revision itself is not maintainable. **(Rishi Kumar Jain & Ors. v. Suresh Chandra Shah & Ors., 2006(2) ALJ 380).**

Section 115 (2) & S. 151 – Revisional Court not to act contrary to the express provision of CPC for cutting short litigation.

Respondent 1 decree-holder filed a petition under Section 151 CPC before the executing court on 23-4-1999 to remove the obstructer, namely, the appellant herein. Though an application was filed under Section 151 CPC, it appears that the court recorded evidence and ultimately came to the conclusion that the application filed by Respondent 1 decree-holder under Section 151 CPC was not maintainable. According to the executing court the decree-holder ought to have filed an application under Order 21 Rule 97 CPC where after the procedure prescribed by the following rules had to be observed and the matter adjudicated. In view of its findings the executing court

on 22.11.1999 dismissed the petition filed under Section 151 CPC. Respondent 1 decree-holder preferred a revision against the order of the executing court dismissing his application under Section 151 CPC.

Having regard to the fact that the executing court substantially followed the procedure laid down by Rules 98 to 100 and thereafter passed an adjudicatory order, we may hold in favour of Respondent 1 to the extent that the application though filed with the label of Section 151 CPC was in fact treated as one under Order 21 Rule 97. This, however, does not resolve the controversy before us because even if we treat the said application under Section 151 CPC as one under Order 21 rule 97 CPC, the order passed in that proceeding must be treated as a decree against which only an appeal lay to the appellate court. Respondent 1 did not appeal to the High Court and instead preferred a revision petition under Section 115 CPC. We have no doubt that in view of the provisions of Order 21 Rule 103 CPC which provide for appeal against the order passed by the executing court in such matters, no revision could be entertained by the High Court against that order in view of the clear prohibition contained in Section 115(2) CPC, which in clear terms provides that the High Court shall not under Section 115 vary or reverse any decree or order against which an appeal lay either to the High Court or to any other court subordinate thereto. The High Court appears to have interfered with the order of the executing court because it was under the impression that a long drawn out litigation, perhaps engineered by the judgment-debtor, would result in great injustice, and therefore, if some relief could be granted by cutting short the procedure of appeal, etc. the power under Section 115 could be exercised to do justice between the parties. **(S. Rajeswari v. S.N. Kulasekaran; (2006) 4 SCC 412)**

Ss. 151, 114 & 115 – Withdrawal of suit permitted without permission to file fresh suit – Recall of withdrawal order – S. 151 CPC can be invoked.

As indicated hereinbefore, the only point which falls for our consideration in these appeals is whether the trial court was entitled in law to recall the order by which it had allowed the plaintiff to withdraw his suit.

From the order of the learned Civil Judge (Senior Division), 9th Court at Alipore, it is clear that he had had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing

the plaintiff to withdraw his suit. That does not, however, mean that by passing such an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order passed by it earlier. In the circumstances set out in the order of 24.9.2004, the learned trial court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the conscious decision of the court not to exercise such jurisdiction in favour of the plaintiff. **(Jet Ply Wood (P) Ltd. v. Madhukar Nowlakha, (2006) 3 SCC 699).**

O.1 R.10 – By mere impleadment it cannot be said that defences available to subsequent purchaser regarding non-service of notice u/s 106 of T.P.A have been waived – these would be still be open – 'No' – These would be open.

By mere impleadment of respondents 2 and 3 it cannot be said that the defence, which were available, are waived. Petitioner's defence including that of notice is still open. Reading the application filed by respondents 2 and 3 and the order it appears that respondents 2 and 3 have sought impleadment on the ground that the suit for recovery of rent is pending. In this view of the matter I do not find any error in the orders passed by their trial court and affirmed by the revisional court whereby the courts have allowed the application for impleadment of the respondents. **(Ram Pyare Singh v. Ram Govind & Ors., 2006(2) ALJ 624)**

O. 6 R. 17 – Rejection of application for Amendment of pleadings – Whether knowledge of fact could be brought by way of amendment of pleading after 20 Yrs. from initiation of proceeding- Held, "No" and it become ground for rejection of amendment of pleading.

If a particular fact substantiating the case taken by a party, was within its knowledge from the very beginning, it should be pleaded much before commencement of trial of the suit itself. The proviso to Order VI, Rule 17 C.P.C. has been added by Amending Act 22 of 2002 whereby the right for bringing amendment in the pleadings has been specifically provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the present case this fact was within the knowledge of the plaintiff and if such prayer for amendment in pleadings

has been made after 20 years of filling of the suit, the same has rightly been rejected by the court below. **(Prabhu Niwas & anr. V. Laxmi Narain & Ors., 2006(2) ALJ 716)**

Order 6 Rule 17 – All amendments necessary for determining the real question in controversy must be allowed provided it does not cause injustice to the other party – However, the court should not go into the correctness or falsity of amendment.

Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading, the second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties. The real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, amendment will be refused.

The object of Order 6 Rule 17 is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court. The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. **(Rajesh Kumar Aggarwal v. K.K. Modi; (2006) 4 Supreme Court Cases 385)**

O. 21 R. 2 – Execution of decree – Payment out of Court to decree holder-Validity in matrimonial proceedings – Factum of payment cannot be believed.

The mandatory provision of Order XXI Rule 2 CPC prohibits the judgment debtor to take the plea to payment if the judgment debtor fails to move application in the court concerned that payment was made to the decree holder even though payment is said to have been made but no application was moved by the judgment debtor in the court that he had paid Rupees 1,40,000/- and fact be recoded by the court when the judgment debtor is an advocate at the same place there was no hurdle in moving such application to the court. It shows that such application was not moved because really payment was not made that is why when execution application was moved in the family court it was transferred to the court of District Judge and process for attachment started. The objection was raised by moving application. The law has been laid down in the Sultana Begum's case by Hon'ble Apex Court that Order XXI Rule 3 places a restraint on the exercise of that power by providing that the executing court shall not recognize or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment debtor before the executing court the later in view of the legislative mandate has to ignore it if it has not been certified or recorded by the Court. **(Desh Raj Singh V. Smt. Vandana Chaudhary, AIR 2006 All. 154)**

Order 21 Rule – 90 – Mere irregularity or fraud is not sufficient to set aside auction sale unless coupled with substantial injury to the applicant.

Before the sale can beset aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale.

A charge of fraud or material irregularity under Order XXI Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with the orders of Order XXI Rule 67(1) read with Order XXI

Rule 54(2). No doubt, the Trial Court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order XXI Rule 67 dearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of Court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order XXI Rule 67(1) "as nearly as may be in the manner prescribed by Rule 54, sub rule (2)".

In any even the respondent No. 1 has been unable to establish that he had suffered substantial injury by reason of any irregularity or fraud. The lack of notice under the Partition Act, 1893 to the respondent No. 1 was immaterial as it was not the appellant's case that he would have purchased the property. No such intention has ever been expressed. The respondent No. 1's only grievance is that the property could have fetched a higher value. Apart from the alleged affidavit of the said Sidhique, no other material has been produced by him in support of the such submission. On the other hand in fixed the upset price, the Advocate Commissioner had taken into account the certificate of market value in respect of the property issued by the Sub-Registrar Golkunda dated 13th May, 2005 at Rs. 10 lakhs. The respondent No. 1 has never complained that the upset price had been wrongly fixed. The appellant's offer was above the market value. Additionally, the respondent No. 1 was given several opportunities to produce the purchaser, who was allegedly willing to pay a higher price. The purchaser was never produced. As against this, the appellant has duly deposited the entire amount of Rs. 12 lakhs in Court. The District Judge was in the circumstances correct in rejecting the so-called offer of the said Sidhique. In the circumstances, the High Court erred in setting aside the sale in favour of the appellant. The decision of the High Court is unsustainable both in fact and in law. **(Saheb Khan v. Mohd. Yusufuddin & Ors.; 2006(3) Supreme 474)**

O. 22 R. 3 – Abatement of suit- Failure of plaintiff to move formal substitution application before trial Court -Would not amount to abatement of suit.

It is true that a formal substitution application is required to be given in the trial court also for the purpose of incorporating amendment in the array of the parties in the plaint. But in case the plaintiff has failed to move this formal application it will not amount abating the suit- In the present view of the matter the application moved by the petitioner had absolutely no merit and it has rightly been rejected by the courts below**. (Committee**

of Management, Rama Devi Balika Inter College, Allahabad v. Mohd. Iqbal Khan & Ors., 2006 (2) ALJ 784.)

O. 22 R – 3 & 4 – Abatement of appeal on death of one of the respondents – No abatement if decree is severable.

As held in Amarjit Singh Kalra case, (2003) 3 SCC 272, whether an appeal partially abates on account of the death of one or the other party on either side has to be considered depending upon the fact as to whether the decree obtained is a joint decree or a severable one. In case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being carried on with among or against those remaining parties other than the deceased. Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, or in the case of the defendants or respondents having similar rights, contesting the claims against them, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree.

The gift deed in question and the facts relating to its revocation clearly show that each of the respondent daughters had a distinct and separate share by metes and bounds and also that each one of them had received Rs. 10,000 in lieu of the plots of land and therefore, it cannot be held that abatement of the appeal against Respondent 1 would abate the appeal qua the other respondents. **(N. Khosla v. Rajlakshmi, (2006) 3 SCC 605).**

Order 23 Rule 3 – Consent decree - Is a contract with imprimatur of court superadded to it.

A consent decree has been held to be a contract with the imprimatur of the court superadded. It is something more than a mere contract and has the elements of both a command and a contract. **(Manish Mohan Sharma v. Ram Bahadur Thakur Ltd.; (2006) 4 SCC 416)**

Order 33 – Application to file appeal as indigent person – Applicant must get fair opportunity to satisfy the court that he is an indigent person.

The appellant claimed to be an indigent person and entitled to exemption from payment of requisite court fee. It is not disputed before us that the respondent herein filed counter affidavit opposing the application. The counter affidavit opposing the application. The counter affidavit was served on the appellants on 12.3.2004 and the matter came up for hearing before the Court on 15.3.2004 with Saturday and Sunday intervening. The appellants request for grant of time to file a reply was refused. On the same day, a report of the Tehsildar was also produced. The grievance of the Appellants therefore, is that they had no opportunity to meet the case set up by the respondent in its counter affidavit, nor did it have opportunity of controverting the facts stated in the Tehsildar's report.

We do not wish to make any observation with regard to the merit of the claim of the appellants but we feel that in a case of this nature a fair opportunity should be given to the appellants to satisfy the Court that he being an indigent person is entitled to be exempted from payment of requisite court fee. **(M/s. Vivek Financial Services v. M/s. Coimbatore Stock Exchange Ltd.; 2006(3) Supreme 5)**

O. 34 Rr. 7 & 8 – Suit for redemption of mortgage –Whether decree passed in suit for redemption of mortgage would be final or preliminary –It would be depend upon terms & condition mentioned therein.

Whether the decree is preliminary or final in a suit for redemption of mortgage will depend upon the terms & condition mentioned therein. In case where all the dispute between the parties with regard to payment or mortgaged money & interest accrued thereon in finally settled & no further accounting etc., is required to be done, such a decree would be final decree as it finally determines the right of the parties. **(Ghulam Ashraf v. Abdul Khalik & Anr., AIR 2006 ALL. 149)**

O. 39 R. 1& 2 – Suit for injunction- Serious challenge to the jurisdiction of Court as well as to valuation of suit sufficiency of Court fee and maintainability of suit-Whether should be decided before granting injunction "Yes"

Whenever a serious challenge is made to the jurisdiction of the court as well as so to the valuation of the suit and sufficiency of the court fee or to the maintainability of the suit, then if there appears prima facie

some substance in those pleas, the proper procedure for the court is to first decide these issues and then to decide the injunction application and other matters. The learned Addl. Civil Judge has observed in the impugned order that the preliminary issues could not be decided before hearing of the injunction because other defendants had not put in appearance so far. The approach adopted by the learned Addl. Civil Judge (Senior Division) was totally erroneous in this regard. (**Smt. Deepa Sharma & Ors. V. Smt. Raj Kaumari Devi & Ors, 2006 (2) ALJ 636 (DB).)**

O. XLI Rule 27 – Lacunae cannot be filled up by filing additional evidence in appeal.

Mr. Sorabjee appearing on behalf of the respondents rightly submitted that Order XLI Rule 27 of the Code of Civil Procedure cannot be invoked by a party to fill up the lacunae in his case. The State found itself in a dilemma when confronted with two sets of documents conflicting with each other. There was no plea that the documents sought to be produced by way of additional evidence could not be produced earlier despite efforts diligently made by the State or that such evidence was not within its knowledge. In fact no ground whatsoever was made out for adducing additional evidence, and the sole purpose for which the State insisted upon adducing additional evidence was to persuade the Court to accept the point of view urged on behalf of the State, since the evidence on record did not support the case of the appellants/State. Having considered all aspects of the matter we are satisfied that the High Court rightly rejected the applications filed by the State for adducing additional evidence at the stage of appeal which was intended only to fill up the lacunae in its case.

The trial court has also considered the evidence exhaustively and recorded a categoric finding that there was no evidence to prove that the records were tampered with. In fact there was no pleading to this effect in the suit. It considered Ext. 385 Hali Maji register and found that the witness examined on behalf of the plaintiffs at Ext. 25, himself stated that Ext. 385 was prepared from disposal/settlement register and that if it did not tally with the original, it ought to be duly corrected. Thus, as between the Fesal Patrak and the Haji Maji register, the entries in the Fesal Patrak had to be accepted since Hall Maji register is prepared on the basis of the Fesal Patrak. Having considered the entire documentary evidence on record, it reached the conclusion that 53 vighas 18 vasas of land bearing Survey Nos. 371 and 372 belonged to the defendants as owners. **(State**

of Gujarat and another v. Mahendrakumar Parshottambhai Desai (Dead) by L. Rs. 2006(3) Supreme 754 SC)

CONSTITUTION OF INDIA:

Article 16 – Pay scales – Differentiation in pay scales of two groups of storekeepers – whether grant of higher pay scale to storekeeper having higher educational qualification is discriminatory – 'No'.

Differentiation in pay scale of two groups of store keepers is not something new brought about for the first time in recent past of in last one or two revisions of pay scales. It has always been there since very inception of creation of two different grades in storekeepers in the U.P. State Bridge Corporation. A different grade in the same service cadre was created in higher pay scale of Rs. 250-425 and appointees having amended qualification were placed in higher pay scale. ON revision of pay scales from time to time both the categories of storekeepers were treated as distinct and separate class. They were never fused together and integrated into one class. Therefore, no question of unconstitutional discrimination could arise by reason of differential treatment being given to them in the fixation of their pay scale and its revision from time to time and no fault can be found in fixation of higher pay scale to the store keepers having Diploma in Material Management, as their better qualification have

reasonable nexus with their duties and responsibilities and quality of work on their respective posts.

Unless the petitioner placed relevant material before the Court that change in qualification was not required by expediency or need of public service and had not rational nexus with the duties and responsibilities for the post the fixation of high pay scale for the appointees having higher and better qualification cannot be found faulty. According fixation of higher pay scale for appointees subsequent to the appointment of the petitioner cannot be said to be discriminatory and violative of Art. 14 and 16 of the constitution.

(Ram Krishna Mishra v. State of U.P. & Ors., 2006(2) ALJ 500)

Articles 16, 309 – U.P. Dependents of Govt. Servant Dying in Harness Rules (1974), R. 5 - Compassionate Appointment – Whether denial of compassionate appointment on the ground that family of claimant was not living in indigent conditions was proper – 'Yes'

The petitioner claimed that his brothers are handicapped and there is no other source of livelihood and as such the dependent of the deceased employee must be given appointment by the Respondents on compassionate ground. It has been found by the Committee that the family is not living in indigent condition, which is a relevant consideration for offering appointment to the dependent of the deceased family who died in harness. It may be that the dependent may not be having independent source of income but the family still may not be in indigent condition. **(Sunil Kumar v. Union of India & Ors., 2006(2) ALJ 709)**

Article 102 (1)(a) & 103 – Office of profit – Require to be interpreted in a realistic manner – Payment of honoraria, daily allowance etc. are in nature

of remuneration hence amount to profit – The office of profit would nevertheless be an office of profit irrespective of the fact that the holder chooses not to receive them.

The term ‘holds an office of profit’ though not defined, has been the subject matter of interpretation, in several decisions of this Court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is ‘holding an office of profit’. The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word ‘honorarium’ cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the “pecuniary gain” is “receivable” in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of Article 102 (1)(a). (Paras 5 & 6)

It is well settled that where the office carries with it certain emoluments or the order of appointment states that the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office choose not to receive/draw such emoluments. What is relevant is whether pecuniary gain is “receivable” in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly. In this case, as noticed above, the office carried with it a monthly honorarium of Rs. 5000/-, entertainment expenditure of Rs. 10,000/-, staff car with driver, telephones at office and residence, free accommodation and medical treatment facilities to self and family members, apart from other allowances etc. That these are pecuniary gains

cannot be denied. The fact that the petitioner is affluent or was not interested in the benefits/facilities given by the State Government or did not, in fact, receive such benefits till date, are not relevant to the issue. In this view, the question whether petitioner actually received any pecuniary gain or not is of no consequence. **(Jaya Bachchan v. Union of India & Ors.; 2006(4) Supreme 378)**

Article 142 – Directions made by the Supreme Court under this Article are not binding on subordinate courts – Courts should be careful and should follow the ratio decidendi and not the relief given on specific facts.

Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally, it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should therefore be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Article 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Article 142. Be that as it may. **(Indian Bank v. ABS Marine Products Pvt. Ltd. 2006(3) Supreme 647)**

Article – 226 – Aligarh Muslim University Act, S. 5 – Admission to P.G. Medical Courses – Whether reservation claim for 50% Muslim quota in Aligarh Muslim University under Section 5 of (Act No. 40 of 1920) is Constitutional - “No”, it is unconstitutional and impermissible.

The claim of 50% Mohammdan quota for the post graduate medical courses by the University is declared as unconstitutional and impermissible and they shall make no claim of minority quota in like or other manner in future. In this regard, the Union’s communication dated 25.2.2005 vetting the purported minority status of the Aligarh Muslim University by permitting their c .laim of Muslim reservation is quashed and

set aside. The admission of Muslim students made on the invalidly claimed quotas of 50% is maintained on account of pure practicality. **(The Aligarh Muslim University, Aligarh v. Malay Shukla & Ors., 2006 (2) ALJ 528.)**

Article 235 & 237 – Supervisory jurisdiction of High Court – Extends over all courts subordinate to it and can be exercised in respect of judicial as well as administrative matters.

Article 235 of the Constitution of India confers a supervisory jurisdiction upon the High Court over all the courts subordinate to it. Such jurisdiction can be exercised by the High Court in respect of judicial as also administrative matters. Article 236 of the Constitution of India, as referred to by Dr. Dhawan, provides for an interpretation clause. The expression "District Judge" would not only be an officer who has been specified in Clause (a) of Article 236 but would also be such officer who would otherwise be within the control of the High court in terms of Article 235 of the Constitution of India.

The High Court exercises control over the subordinate courts not only in terms of the Constitution of India as envisaged under Articles 235 and 227 thereof but also under other Acts, viz., Code of Civil Procedure and Code of Criminal Procedure. The officers appointed as the Judge, Family Court are selected by the High Courts from amongst the existing cadre of the District Judges. The ACRs of the said Judges are recorded by the High Court. It remains undisputed that there is a Committee of Judges Incharge of the Administration of the Family Courts. It may be true that the Act is a Federal Legislation but such Federal Legislation has been enacted by the Parliament for other purposes also as, for example, the Motor Vehicles Act, 1988 in terms whereof Motor Accident Claims Tribunals are constituted. **(M.P. Gangadharan & Anr. V. State of Kerala & Ors.; 2006(4) Supreme 489)**

Art. 311 – Termination of services – if it is in accordance with condition of appointment letter – Order cannot be termed as stigmatic in nature.

Where the appointment is totally irregular no opportunity is required while dispensing with his service. No doubt, it is mentioned in the impugned order that the working of the petitioner was not upto the mark, but that is not the foundation of the order. The foundation of the order is that the appointment was temporary which was terminable without notice and thus in accordance with the condition of appointment letter, the order

has been passed and in this particular case the petitioner was not entitled to any opportunity as the order cannot be termed as stigmatic. It is also well settled that temporary employee does not have any right to the post and that too one whose appointment itself is hit by the principles enshrined in Articles 14 and 16 of the Constitution. **(Yogesh Verma v. District Judge, Aligarh, 2006(2) ALJ 620)**

Art. 311 – Compulsory retirement – Order of compulsory retirement passed after scrutinizing entire service record of employee – Cannot be said to be illegal or malafide.

The controversy regarding an order passing the compulsory retirement cannot be said to be illegal, malafide, if the same has been passed by the competent authority after scrutinizing the entire service record of an employee. As mentioned above, the courts has perused the complete service record of the petitioner, therefore, the contention of the petitioner to this effect cannot be accepted that the order of compulsory retirement against the petitioner is in any way illegal, punitive and has passed without taking into consideration the performance of the petitioner. **(Ramesh Kumar Srivastava v. State of U.P. & Anr., 2006(2) ALJ 686)**

CONSUMER PROTECTION ACT (1986):

Section 14(1)(c), 18 & 22(1) – Consumer must pay higher price as stipulated in allotment order in terms of his undertaking to pay higher cost due to fluctuations in price of building material – No relief can be given on the ground that there is no actual increase in the price.

The respondent had filed an affidavit clearly indicating that she undertook to abide by all the terms and conditions of the allotment letter, the amount indicated in the allotment letter was the amount in respect of the allotment of the house. There was nothing in the quoted clause to show that the increase was possible only when there was an increase in the cost of construction. Therefore, the respondent was liable to pay the amount as stipulated in the allotment letter. **(Chief Administrator, Puda & Another v. Shabnam Virk; (2006) 4 SCC 74)**

S.17- Deficiency in service- Complaint filed before State Commission-

Would not be barred by the suit of permanent injunction filed in Civil Court

as the cause of action and relief claimed in the suit and the complaint were quite different.

The State Commission has rightly arrived at the conclusion that the permanent injunction suit filed before the civil court would not bar the complaint filed before it as the cause of action and relief's claimed in the suit and the complaint were quite different. (Patrick Gonsalves & Ors. V. M/s. Haven Developers Pvt. Ltd. & Ors. , 2006 (2) ALJ 523)

CONTEMPT OF COURTS ACT:

S. 2(b) – Willful disobedience of order of Court – Whether defying of interim order of the High Court in absence of specific order – Would amount to willful disobedience of order of court.

It is clear that the staying of the operation of the termination order is not a superfluous, meaningless or redundant order, It is not necessary that a specific order in this regard is required to be issued separately. The effect of the interim order is to restore the relationship between the employer and the employee. The effect of the interim order is, that the applicant continues to remain an employee of the opposite parties, inasmuch as, the termination order has been suspended and that the applicant is entitled to perform his

duty. If a specific order was required to be passed, in that eventuality, the opposite parties would never implement any interim order and the interim order would become meaningless. By not giving effect to the interim order, the opposite parties are necessarily implementing their own order, which had become ineffective by virtue of the interim order. If the opposite parties continue to implement the order which has been rendered ineffective for the time being, in that eventuality, in the opinion of the Court, it would amount to willful violation of the order to the Court. (Ram Niwas Vs. Ram Avtar Gupta & Anr, 2006 (2) ALJ 431.)

Ss. 12 & 15 – Scope of jurisdiction – Rightness or wrongness of the order can't be urged in contempt proceedings.

If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach the court that passed the order or invoke jurisdiction of the appellate court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the court would render the party liable for contempt. While dealing with an application for contempt the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. **(Union of India v. Subedar Devassy PV; 2006 Cri. L.J. 971)**

S. 15 – False statements before Courts – amounts to Contempt of Court.

The witness made statement before National Human Rights Commission and Supreme Court that she was intimidated threatened and coerced to make statement in a particular way before trial Court. She subsequently disowned it. The Supreme Court set up an enquiry to find out truth. The findings by Inquiry Officer indicated that money has exchanged hands which made the said witness to state in the particular way in trial Court. The witness could not explain her assets sources of bank deposits etc. The report of Inquiry officer was found to be acceptable by the Supreme Court. Said witness thus, held, committed contempt of Supreme Court.

Serious questions arise as to the role played by witnesses who changed their versions more frequently than chameleons. Zahira's role in the whole case is an eye-opener for all concerned with the administration of criminal justice. As highlighted at the threshold the criminal justice system is likely to be affected if persons like Zahira are to be left unpunished. Not only the role of Zahira but also of others whose conduct and approach before the Inquiry Officer has been highlighted needs to be noted. The Inquiry Officer has found that Zahira could not explain her assets and the explanations given by her in respect of the sources of bank deposits etc. have been found to be unacceptable. We find no reason to take a different view.

The witness was sentenced to undergo simple imprisonment for one year and to pay cost of Rs. 50,000.00. Income-tax Authorities directed to initiate proceedings requiring her to explain sources of acquisition of various assets and expenses met by her during relevant period. **(Zahira Habibullah Sheikh v. State of Gujarat; 2006 Cri. L.J. 1694)**

CONTRACT ACT:

Ss. 18 & 19 – Contract of insurance- Repudiation of claim- LIC cannot wriggle out of contract by saying that it was void or viodable at its option.

The medical examiner of the Corporation having examined the assured and submitted a favourable report regarding his health, the Life Insurance Corporation cannot wriggle out of the contract by saying that it was void or voidable at its option. It was not a case where the L.I.C. of India would not have consented to the contract of the insurance but for misrepresentation or suppression of material facts. There was no evidence that the policyholder was treated for any serious ailment short time before the taking of the policy. The LIC. of India, its development officer and other staff including the medical practitioner who has examined

the person insured owe a responsibility to the person to whom they sell insurance and they are presumed to be acting in the interest of the Corporation. The LIC. of India cannot disclaim the liability make payment of assured amount under life policy for the acts and omissions of its development officer or medical practitioner appointed by it to examine the deceased before accepting the proposal. **(Smt. Meena Sahu v. Life Insurance Corporation of India & Anr., AIR 2006 All. 156)**

Section 27 – Post contractual covenants and restrictions – test of reasonableness or principle of restraint being partial are not applicable in India.

Under Section 27 of the Contract Act: (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable, (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applies only when the contract comes to an end, (c) this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts.

The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallized in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within the express exception engrafted in Section 27. Even if there were a case for reconsideration of the 132 years old interpretation laid down in Madhup Chunder case, (1874) 14 Beng LR 76, though none is made out by the appellant, such an exercise ought not to be undertaken in the present interlocutory proceedings. **Percept D'Mark (India) (P) Ltd. v. Zaheer Khan & Another; (2006) 6 SCC 227).**

COOPERATIVE SOCIETIES:

U.P. Co-operative Societies Act, 1966 – S. 122 – Power of Member-Secretary to suspend member of centralized service – Exercise of – Challenge as to.

In the instant case, Hon'ble Court observed that aggrieved party has to allege and prove that contemplation of inquiry against him by District Committee cannot be even thought or imagined to exist in facts and circumstances of particular case. If he can show that, he can successfully challenge order of suspension passed by the Member-Secretary. (**Sripal Singh v. State of U.P. & Ors, 2006 (2) ALJ 384)**

U.P. Cooperative Societies Act, 1965 – S. 128 – Order of Dy. Registrar holding 1.8.1949 as date of birth of Respondent No. 4 – Writ Petitioner having no locus standi to challenge the order.

It appears that after retirement, respondent No. 4 challenged his retirement under Section 128 of U.P. Cooperative Societies Act and moved an application before Deputy Registrar, Cooperative Societies Agra Region, Agra (respondent No. 3) claiming that he has been prematurely relieved from service on 31.5.2005 as actual date of his birth is 1.8.1949. Vide order dated 18.11.2005, respondent No. 3 held that respondent No. 4 was wrongly retired on the basis of date of birth as 22.5.1945 whereas his actual date of birth is 1.8.1949, hence he is entitled to continue in service for further period of four years.

The petitioner has come up with the writ petition aggrieved by the order passed by the Deputy Registrar, Cooperative Societies, by which the date of birth of respondent No. 4 has been held to be 1.8.1949.

The grievance of the petitioner is that in case respondent No. 4 would have been retired on the basis of his date of birth 22.5.1945 and had the Dy. Registrar not set aside the order of superannuation of respondent No. 4, the petitioner would have been appointed in service in place of respondent No. 4.

In my opinion the contention of Sri K.N. Misra has force. The petitioner has no locus standi in the matter, nor he is an aggrieved person. (Rakesh v. State of U.P. & Others; 2006(2) AWC 1778)

CRIMINAL TRIAL:

Code of Criminal Procedure – S. 227 & 228 (1)(b) – Discharge of accused – test to be applied – whether there is sufficient ground for proceeding against the accused or whether there is ground for presuming that accused has committed the offence.

Reading [Ss. 227 and 228] together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the

trial the truth, veracity and effect of the evidence, which the prosecutor proposes to adduce, are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accuse. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. (**Rajbir Singh v. State of U.P. & Another; (2006) 4 SCC 51)**

Code of Criminal Procedure – S. 311 – Recalling the witness for further Cross-examination to

enable him to resile from his earlier statement – Not proper.

In the present case the informant had stuck to his testimony when he was examined as P.W. 1. The said testimony was even consistent with the dying declaration given by the accused (deceased?). Now after nine witnesses have been examined and for some reason or the other, it is claimed the he has turned hostile. The Court is not to act in a manner so as to facilitate a witness to turn hostile, but what was emphasized in Zahira Sheikh was that effort should be made to enable a witness to speak truth. The decision was aimed as eliciting the truth from a witness who may have turned hostile, as she may have been prompted by extraneous consideration to act in that manner. (**Mangesh Kumar v. State of U.P., 2006 Cri.L.J. 1436).**

Code of Criminal Procedure – S. 311 – Summoning of Investigating Officer for Re-examination – No party can prevent Court from doing so – It is responsibility of Court to do justice and separate chaff from grain.

Second part of S. 311 Cr.P.C. empowers the court to summon or recall or re-examine any person/witness if his evidence appears to be essential for just decision of the case. Such a power is inherent in a criminal court for the reason that in the criminal court every effort is made to reach to the truth. It appears that learned Sessions Judge felt necessity to recall the Investigating Officer for re-examination. In my opinion, none of the parties can agitate this matter and they cannot prevent the court from exercising its power under Section 311 Cr.P.C. Ultimately, it is the responsibility of the courts to do justice and every effort should be made by the court to separate this chaff from grain. **(Rajan v. Union of India, 2006 Cri.L.J. 1415)**

Circumstantial evidence – Conviction can be sustained even if there is no direct evidence or direct witnesses have turned hostile, if circumstantial evidence is conclusive in nature.

It has been submitted by the learned counsel for the appellant that there is no direct evidence to prove the participation of the appellant in the commission of the offence in view of the rejection of the evidence of the eyewitnesses. In a case based on circumstantial evidence, there may be no direct evidence to prove the manner of assault or the actual participation of an accused in the assault on the deceased resulting in his death, but if the circumstantial evidence is conclusive in nature, a conviction on the basis of such circumstantial evidence may be recorded. It must be shown that the circumstances established on record are incriminating in nature, and the chain of circumstances established by the prosecution is so complete as not to be consistent with any other hypothesis except the guilt of the accused.

Learned Counsel for the appellant also submitted before us that the evidence of PWs 15 & 13 to the effect that the appellant was last seen in the company of the appellant became irrelevant in view of the fact that the prosecution had led direct evidence to prove the assault on the deceased. In our view, the submission does not help the appellant. In this case, the circumstance that the deceased was last seen by PWs 15 and 13 in the company of the appellant, is a circumstance which considered with other evidence on record has been found to prove the guilt of the accused. It is not as if the prosecution has tried to set up a case other than what was sought to be proved by the eye witnesses examined in the case who turned hostile. Since the eyewitnesses turned hostile, the circumstance that the appellant had accompanied the deceased and was last seen by him was only treated as one of the circumstances in the chain of circumstances to prove his guilt. **(Deepak Chandrakant Patil v. State of Maharashtra, 2006(3) Supreme 162 SC)**

Last seen – Whether sufficient to have conviction – Theory comes into play when the time gap between the point of time when the deceased was last seen with accused and deceased found dead is small.

The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration.

(Ramreddy Rajeshkhanna Reddy and another v. State of Andhra Pradesh, 2006(3) Supreme 175 SC)

Suspicion – However grave cannot be a substitute for proof.

It is well settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. **(Ramreddy Rajeshkhanna Reddy and another v. State of Andhra Pradesh, 2006(3) Supreme 175 SC)**

Whether prosecution witness can be examined at defence U/s. 233 (3) Cr.P.C. – Not permissible to defeat the ends of Justice – Provisions of Section 233(3) Cr.P.C. cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined to be juxtaposed as DW.

Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as PW-1 and DW-2. This situation is not one what was contemplated by sub-section 3 of Section 233 Cr.P.C. When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should have used his discretionary power and should have refused relief on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by the prosecution as eyewitnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section311 Cr.P.C., was rejected. They were recalled purportedly in exercise of power under sub-section (3) of Section 233 Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law. **(State of M.P. v. Badri Yadav and another 2006(3) Supreme 204 SC)**

Non – explanation of Injuries – Effect – Non-explanation of injuries by prosecution may not affect the prosecution case in all cases and particularly where injuries sustained by accused are minor and superficial or where evidence is so clear and cogent, independent and disinterested plausible, consistent and creditworthy that it outweighs effect of omission.

It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probably, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. **(Raj Pal and others v. State of Haryana, 2006(3) Supreme 585 SC)**

CRIMINAL PROCEDURE CODE, 1973:

S. 2(d) – Protest petition – Cannot be treated as complaint.

The question arises whether the protest petition can be treated as a complaint. The procedure of complaint and FIR are different. The complaint is defined in Section 2(d) of the Code of Criminal Procedure, which runs as under:

Section 2(d): “complaint” means any allegation made orally or in writing to a magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

The application under Section 156(3) Cr.P.C. can also be treated as complaint, as has been observed by Hon’ble Apex Court in case of Joseph Mathuria and others v. Swami Sacchidanand Harisakhsi and others, reported in ACC 2001 (Supplementary) page 957, but nowhere the protest petition has been treated as complaint.

If the magistrate has recorded the statement as referred to above for which he was not bound, he was at obligation to proceed with the State case not the complaint one. **(Salim v. State of U.P.; 2006 Cri. L.J. 1801(Alld.))**

S. 157 – FIR – Mere delay in recording of FIR and sending same to Magistrate – Is not a circumstance to discard prosecution case.

There cannot be any manner of doubt that S. 157 of Criminal Procedure Code requires sending of an FIR to the Magistrate forthwith which reaches promptly and without undue delay. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be the sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of S. 157 Cr.P.C. are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at subsequent stage of investigation. The cases cited by the learned counsel for the appellants do not lay down any law that simply because there is a delay in lodging the FIR or sending it to the Magistrate forthwith, the entire case of the prosecution has to be discarded. Thus in the present case the prosecution has led reliable evidence the veracity of which is not dislodged by delay in recording of the FIR and delay in sending the same to the Magistrate in the facts and circumstances of this case. At best it can be taken to be an infirmity in investigation. **(Rabindra Mahto v. State of Jharkhand; 2006 Cri. L.J. 957(Alld.))**

S. 174 – Inquest report – The purpose is limited to ascertainment of cause of death – Hence no mention of the name of the accused eyewitnesses or weapon is not fatal to the prosecution.

Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under S. 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is

foreign to the ambit and scope of proceedings under S. 174. Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details**. (Radha Mohan Singh v. State of U.P.; 2006 Cri. L.J. 1121 (SC))**

S. 190 – Cognizance on complaint –Averments in complaint not constituting offence for which cognizance was taken – Allegations amount to civil liability – Cognizance is abuse of process of court.

We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties. On examination of the contents of the complaints, we find that there is not even a whisper of allegation or averment made therein constituting an offence for which cognizance has been taken by the learned Magistrate against the appellants. On the one hand, the complainant himself has stated in the complaint that oral agreement to sell the plot took place in July 2002 and on the other hand, he has alleged that he started paying the consideration amount for the purchase of the plot between 15.7.2000 and 15.12.2002. The version of the complainant is self-contradictory and, therefore, no prima facie case is made out against the appellant involving them in the commission of the alleged offences.

The learned Magistrate in his order has categorically stated that the perusal of the complaint would make it clear that there was a dispute in respect of sale and purchase of land between the parties. In our view even if the allegations made in the complaint are accepted to be true and correct, the appellants cannot be said to have committed any offence of cheating or criminal breach of trust. Neither any guilty intention can be attributed to them nor there can possibly be any intention on their part to deceive the complainant. No criminal case is made out by the complainant against the appellants in his complaint and in the statements of the complainant and his witnesses recorded by the Magistrate before taking of the cognizance of the alleged offences. The averments of the complaint and the statements of the complainant and his witnesses recorded by the Magistrate would amount to civil liability inter se the parties and no criminal liability can be attributed to the appellants on the basis of the material on record. **(Ram Biraji Devi & Anr. V. Umesh Kumar Singh & Anr.; 2006(4) Supreme 217)**

S. 190(1), 173(2), 169, 200 & 202 – Report of Police that no case is made out against the accused – Magistrate can ignore conclusion of I.O. and can take cognizance – No need to follow procedure under S. 200 and 202 Cr.P.C.

When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise: the report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (I) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he again has option of adopting one of the three courses open i.e. (I) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. **(Minu Kumari v. State of Bihar; (2006) 4 SCC 359)**

Section 197 – Sanction U/s.197 is a condition precedent and no prosecution can be launched without such sanction – The question as to the applicability of S. 197 may be raised even at subsequent stage.

The complainant argued that want of sanction under Section 197(1) Cr.P.C. did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. This submission cannot be accepted. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of the Supreme Court, clearly indicate that a prosecution hit by that provision cannot be launched without the contemplated sanction. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. One cannot therefore accede to the request to postpone a decision on this question. Postponing a decision on the applicability or otherwise of Section 197(1) Cr.P.C. can only lead to the proceedings being dragged on in the trial court and a decision by the Supreme Court, here and now, would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind.

The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) Cr.P.C. cannot be by passed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) could not be attracted. Such a reasoning would be against the ratio of the earlier decisions of the Supreme Court. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements, which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) Cr.P.C. **(Sankaran Moitra v. Sadhna Das; (2006) 4 SCC 584).**

Section 210 – Object and Conditions to be satisfied.

Section 210 requires procedure to be followed when there is a complaint case and police investigation in respect of the same offence. The object of enacting S. 210 of the Code is threefold: (i) it is intended to ensure that private complaints do not interfere with the course of justice; (ii) it prevents harassment to the accused twice; and (iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once.

It is thus clear that before S. 210 can be invoked, the following conditions must be satisfied. (i) there must be a complaint pending for inquiry or trial; (ii) investigation by the police must be in progress in relation to the same offence; (iii) a report must have been made by the police officer under S. 173; and (iv) the Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case. **(Sankaran Moitra v. Sadhna Das; (2006) 4 SCC 584)**

S. 256 – Death of complainant – If statement of the complainant and witnesses are recorded then the death of the complainant would not be dismissed merely on the ground of death.

The statement of the complainant was recorded under Section 200 Cr.P.C. on 20.1.2005. Sri Ram Ratan Gupta died on 8.5.2005 and after his death, the statement of witnesses under Sections 200 and 202 Cr.P.C. was recorded only on 22.6.2005. A perusal of the statement of pw-1 Suresh Chandra Gupta shows that he has mentioned that Ram Ratan Gupta is dead. After the statement of the witnesses, the applicants were summoned vide order dated 4.8.2005 which is under challenge in this application.

It is emphatically argued by counsel for the applicants that since the complainant is dead and offences for which the applicants have been summoned, are cognizable offences and that charge has not been framed, therefore, on the death of the complainant, the proceedings of the complaint are liable to be dropped.

Section 256 Cr.P.C. is another provision which has been taken into consideration in the instant case. The complainant recorded his statement on 20.1.2005, died on 8.5.2005 and thereafter the statement of other witnesses PW-1 and PW-2 were recorded only on 22.6.2005. Thus the complaint cannot be dismissed on the death of the complainant specially where the other persons are represented by him.

In the circumstances, merely because the complainant is dead, the complaint cannot be dismissed outright. Admittedly the complainant is being represented by a pleader and it is for the Magistrate to decide whether the attendance of the complainant is necessary. It is discretion of the Magistrate to dispense with his attendance and proceed in the case. It is only in such cases where the complainant has failed to appear without any justifiable reason and the Presiding Officer is of the opinion that the allegations made in the complaint cannot be established on account of absence of the complainant, the complaint can be rejected for want of complainant. In the instant case, the complainant is dead and it has already been noticed that the presence of the complainant is not mandatory and the proceedings cannot be quashed. **(Saroj Gupta v. State of U.P.; 2006 Cri. L. J. 1045 (Alld.))**

S. 319 – Jurisdiction to add a new accused is discretionary and extraordinary – Should be exercised very sparingly and only if compelling reasons exist.

In Michael Machado and Anr. V. Central Bureau of Investigation and Anr. [2000(3) SCC 262] construing the words “the court may proceed against such person” in Section 319 of the Code, this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court, while examining an application under Section 319 of the Code, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, for exercise of discretion under Section 319 of the Code all relevant factors including those noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

On a careful reading of Sec. 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. Of course, as evident from the decision reported in Sohan Lal and Others v. State of Rajasthan, (AIR 1990 SC 2158) the position of an accused who has been discharged stands on a different footing. Power under Sectin 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be t4ried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word “evidence” in Section 319 contemplates that evidence of witnesses given in Court. **(Lok Ram v. Nihal Singh & Anr. 2006(3) Supreme 400)**

ELECTRICITY ACT:

S. 125 & 126 and S. 12 of Consumer Protection Act – Beneficial consumer jurisdiction – Whether extends to determination of tortious acts and liabilities.

In this case we are concerned with the scope and extent of the beneficial consumer jurisdiction, particularly with regard to technical subjects falling under provisions such as the Electricity Act, 2003. Under Section 2(c) of the 1986 Act “complaint” is defined to mean allegation in writing made by a complainant that the service provider has charged for the services, a price in excess of the price fixed under the law for the time being in force [See: Section 2(c)(iv)]. Under section 2(d) “consumer” is defined to mean any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly

promised. Under Section 2(g) of the said 1986 Act the word “deficiency” is defined to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or under a contract or otherwise in relation to any service. The word “goods” is defined under section 2(i) to mean goods a defined in the Sale of Goods Act, 1930. “Service” also defined under section 2(o) of the said 1986 Act to mean service of any description which is made available to users in connection with banking, financing, insurance, transport, processing, supply of electrical energy, entertainment etc. Therefore, supply of electric energy by the Nigam falls under section 2(o) of the said 1986 Act. However, the question which arises for determination and which has not been decided is: whether the beneficial consumer jurisdiction extends to determination of tortious acts and liability arising there from by the Consumer Forum. In this connection, it is urged on behalf of the Nigam that assessment of the duty for unauthorized use of electricity, tampering of meters, distribution of meters and calibration of electric current are matters of technical nature which cannot be decided by the Consumer Forum. It is urged that under the Electricity Act, 2003 the jurisdiction of the civil court is excluded. In this connection reliance was placed on section 145 of the said 2003 Act under which the jurisdiction of the civil court to entertain suits in respect of matters falling under Section 126 is expressly barred. These are matters of assessment. According to the Nigam, the said 2003 Act is a complete code by itself and therefore in matters of assessment of electricity bills the Consumer Forum should have directed the respondent to move before the competent authority under the Electricity Act, 2003 read with rules framed there under either expressly or by incorporation. State Commission directed to decide the matter on facts of the case in light of the provisions of the Electricity Act, 2003. **(Haryana State Electricity Board v. Mam Chand; 2006(4) Supreme 443)**

ENVIRONMENTAL PROTECTION AND POLLUTION CONTROL:

Forest (Conservation) Act, 1980 – S. 2 & Wild Life (Protection) Act – S. 26-A – Strengthening of dam and increase in expanse of dam reservoir – Boundaries of sanctuary remaining unaffected – Does not amount to non-forestry activity.

Reliance has been placed on Section 26-A of the Wild Life (Protection) Act which stipulates that the boundaries of a sanctuary shall not be altered except on a recommendation of the National Board

constituted under Section 5-A of the Act. The total area of the sanctuary is about 777 square kilometers. The leased area of about 8000 acres is a part of the total area. By raising the water level, the boundaries of the sanctuary do not get altered. The total area of the sanctuary remains 777 square kilometers. Further, Section 2(17) of the Act, which defines land includes canals, creeks and other water channels, reservoirs, rivers, streams and lakes, whether artificial or natural, marshes and wetlands and also includes boulders and rocks. It cannot be said that forest or wildlife would be affected by carrying out strengthening works and increase of the water level. On the facts and circumstances of the case, the strengthening work of the existing dam in the forest cannot be described as a non-forestry activity so as to attract Section 2 of the Forest (Conservation) Act, 1980 requiring prior approval of the Union of India. **(Mullaperiyar Environmental Protection Forum v. Union of India (2006) 3 SCC 643).**

EVIDENCE ACT:

S. 3 – Hostile witness – Statement not to be rejected merely because the prosecution declared the witness as hostile and cross-examined him – The statement can be relied upon to the extent the version is dependable on careful scrutiny.

Even PW-3 Mohan Yadav fully supported the prosecution case in his examination-in-chief. In his cross-examination, which was recorded on the same date, he gave details of the weapons being carried by each of the accused and also the specific role-played by them in assaulting the deceased and other injured persons. As his cross-examination could not be completed it was resumed on the next day and then he gave a statement that he could not see the incident on account of darkness. His testimony has been carefully examined by the learned Sessions Judge and also by two learned Judges of the High Court (Hon'ble K.K. Misra, J. and Hon'ble U.S. Tripathi, J.) and they have held that the witness, on account of pressure exerted upon him by the accused, tried to support them in his cross-examination on the next day. It has been further held that the statement of the witness, as recorded on the first day including his cross-examination, was truthful and reliable. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. (See Bhagwan Singh v. State of Haryana, AIR 1976 SC 202; Rabinder

Kumar Dey v. State of Orissa, AIR 1977 SC 170: Syed Akbar v. State of Karnataka; AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh; AIR 1991 SC 1853). The evidence on record clearly shows that the FIR of the incident was promptly lodged and the testimony of PW-1 Ganesh Singh, PW-4 Ramji Singh and also PW-3 Mohan Yadav finds complete corroboration from the medical evidence on record. We find absolutely no reason to take a different view. **(Radha Mohan Singh v. State of U.P.; 2006 Cri. L.J. 1121 (SC)).**

S. 32 – Dying Declaration – When can be the basis of conviction – Conviction can be based on dying declaration which was credit worthy and reliable and it would not be interfered with.

It is seen from the doctor's evidence that the deceased disclosed the history to the doctor that the accused poured kerosene on her body and set her on fire and that the judicial Magistrate has recorded the dying declaration of the deceased. It is also seen from the doctor's evidence that before her statement was recorded by the Sub-Judicial Magistrate he had examined her and found that she was conscious and in a position to give the statement. Accordingly, the doctor has signed the endorsement appearing on the dying declaration. He has also identified his signature on the dying declaration. In cross-examination nothing contrary has been elicited to discredit the doctor's evidence. **(Ashok Laxamn Gaikwad v. state of Maharashtra, 2006(3) Supreme 519 SC)**

S. 35 – Entries made in school leaving certificate – Not in conformity with terms of S.35 – Cannot be accepted as proof of age.

Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible there under: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.

The deposition of the Head Master of the school in this case did not satisfy the requirements of the law laid down in the aforementioned decisions.

Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case**. (Ravinder Singh Gorkhi v. State of U.P.; 2006 (4) Supreme 337)**

Ss. 101, 102 & 111 – Suit for declaration that sale deed is forged fabricated and void document – Trial court framed the issue "whether the sale deed was forged and fabricated" – On application of defendant the issue was recast "whether the sale deed was valid and genuine" – High Court held that when a person was in fiduciary relationship the burden would be on the person who was in dominating position – This legal position and presumption would arise when fiduciary relationship is first established by the plaintiff – The issue as originally framed by the Trial Court putting burden on plaintiff was right.

The burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rules may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The application in his written statement denied and disputed the said averments made in the plaint. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fall if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side. The fact that the defendant was in a dominant position must,

thus, be proved by the plaintiff at the first instance. **(Anil Rishi v. Gurbaksh Singh 2006(4) Supreme 62)**

S. 114 – Reference to persons as 'mama' or 'bhagina' – Not necessarily mean that they are related by blood – Often because of closeness of families even distant relatives are addressed as 'mama' or 'bhagina'.

It was stated that in the said letters the appellant was described as mama, and he referred to the sons of Nirmala Devi as bhagina (sister's son). From this it was sought to be inferred that Nirmala Devi must have been the sister of the appellant. On the basis of these letters alone we are not prepared to draw this inference. There is evidence on record to show that Nirmala Devi was also distantly related to the appellant. In any event, the two families were on visiting terms and it cannot be denied that the appellant and the respondent were known to each other. The assertion of the appellant that he came to know Nirmala Devi only after objections were filed in his succession case cannot be accepted. But even so, we cannot jump to the conclusion that since he described himself as the mama it must be held that he was the brother of Nirmala Devi, the respondent herein. Very often because of closeness of families even distant relatives are addressed as uncle, and sometimes-even persons unrelated are referred to as uncle i.e. chacha or mama, etc. We expected some more evidence to be examined to support the plea that the appellant was the brother of the respondent. (**Virendra Kumar Tripathy v. Nirmala Devi, (2006) 3 SCC 615).**

Promissory estoppel – Whether apply to State.

The doctrine of promissory estoppel operates even in the legislative field. What is granted can be withdrawn by the Government except in the case where the doctrine of promissory estoppel applies. **(Mahabir Vegetable Oils Pvt. Ltd. and another v. State of Haryana and others, 2006(1) Supreme 693 SC)**

Will – Presumption of due execution when arises.

If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statute, a presumption of due execution and attestation applies. **(Gurdev Kaur and others v. Kaki and others, 2006(3) Supreme 631 SC)**

Whether propriety of testator's decision can be looked into – The Court does not sit in appeal over the right and wrong to the testator's

decision. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded on the last Will, that the Court looks into the nature of the bequest.

The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will that the Court looks into the nature of the bequest.

The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the Will have to be appreciated in the context of his circumstances, and not vis-à-vis the rules for interstate succession. It is only for this limited purpose that the Court examines the nature of bequest. The Court does not substitute its own opinion for what was the testator's Will or intentions manifested from a reading of the written instrument. After all, a Will is meant to be an expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property. **(Gurdev Kaur and others v. Kaki and others, 2006(3) Supreme 631 SC)**

FAMILY LAW:

Family Courts Act, 1984 – S. 7 – Whether grant of injunction in proceeding under S.125 Cr. P.C. is outside scope of matrimonial proceedings pending before Family Court-"Yes".

> **For obtaining such an injunction, two things are necessary. First, the person-seeking injunction should have a right to that effect. In this case, we do not see how the petitioner, merely on account of being wife, can claim the right to restrain the husband from selling property, which belongs to the husband. Therefore, the injunction did not deserve to be granted on facts. Besides, this injunction, which has been granted in proceedings under section**

125 Cr. P.C. is wholly outside the scope of those matrimonial proceedings pending before the Family Court. Thus prima facie, the Family Court has no jurisdiction to grant this kind of an injunction order. (Smt. Kanchan Upadhayay V. State of U.P. & Ors., AIR 2006 ALL. 148)

Hindu Marriage Act – Section 13(1)(i-a) – Cruelty may be physical or mental – Each case to be decided on its own merits.

Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

The appellant filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act for divorce on ground of cruelty. The respondent filed a number of cases including criminal complaints against the appellant and made every effort to harass and torture him and even get him arrested and put him behind the bars. Further, the respondent had sent notice for breaking the nucleus of HUF, expressly stating that the family nucleus had been broken with immediate effect and asking for partition of all the properties and assets of HUF and stating that her share should be given to her within 15 days. She had filed a complaint against the appellant under Section 24 of the Hindu Marriage Act directing payment of maintenance during the pendency of the case. Both the parties have leveled allegations against each other for not maintaining the sanctity of marriage and involvement with another person. The court held that having regard to these and other facts and their impact the respondent treated appellant with mental cruelty. **(Naveen Kohli v. Neelu Kohli; (2006) 4 SCC 558).**

NOTE: In this case the Supreme Court commended the Parliament to pass an amendment in the Hindu Marriage Act to recognize irrevocable breakdown of marriage as a ground for divorce.

GENERAL CLAUSES ACT:

S. 27 – Notice not claimed even though send by registered post – Presumption of service may arise - drawer of the cheque may rebut the presumption.

It is no doubt true that the receipt of the notice has to be proved, but as held by this Court consistently, refusal of notice amounts to service of notice. Similarly in a case where notice is not claimed even though sent by registered post, with the aid of Section 27 of the General Clauses Act, the drawer of the cheque may be called upon to rebut the presumption which arises in favour of service of notice.

In (2004) 8 SCC 774: V. Raja Kumari v. P. Subbarama Naidu and another, dealing with a case where the notice could not be served on account of the fact that the door of the house of the drawer was found locked, this Court held that the principle incorporated in Section 27 of the General Clauses Act will apply to a notice sent by post, and it would be for the drawer to prove that it was not really served and that he was not responsible for such non-service. This Court reiterated the principle laid down in K. Bhaskaran v. Sankaran Vaidhyan Balan and another case (supra). This Court while dismissing the appeal concluded: -

"Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of notice, the inference that is to be drawn has to be judged on the background facts of each case."

In (2005) 4 SCC 417: Prem Chand Vijay Kumar v. Yashpal Singh and another, the Court relied upon the principle laid down in (1998) 6 SCC

514: Sadanandan Bhadran v. Madhavan Sunil Kumar which was followed in Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. and others (supra**). (D. Vinod Shivappa v. Nanda Belliappa; 2006 (4) Supreme 540)**

INDIAN EASEMENT ACT:

S. 13 & 41 – Easement of grant and easement of necessity – Easement of grant does not get extinguish U/s. 41 of the Act.

Easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not anything else. Easement of necessity and quasi easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the necessity was absolute. In fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 14 of the Act which is applicable only to easement of necessity arising under Section 13.

An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one, which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servant owner or not. When an

alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case. **(Hero Vinoth (Minor) v. Seshammal; 2006(4) Supreme 131)**

INDIAN SUCCESSION ACT:

S. 372 & 373 – Grant of succession certificate in favour of respondent – Evidence was not properly appreciated hence order of High Court set-aside.

The logic of the judgment of the High Court is that these letters proved that the appellant was the brother of Nirmala Devi. Since it is the admitted case of the parties that the appellant is not the real brother of Nirmala Devi, he must be her stepbrother. Since in one of the rejoinders filed by the appellant, it was stated that Ramdaso Devi was the daughter of one Deolal Pandey and Nirmala Devi was her daughter, the High Court connected these two facts and came to the conclusion that Ramdaso Devi was married to Ram Briksh Sharma. We do not subscribe to this logic because there is no evidence to show that Ramdaso Devi was ever married to Ram Briksh Sharma. We, therefore, come to the conclusion that the High Court was not justified in setting aside the findings of the trial court. These appeals must be allowed and we accordingly, allow these appeals, set aside the impugned judgment and order of the High Court, and restore that of the trial court. There shall be no order as to costs. **(Virendra Kumar Tripathy v. Nirmala Devi; 2006(2) AWC 1700 (SC))**

STAMP ACT:

S. 47-A – Compounding of document and levy of penalty- Issued after lapse of 4 years from date of registration of document would contravenes provisions of S. 47-A.

As the notice itself was issued to the petitioner more than four years, which was in clear contravention of the provisions of Section 47-A of the Indian Stamp Act, on proceedings could have been initiated against the petitioner in pursuance of the said notice. As such, the orders impugned in this writ petition, which had been passed in pursuance of the aforesaid notice, are both

liable to be quashed. (Smt. Nisha Keserwani v. State of U.P. & Ors., AIR 2006 All. 152)

S. 47-A (as per U.P. amendment) – Stamp duty – Deficiency – Reference to Collector after 4 years without permission of State Government – Not permissible.

Under Section 47A of the Stamp Act as amended by Act No. 22 of 1998 the Collector was bound to make enquiry and also to give a finding on the market value of the property. He has merely referred to the audit objection in his order, which is no evidence of market value and has not applied his mind in determining market value of the property. The circle rate fixed under the Stamp Act is prima facie evidence of market value of the area where the property is situated. No reasons have been given in the impugned order for holding market value above the circle rate. From the language of the sub-section it is not possible to hold that the period of four years qualifies the reference made by the authorities of the Stamp Department and this question has been decided in the Full Bench decision in Girjesh Kumar Srivastava (supra). **(Rais Ahmad v. Commissioner, Allahabad Division; 2006(2) AWC 1496)**

INDIAN PENAL CODE:

S. 201 – Appellants not only assisted the main accused (who had caused the injuries) in snatching the cot from the PWs but carried away the cot themselves at the gun point – This shows that appellants had knowledge of the offence and they were rightly convicted.

The ingredients of Section 201 of the Penal Code are as under: (1) that an offence has been committed; (2) that the accused knew or had reason to believe the commission of such offence; (3) that with such knowledge or belief he – (a) caused any evidence of the commission of that offence to disappear, or (b) gave any information respecting that offence which he then knew or believed to be false; (4) that he did as aforesaid, with the intention of screening the offender from legal punishment; (5) if the charge be of an aggravated form, as in the present case, it must be proved further that the offence in respect of which the accused did as in (3) and (4) was punishable with death, or with imprisonment for life or imprisonment extending to ten years.

In this case the deceased had been injured. Whether he was dead at that point of time or not is not of much importance inasmuch when the

second incident took place an offence had already been committed. The question, however, would be as to whether the appellants before us had the requisite knowledge of the commission of the said offence or they had a reason to believe that an offence had been committed.

From the conspectus of events and the manner in which the appellants are said to have taken part in the commission of crime, it is clear that they had the requisite knowledge about the commission of an offence. The very fact that an injured person was being carried out to the hospital in a cot and the appellants not only assisted the main accused persons in snatching away the cot, two of them carried the cot themselves and two others were armed with firearms clearly establishes their knowledge about commission or the likelihood of offence. In view of the concurrent finding of fact by both the courts, no case has been made out for exercising of the Supreme Court's jurisdiction under Article 136 of the Constitution**. (Budhan Singh v. State of Bihar; (2006) 4 SCC 740)**

S. 228-A – Disclosure of identity of victim of certain offences – Judgments of courts should not indicate the name of victim.

We do not propose to mention name of the victim. Section 228-A IPC makes disclosure of identify of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court. High Court or lower Court, the name of the victim should not be indicated, we have chosen to describe her as 'victim' in the judgment. The above position was highlighted in State of Karnataka v. Puttaraja (2004) (1) SCC 475. **(Om Prakash v. State of Uttar Pradesh; 2006 (4) Supreme 313)**

S. 299(C) and S. 300(4) – Murder and Culpable Homicide not amounting to murder – The Difference between clause (b) of Section 299 and clause (3) of section 300 IPC is one of degree of probability of death resulting from intended bodily injury.

Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result

in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death, which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. **(Raj Pal and others v. State of Haryana, 2006(3) Supreme 585 SC)**

S. 300 - Essential of Exception IV.

To attract Exception 4 to Section 300 IPC it has to be established that act was committed without premeditation in a sudden fight in heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. **(Ramreddy Rajeshkhanna Reddy and another v. State of Andhra Pradesh, 2006(3) Supreme 217 SC)**

S. 304-B – Suicide due to misunderstanding – The case would not covered under this section.

It, therefore, appears that no cogent evidence had been adduced by the prosecution to establish that the appellant had demanded any dowry. It would bear repetition to state that according to the mother of the deceased, PW-7 only PW-3 demanded dowry and only he was responsible for the death of her daughter. If that be so, he should have also been prosecuted. The trial court has not given any cogent reason for disbelieving the evidence of PW-1; upon whom even the prosecution

placed reliance. The statement of PW-1 that the deceased was short-tempered girl has not been discarded. The statement of PW-2 that even ½ hour before committing suicide the deceased behaved normally had also not been taken into consideration. The prosecution did not cross-examine PW-3, except making some suggestions; although he was declared hostile. Even the trial court did not discard the explanation given by the accused as regard suicide of the deceased. It proceeded on the basis that there was no evidence either directly or indirectly as regard harassment or cruelty committed by the appellant against his wife and there are only circumstantial evidence therefore. The necessary ingredients of circumstantial evidence for holding the appellant guilty of commission of the offence had not been deliberated upon either by the trial court or by the High court. Even an attempt had been made to show that the accused had on an earlier occasion tried to murder the deceased but the same was found to be false by the trial court holding that there was no evidence that the "accused had already attempted to burn away his wife". If there was a case misunderstanding between accused husband and deceased wife and deceased committed suicide same would not automatically lead to conclusion that appellant committed offence under sec. 304-B IPC. **(T. Aruntperunjothi v. State Though S.H.O., Pondicherry, 2006(3) Supreme 764 SC)**

S. 306 & 498A – No charge U/s. 306 IPC – Still conviction U/s. 306 – Not improper if presumption U/s.113A of Evidence Act not rebutted.

The appellants were also convicted under Section 306 IPC with the aid of the presumption as to the abetment of suicide by a married woman under Section 113-A of the Indian Evidence Act, 1872. It is proved by the prosecution that Sangita committed suicide within a period of seven years from the date of her marriage and that her husband and his elder brother subjected her to cruelty. On the basis of the evidence, it can be said that the cruel treatment meted out to the deceased was of such a nature that it has driven the lady to commit suicide.

In Ramesh Kumar v. State of Chhattisgarh (2001) 9 SCC 618 (para 22), this Court held as under:

> "Sections 498-A and 306 IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under Section 498-A and may also, if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide…"

Similarly, in Hans Raj v. State of Haryana, (2004) 12 SCC 257 (in para 13), this Court opined that:

> "…Under Section 113-A of the Indian Evidence Act, the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband (in this case) had subjected her to cruelty. Even if these facts are established the court is not bound to presume that the suicide had been abetted by her husband. Section 113-A gives discretion to the court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word "cruelty" in Section 498-A IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman…"

Neither any evidence was led by the defence nor from the evidence placed on record by the prosecution, we can draw a plausible, reasonable and trustworthy explanation to rebut the presumption under Section 113-A of the Evidence Act. The prosecution has sufficiently proved by cogent evidence that the accused-appellants by series of acts

and conduct created such a difficult and hostile environment for the deceased that she was compelled to commit suicide. In the light of the discussion in regard to the cruelty committed by the accused persons to the deceased under Section 498-A, IPC, there is a direct and reasonable nexus with the commission of suicide by the deceased with the act of cruelty to which the deceased was subjected to by the accused-appellants. **(Sahebrao & Anr. V. State of Maharashtra; 2006(4) Supreme 419)**

INTERPRETATION OF STATUTES:

Taxing Statutes should be construed strictly – However, an exemption provision made for implementation of industrial policy of the State should be construed liberally.

A tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, the implementing notifications have to be read in the context of the industrial policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the industrial policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute. **(State of Jharkhand & Others v. Tata Cummins Ltd. & Another; (2006) 4 SCC 57)**

Rule of Purposive Construction – Court must adopt that construction which suppressed the mischief and advanced the remedy.

It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in Heydon's case (76ER 637) also known as the rule of purposive construction or mischief rule. **(D. Vinod Shivappa v. Nanda Belliappa; 2006(4) Supreme 540)**

JUVENILE JUSTICE (Care & Protection Of Children) ACT:

Bihar Children Act, 1982 - Enquiry of Determination of Age - Juvenile Justice Act imposes a duty upon competent authority to make an enquiry as to the age of that person who appears to be a child.

The statute, therefore, has imposed a duty upon the competent authority to make an enquiry as to the age of that person who appears to be a child to him. No such enquiry was, however, made presumably because no such plea was raised. At that time, it also might not have occurred to the court that the Appellant was a child. Section 33 of the Act lays down the circumstances, which are required to be taken into consideration in making an order under Section 32 of the said Act. In the year 1999, evidently the trial court did not consider the question of estimating his age in terms of the provisions of the Act.

The provisions of a beneficial legislation should ordinarily be given effect to. However, we may notice that the appellant is literate. Presumably he attended some school. However, no certificate of his date of birth or any other proof as regard his date of birth is available on records. No other material apart from the estimate of the court has been brought to our notice. In the absence of any material on record, we cannot arrive at a definite conclusion that the appellant as on the date of commission of the offence was a child within the meaning of the said Act.

We are, however, not oblivious of the decision of this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720], wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially oriented legislation, the same should be examined with great care. We are, however, of the opinion that the same would not meant that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records. The aforementioned decisions have been noticed by this Court in Zakarius Lakra and Others v. Union of India and Another [(2005) 3 SCC 161], wherein a Bench of this Court while entertaining an application under Article 32 of the Constitution of India opined that although the same was not maintainable, having regard to the decision of this Court in Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 3880], the review petition should be allowed to be converted into a curative petition. [See also Raj Singh v. State of Haryana – (2000) 6 SCC 759]. We, therefore, are of the opinion that the determination of the age of the appellant as on the date of the commission of the offence should be done afresh by the learned

Sessions Judge. For the reasons aforementioned, this appeal is allowed and the matter is remitted to the learned Sessions Judge with a direction to consider the matter as regard the age of the appellant as on the date of commission of the offence and in the event, he is found to be a child and/or juvenile within the meaning of the Act and the Juvenile Justice Act to deal with the accused accordingly. If he is found not to have been a child as on the date of the commission of the offence, the present conviction will stand. **(Jitendra Ram alias Jitu v. state of Jharkahnd, 2006(3) Supreme 737, SC)**

Determination of age.

The age of a person as recorded in the school register or otherwise may be used for various purposes; namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum, e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence were the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible there under:

(i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be

made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.

The school leaving certificate was no an original one. It was merely a second copy. Although it was said to have been issued in July 1972, the date of issuance of the said certificate has not been mentioned. The copy was said to have been signed by the Head Master on 30.4.1998. It was accepted before the learned Additional Sessions Judge, Bulandshahr on 27.1.1999. The Head Master has also not that the copy given by him was a true copy of the original certificate. He did not produce the admission register. **(Ravinder Singh Gorkhi v. State of U.P.; 2006(4) Supreme 337)**

Whether age in school register is conclusive – Entry in School register regarding age of prosecutrix is not conclusive but it has evidentiary value.

A register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act. Such dates of birth are recorded in the school register by the authorities in discharge of their public duty. PW-5, who was an Assistant Teacher in the said school in the year 1977, categorically stated that the mother of the prosecutrix disclosed her date of birth. Father of the prosecutrix also deposed to the said effect. The prosecutrix took admission in the year 1977. She was, therefore, about 6-7 years old at that time. She was admitted in Class I. Even by the village standard, she took admission in the school a bit late. She was married in the year 1985 when she was evidently a minor. She stayed in her in-laws place for some time and after the 'gauna' ceremony, she came back. The materials on record as regard the age of the prosecutrix was, therefore, required to be considered on the aforementioned backdrop. It may be true that an entry in the school register is not conclusive but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix. Only because PW-3 the father of the prosecutrix could not state about the date of birth of his other children, the same, by itself, would not mean that he had been deposing falsely. We have noticed hereinbefore, that he, in answer to the queries made by the counsel for the parties, categorically stated about the year in which his other children were born. His statement in this behalf appears to be consistent and if the said statements were corroborative of the entries made in the register in

the school, there was no reason as to why the High Court should have disbelieved the same. We, therefore, are of the opinion that the High Court committed a serious error in passing the impugned judgment. It cannot, therefore, be sustained. It is set aside accordingly. **(State of Chhatisgarh v. Lekhram; 2006(3) Supreme 288)**

LABOUR LAWS:

Industrial Disputes Act - S. 2-A – Back wages on reinstatement – Reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside the order of dismissal.

In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised keeping in view the facts and circumstances of each case and neither straight jacket formula can be evolved, nor a rule of universal application can be adopted [vide P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar, (2001) 2 SCC 54; Hindustran Motors v. Tapan Kumar Bhattacharya, (2002) 6 SCC 41]. In Kendriya Vidyalaya Sangathan v. S.C. Sharma, (2005) 2 SCC 363, this Court held that when question of determination of entitlement of back wages comes up for consideration, prima facie, it is for the employee to prove that he had not been gainfully employed. Initial burden is on the employee to show that he remained without any employment. In several cases, similar view has been taken by this Court in recent years. In M.P. State Electricity Board v. Jarina Bee, (2003) 6 SCC 141, it was observed that reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside an order of dismissal. In Allahabad Jal Sansthan v. Daya Shanker Rai, (2005) 5 SCC 124, it was indicated that the law is not in absolute terms that in all cases of illegal termination of services, a workman must be paid full back wages. In Haryana State Coop. Land Development Bank v. Neelam, (2005) 5 SCC 91, it was stated that the aim and object of Industrial Disputes Act is to impart social justice to the workman but keeping in view his conduct. Payment of back wages, therefore, would not be automatic on entitlement of the relief of reinstatement. In General Manager, Haryana Roadways v. Rudhan Singh, (2005) 5 SCC 591, the Court reiterated that there is no rule of thumb that in each and every case, where the Industrial Tribunal records a finding that the order of termination of service was illegal that an employee is entitled to full back wages. A host of factors which are relevant, must be taken into account.

No precise formula can be adopted nor 'cast iron rule' can be laid down as to when payment of full back wages should be allowed by the court or Tribunal. It depends upon the facts and circumstances of each case. The approach of the Court/Tribunal should not be rigid or mechanical but flexible and realistic. The Court or Tribunal dealing with cases of industrial disputes may find force in the contention of the employee as to illegal termination of his services and may come to the conclusion that the action has been taken otherwise than in accordance with law. In such cases obviously, the workman would be entitled to reinstatement but the question regarding payment of back wages would be independent of the first question as to entitlement of reinstatement in service. While considering and determining the second question, the Court or Tribunal would consider all relevant circumstances referred to above and keeping in view the principles of justice, equity and good conscience, should pass an appropriate order. **(UPSRTC Ltd. v. Sarada Prasad Misra and another, 2006(3) Supreme 662 SC)**

Payment of Wages Act, 1936 - Section 2(6) – Wages – Definition of.

The word "Wages" not only includes basic wages, but the entire package and other components of the wage were also included the word "wages" as defined Section 2 (6) of the Payment of Wages Act. **(General Electric Co. of India Ltd v. Addl. Dist. Judge-V, Allahabad & ors, 2006 (2) ALJ 378)**

Payment of Wages Act – S. 15 – Claim for "potential wages" – Is not within scope of jurisdiction of authority under S. 15 of Act.

In the present case, no illegal deductions have been made from the wages of the respondent workmen. They were in fact claiming "potential wages", which is clearly not within the scope of the jurisdiction of the authority under Section 15 of the Act as has been laid down by the Hon'ble Supreme Court in the case of A.V. D'Costa (Supra). **(M/s. Rampur Distillery Ltd. v. Dy. Labour Commissioner, Varanasi & Ors. 2006(2) ALJ 750)**

Payment of Wages Act - S. 17 – Limitation Act S, 5 – Appeal – Whether

Payment of Wages Act excludes applicability of S. 5 of Limitation Act -

"No"

There is no specific exclusion as to applicability of S. 5 of the Limitation Act by virtue of Payment of Wages Act, 1936, being a special law. The Payment of Wages Act is not complete Code in itself. S.5 of the Limitation Act can be called in aid to apply to the proceedings under S. 17 of the Payment of Wages Act by virtue of S. 29 of Limitation Act. Thus, delay in filing appeal under S. 17 of the Payment of Wages Act can be condoned by applying S.5 of Limitation Act. (Hafizuddin V. Addl. District Judge & Anr., 2006 (2) ALJ 481).

LAND ACQUISITION AND REQUISITION:

Section 28-A – Redetermination of compensation – Those who secure benefit by reason of others getting such benefits not to be allowed to retain the same when the other's benefits reduced –- Amount payable under Sec. 28-A of Land Acquisition Act is the amount which is finally payable by way of compensation to owners who challenged the award had claimed reference under S. 18 of the Act.

Section 28-A seeks to confer the benefit of enhanced compensation even on those owners who did not seek a reference under Section 18. It cannot be that those who secure a certain benefit by reason of others getting such benefit should retain that benefit, even though the others on the basis of whose claim compensation was enhanced are deprived of the enhanced compensation to an extent. This would be rather inequitable and unfair. Moreover, even if it be that the compensation payable to claimants who have applied under Section 28-A of the Act, is the enhanced compensation decreed by the Reference Court, the decree must be understood to mean the decree of the Reference Court as modified in appeal by the higher courts. Otherwise, an incongruous position may emerge that a person who did not challenge the award of the Collector and did not claim a reference under Section 18 of the Act would get a higher compensation than one who challenged the award of the

Collector and claimed a reference, but in whose case a higher compensation determined by the Reference Court was subsequently reduced by the superior court. Those claiming higher compensation and claiming reference under Section 18 of the Act are bound by the decree as modified by the superior court in appeal. The principle of restitution must apply to them. For the same reason, the same consequence must visit others who have been given the benefit of enhanced compensation pursuant to the decree passed in reference proceeding on the application of others. It must therefore, be held that under Section 28-A of the Act, the compensation payable to the applicants is the same which is finally payable to those claimants who sought reference under Section 18 of the Act. In case of reduction of compensation by the superior courts, the applicants under Section 28-A may be directed to refund the excess amount received by them in the light of reduced compensation finally awarded. **(Union of India v. Munshi Ram (Dead) by Lrs. And others, 2006(3) Supreme 6 SC)**

S. 28 – A – Whether application for re-determination of compensation by the petitioner/ land owner- Who failed to make reference under S. 18 can entitle to rely upon award passed by reference Court U/S. 28-A of the Act.

The petitioner is entitled to rely on a award passed by the reference Court under Section 28-A (3) of the Act in reference no. 133 of 1992 (Jhillu Vs. Collector and others) for maintaining his application under Section 28-A of the Act. Therefore, the impugned order dated 11-9-2001 is apparently illegal and liable to be quashed.

(Babu Nandan V. State of U.P. & Ors. 2006 (2) ALJ 778)

LIMITATION ACT:

S. 18 – Redemption suit – Acknowledgement may be direct or implied – An intention to admit jural relationship, over and above a

mere reference to it must be there to amount "acknowledgement" within the meaning of S.18.

In a mortgage, both the mortgagor and the mortgagee have certain rights and obligations against each other. The rights/obligations of a mortgagor or a mortgagee coexist, like the two sides of a coin. The mortgagor's right of redemption is coextensive with the mortgagee's right of sale or foreclosure (where such right is recognized in law). Any statement by either, admitting the jural relationship with the other, will extend the limitation for a suit by that other, against the person acknowledging. It follows that when a mortgagee makes a statement about his right to recover the mortgage amount, such statement impliedly acknowledges the corresponding right of redemption of the mortgagor. Further, a statement admitting jural relationship need not refer to or reiterate the rights and obligations flowing there from. Where a party to the mortgage, by his statement, admits the existence of the mortgage or his rights under the mortgage, he admits all legal incidents of the mortgage including rights and obligations of both parties that is mortgagee and mortgagor.

It would be erroneous to proceed on the assumption that an acknowledgment that would fall within the ambit of Section 18 can be made only by a "debtor" and there is no question of a "creditor" making an acknowledgment. This would also be to ignore the purport and scope of Section 18. Section 18 of the Act deals not only with acknowledgment of debts, but acknowledgments with reference to all suits involving properties or rights for which limitation is prescribed under the Act. It sets out the circumstances in which a fresh period of limitation can be computed for a suit. If the suit is one for recovery of the amount due under an on-demand promissory note, no doubt, only an acknowledgment by the debtor can extend the period of limitation. But in regard to mortgages, the Transfer of Property Act has created and recognized rights as well as obligations both in the mortgagor and the mortgagee. An acknowledgment under Section 18 can be by a mortgagee also, and such acknowledgment will extend the limitation for a suit against the mortgagee in respect of the property or right claimed against him. **(Prabhakaran v. M. Azhagiri Pillai; (2006) 4 SCC 4834)**

Article 65 (b) – Limitation starts from the date of death of the female in suit for possession of immovable property – From the date of death of the female - The possession of the defendant would become adverse to the plaintiff only from that date.

The High Court was right in holding that the suit was barred by limitation. The limitation period prescribed under Article 65 is 12 years beginning from the date when the possession of the defendant becomes adverse to the plaintiff. Article 65 itself provides that the possession of the defendant shall be deemed to become adverse only when the female dies. Thus, there is no scope for the argument that limitation does not run from the date on which the Hindu female died and that it would start running from some other date. It is, therefore, not possible to sustain the contention that the suit had to be filed within 12 years from the date on which the possession of the defendant became adverse and, therefore, it was immaterial as to when the Hindu female died. The suit should have been filed by the plaintiff within 12 years of the death of the Hindu female, namely, K and the same having not been filed within 12 years was barred by limitation. **(Jagat Ram v. Varinder Prakash; (2006) 4 SCC 482)**

MOTOR VEHICLES ACT & MOTOR ACCIDENTS:

Section 147 - Statutory policy - Gratuitous passengers - A statutory policy would not cover the risk of a gratuitous passenger.

In our view, although the observations made in Asha Rani case (2003) 2 SCC 223: 2003 SCC (Cri) 493) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger. **(United India Insurance Co. Ltd., Shimla v. Tilak Singh and others, 2006(3) Supreme 332 SC: (2006) 4 SCC 404)**

S. 149 – Liability of insurance company – Company would be liable to pay compensation in case driver has not valid driving license instead of owner.

Since the vehicle was insured with the appellant and insurance policy was valid on the relevant date and the appellant – Insurance Company failed to discharge its burden that the driver was not having any valid driving licence on the date of accident, the liability to pay the compensation will be on the Insurance Company and not on the owner of the vehicle. **(National Insurance Co. Ltd., Lucknow v. Smt. Mayawati and Ors., 2006(2) ALJ 799)**

Ss. 149(2)(a)(ii), 147 – Driver holding learner's licence – Insurance company can't avoid liability U/s. 147.

We find that the High Court relied on a decision of this Court in New India Assurance Co. Ltd. v. Mandar Madhav Tambe [(1996) 2 SCC 328: 1996 SCC (Cri) 307: 1996 ACJ 253]. The issue related to the liability of an insurer when the offending vehicle is driven by a person holding a learner's licence. The High Court held that in view of the decision in Madhav Tambe case the Insurance Company has no liability, though the Motor Accidents Claims Tribunal, herein referred to as "the Tribunal" had fixed the liability on the Insurance Company. Correctness of the decision in Madhav Tambe case came to be considered in National Insurance Co. Ltd. v. Swaran Singh [(2004) 3 SCC 297: 2004 SCC (Cri) 733]. It was held that Madhav Tambe case was decided on the peculiar facts of the case without taking note of the binding precedents. It was categorically held that even when the offending vehicle was driven by a person holding a learner's licence, the insurer's liability existed. This position has been clarified in paras 93 and 94 of the judgment. (**Mahamooda v. United India Insurance Co. Ltd., (2006) 1 SCC (Cri) 519).**

Ss. 149(2), 147, 3, 163-A, 166 and 170 – No appropriate driving licence with the driver to drive commercial vehicle – Insurer could rightly deny liability.

The vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefore. R, who was driving the said vehicle at the relevant time, did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of the condition of the contract of insurance. The appellant, therefore, could raise the said defence.

In a proceeding arising out of a claim petition filed under Section 166 of the Motor Vehicles Act, the Insurance Company is a necessary party, as it is required to indemnify the owner or driver of the vehicle. In the circumstances mentioned in Section 170 of the Act, the Insurance Company can contest the matter on merits of the claim petition upon obtaining leave of the court. However, there does not exist any embargo in raising a defence which comes within the purview of Section 149(2) of the Act. **(National Insurance Co. Ltd. v. Kusum Rai; (2006) 4 SCC 250)**

Section 157 – Transfer of vehicle – Effect on rights and obligations of third party and Insurance Company on transfer of vehicle – Liability of Insurer does not cease as far as third party is concerned.

Undoubtedly, under Section 103-A of the 1939 Act, if there was in existence an insurance policy covering the vehicle and the vehicle was transferred, then there was no automatic transfer of policy of insurance but it was open to the transferor to apply in the prescribed form to the insurer for transfer of certificate of insurance before the transfer and, if within 15 days of receipt of such application by the insurer such application had not been refused, the certificate of insurance and the insurance policy, were deemed to have been transferred in favour of the transferee. The 1988 Act, however, brought about a drastic change in the situation. Section 157 of the 1988 Act, which corresponds to the earlier Section 103-A of the 1939 Act, provides that upon the transfer of ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate "shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer". The explanation to the section makes it clear that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.

Section 6(c) of the General Clauses Act would hardly have any application to a cause of action in favour of a person who was neither a transferor, nor the transferee of the insured vehicle. At the most, the failure to give an intimation under Section 103-A of the 1939 Act would create a liability on the part of the transferor vis-à-vis the Insurance Company, but would hardly affect a third party's claim for compensation.

The liability of an insurer under Section 103-A of the 1939 Act did not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party. Thus the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts of the present case or the new Act applies, as far as the deceased third party was concerned, the result would not be

different. **(United India Insurance Co. Ltd., Shimla v. Tilak Singh and others, 2006(3) Supreme 332 SC: (2006) 4 SCC 404)**

S. 168 – Coolie doing manual labour lost one arm in accident – Factors to be considered for awarding compensation– Eighty percent disability assessed.

After hearing learned counsel for the parties, we find that the High Court committed a gross error in ignoring the fact that the claimant was a coolie doing manual labour for earning his livelihood. As a result of the accident his one arm was amputated which was almost total disability for earning. In such a situation, to reduce the quantum of compensation by treating disability at 50% was uncalled for. The Tribunal has in fact assessed the disability at 80%. **(Shankarappa Kubbanna Kattimani v. Karnataka State Road Transport Corporation, (2006) 1 SCC (Cri) 548).**

MUNICIPALITIES:

U.P. Nagar Mahapalika Adhiniyam, 1959 – Ss. 106, 107 & 111 -

Appointment made in violation of law – Such appointments would be void.

Appointments made by Authority in violation of the Act and rules governing such appointment is void though same would not mean that provisions of Industrial Disputes Act were not required to be taken into consideration for determination of question whether termination of workman from service was legal or not but same should have to be considered to be an important factor in matter of grant of relief. **(Nagar Mahapalika (Now Municipal Corpn.) 2006 (3) Supreme 772 SC)**

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT:

S. 50 – Applies only to personal search – Not applicable in cases of search of a bag, article or container, which the accused was carrying.

The question as regards applicability of section 50 of the Act need not detain us for long. We may notice that in view of conflict in the opinions of different Benches as also difference of opinion between two Judges of this Court in State of Himachal Pradesh v. Pawan Kumar (2004

(24) AIC 483 (SC)=2004 (50) ACC 900), the question was referred to a larger Bench. A three-Judge Bench of this Court in State of Himachal Pradesh etc. v. Pawan Kumar (2005 (30) AIC 497 (SC)=2005 (52) ACC 710), relying on or on the basis of a large number of decisions and in particular the decision of the Constitution Bench of this Court in State of Punjab v. Baldev Singh (1999 (39) ACC 349 (SC)), clearly held that section 50 of the Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some baggage like a bag, article or container etc. which the accused at the relevant time was carrying. **(State of Haryana v. Ranbir alias Rana; [2006 (55) ACC 522 (SC)]**

NEGOTIABLE INSTRUMENTS ACT:

S. 138 & 142(b) – Amount due under the cheque payable at Ernakulam – Head office of the accused company also at Ernakulam – Does not mean that a part of cause of action arose at Ernakulam.

For the purpose of proving the ingredients of the offence under Section 138 of the NI Act, the complainant appellant was required to prove the facts constituting the cause of action therefore none of which arose within the jurisdiction of the Kerala High Court. Cause of action within the meaning of Section 142(b) of the Act can arise only once. Cause of action within the meaning of clause (2) of Article 226 shall have the same meaning as is ordinarily understood. The expression "cause of action" has a definite connotation. It means a bundle of facts, which would be required to be proved. Sending of cheques from Ernakulam or the respondents having an office at that place did not form an integral part of "cause of action" for which the complaint petition was filed by the appellant and cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 was taken by the Chief Judicial Magistrate, Suri in West Bengal. **(Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd., (2006) 3 SCC 658).**

S. 138(b) - Service of demand notice – Demand notice was returned with endorsement "addressee always absent during delivery time hence returned" – If complainant is able to prove that drawer of cheque knew about the notice and deliberately evaded service - court can presume service.

We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the parties (premises?) has been found locked or that the addressee

was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice.

The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under clause (c) of proviso to Section 138 of the Act. In our view this question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice.

The proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfill their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons. **(D. Vinod Shivappa v. Nanda Belliappa; 2006(4) Supreme 540)**

PANCHAYATS AND ZILA PARISHADS:

U.P. Panchayat Raj Act – Ss. 27, 95(1)(g) – Surcharge – Whether liability of Pradhan to surcharge u/s 27 and S. 19(1)(g) is same - No.

The prima facie finding of the competent authority under Section 95(1)(g) proviso is not same as finding of misconduct as contemplated

under Section 27 of the Act. We are satisfied that on the basis of mere prima facie finding of guilt, the order of surcharge could not have been passed under Section 27 of the Act. **(Indu Devi v. District Magistrate, Chitrakoot & Ors. 2006(2) ALJ 747)**

PRECEDENTS:

Obiter dicta and Ratio Decidendi – Statements which are not part of ratio decidendi constitute obiter dicta and are not authoritative.

It is in that context the court clearly came to the opinion that the provisions of sub-section (1) of Section 50 was not required to be complied with. The said conclusion was arrived at, inter alia, upon noticing the provision of sub-section (4) of Section 50 of the Act. It was, therefore, not necessary for the Bench, with utmost respect, to make any further observation. It was not warranted in the fact of the said case. A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See Additional District Magistrate, Jabalpur etc. v. Shivakant Shukla etc. (1976) 2 SCC 521). It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. [See Division Controller, KSRTC v. Mahadeva Shetty and Another [(2003) 7 SCC 197].

In Director of Settlements, A.P. and Others v. M.R. Apparao and Another [(2002) 4 SCC 638], it was held:

> "…An obiter dictum as distinguished from ratio decidendi is an observation of the court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such a obiter may not have binding precedent but it cannot be denied that it is of considerable weight…"

We may usefully refer to an observation of Delvin J. Made in Behrens v. Pertraman Mills (1957) 2 QB 25], which is in the following terms:

> "…if the Judge gives two reasons for his decisions, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which

comes second. But the practice of making judicial observation obiter is also well established. A judge may often given additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of the precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is the matter which judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course he has adopted fro the language used and not by consulting his own preference." **(State of Haryana v. Ranbir @ Rana; 2006(3) 358)**

PREVENTION OF FOOD ADULTERATION ACT:

S. 11 – Does not require associating any other person as witness – Corroboration of main witness is a rule of prudence and not of law.

Section 11 of the Act prescribes the procedure to be followed by the Food Inspector for taking the sample of food for analysis. The Food Inspector is required to:

"11.(1)(a) give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed under Section 14-A;

(b) except in special cases provided by rules under this Act, divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed:

Provided that where such person refuses to sign or put his thumb impression the food inspector shall call upon one or more witnesses and take his or their signatures or thumb impressions, as the case may be, in lieu of the signature or thumb impression of such person;

(c)(i) send one of the parts for analysis to the Public Analyst under intimation to the Local (Health) Authority; and

(ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this section and sub-section (2-A) and (2-E) of Section 13."

There is no denial of the fact that the appellant in this case had followed the procedure prescribed under the aforesaid section. The section does not provide for associating any other person as a witness for taking a sample of food for analysis. **(Food Inspector v. G. Satyanarayana; (2006) 1 SCC (Cri) 280)**

S. 13 – Report of Public Analyst is rebuttable and accused can prove it incorrect by sending the sample to CFL.

The courts below committed a mistake of law by acquitting the respondent on the ground that the statement of PW1 had not been corroborated by other independent witnesses. Corroboration of the statement of main witness is not the requirement of law but is only a rule of prudence.

It need not be direct and may be ascertained from the circumstances of a particular case. Under law uncorroborated testimony of a witness is admissible under Section 133 of the Evidence Act. While looking for corroboration, the court has to keep in mind the broad spectrum of the prosecution case and then to see whether there is evidence to led assurance to that version. The nature and extent of corroboration depends upon the facts of each case. **(Food Inspector v. G. Satyanarayana; (2006) 1 SCC (Cri) 280)**

PROVINCIAL SMALL CAUSES COURTS ACT:

S. 17 & 25 – Ex-parte decree for eviction and recovery of arrears of rent – Restoration application – Total decreetal amount being Rs. 164.90 – Tenant depositing Rs. 210 with restoration application – Section 17 fully complied with.

Against order dated 2.8.1983 landlord-respondent filed Civil Revision No. 171 of 1983. IIIrd A.D.J., Mathura, allowed the revision on 5.10.1985 and rejected the restoration application hence this writ petition. Revisional court held that tenant had not deposited the mesne profit which were also decreed hence he had not made full compliance of Section 17,

P.S.C.C. act. In this regard the finding of the revisional court is clearly erroneous in law. Along with counter-affidavit copy of decree has been filed as Annexure- CA 3. In the first part of the said copy the amount claimed in the suit is shown as Rs. 208. In the second part of the copy of decree the decreetal amount is shown as Rs. 64 and costs decreed are shown as Rs. 32.90. The total amount comes to Rs. 96.90 while tenant had deposited Rs. 210. In the ex parte judgment copy of which is Annexure –2 to the writ petition it is mentioned that rate of rent is Rs. 12 per month and tenant has not paid the rent since 12.10.1981. Suit was decreed ex parte on 6.9.1982. From 12.10.1981 till 6.9.1982 the total rent/damages for use and occupation come to Rs. 132(12x11). Date of filing of the suit is not mentioned anywhere in the writ petition or in the annexures. It appears that when suit was filed total rent due was Rs. 64 hence that was shown in the decree. Adding the rent due till the date of filing of suit and the damages, which accrued since, then till passing of the ex-parte decree dated 6.9.1982, the total amount comes to Rs. 132. After adding the cost awarded by the decree, i.e. Rs. 32.90 the total amount comes to Rs. 164.90. Tenant deposited Rs. 210 along with his restoration application which was much more than the decreetal amount. The tenant had therefore fully complied with the provision of Section 17, P.S.C.C. Act. The contrary view of the revisional court in this regard is clearly erroneous. **(Prem Raman Goswami v. 3rd A.D.J., Mathura and another; 2006(2) AWC 1092)**

RENT CONTROL & EVICTION:

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – S. 20(2)(c) – Suit for eviction-Construction of wall in Court yard divide into two-does not amount to material alteration.

Constructing wall in court yard of house in dispute which has effect of dividing court yard into two portions cannot be said to be such structural alteration which is covered by S. 20 (2) (C). Hence suit cannot be decreed on ground of material alteration. **(Hari Singh v. 6th Addl. District Judge, Muzaffarnagar & Ors, 2006 (2) ALJ 390.)**

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – S. 21(1)(a) – Application for release of premises-Purchase of another shop would amount to subsequent development.

As during pendency of the petition landlord has acquired another shop in which he has started business, hence his need stands satisfied. This is such an important subsequent event that it cannot be ignored and

it will have to be taken in consideration. Hence release application liable to be dismissed. **(Babu Lal and Brothers & Anr. V. IV th Addl. Dist. Judge, Saharanpur & Ors, 2006(2) ALJ 385)**

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972

– S. 21(1)(a) – Release of premises – Bonafide need – Whether the need

of the landlord/petitioner no. 1 is bonafide and genuine to release

premises in favor his nominee-“No”.

So far as the findings on the bonafide need of the petitioner no.1 is concerned, the premises is in occupation of the petitioner no. 2 and therefore, there is no occasion to treat the requirement of the petitioner no. 1 as bonafide. The respondent no. 3 has also admitted this fact that the petitioner no. 2 is in occupation of the premises in dispute being the nominee for allotment of the premises in dispute. So far as bonafide need of the landlord/petitioner no. 1 is concerned, **two courts below have recorded a finding against the petitioner no. 1 by holding that the need of the petitioner no.1 is not bonafide.**

(Basant Lal Sah & Anr V. Addl. Dist. Magistrate. Nainital & Ors., 2006 (2) ALJ 589)

Waiver of notice to quit – Section 113 T.P. Act – Waiver can be inferred when there is some act on the part of landlord, which evinces an intention to treat the lease as subsisting.

In the instant case two notices to quit were given on 10.2.1979 and 17.3.1979. The suit was filed on 2.6.1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter.

Mere acceptance of rent did not by itself constitute an act of the nature envisaged by Section 113, TPA showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted the rent, which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent be intended to waive the notice to quit and to treat the lease as subsisting.

A mere perusal of Section 113, TPA, 1882 leaves no room for doubt that in a given case, a notice given under Section 111 clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease, as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative. **(Sarup Singh Gupta v. S. Jagdish Singh & Others; (2006) 4 SCC 205)**

Effect of acceptance of rent after notice to quit.

Mere acceptance of rent cannot amount to waiver of notice to quit unless there be any other evidence to prove or establish that landlord so intended. **(Sarup Singh Gupta v. s. Jagdish Singh and others, Ramreddy; 2006(3) Supreme 206 SC)**

SERVICE LAW:

Departmental Enquiry – Second show cause notice by disciplinary authority – Not illegal -Permissible to correct mistake as regards punishment to be imposed.

The enquiry officer recommended certain punishments including that of a permanent withholding of two increments. On the basis of the said recommendations, the Managing Director of the appellant Company on 27.1.1994 issued a show-cause notice to the first respondent workman as to why two increments of pay from his salary should not be directed to be withheld permanently. The first respondent filed his show-cause thereto. However, another show-cause notice in supersession of the earlier notice was issued on 21.3.1994 by the Managing Director on the

ground that the charges which were proved against the first respondent being serious in nature and having regard to the gravity thereof, why the punishment of dismissal, inter alia, should not be imposed.

The disciplinary authority might have committed a mistake in issuing the first show-cause notice but by reason thereof he cannot be held to be wholly precluded from issuing a second show-cause notice as thereby he intended to rectify the mistake committed by him. Mistake furthermore, may either be of law or fact. By reason of mistake on the part of the enquiry officer, the respondent could not have been inflicted with a minor penalty although he deserved a major penalty.

As the enquiry officer had no jurisdiction to recommend any punishment to be imposed on the respondent by the disciplinary authority, the disciplinary authority although acted thereupon at the first instance, could have corrected his mistake, as the same was apparent on the face of the record. He, therefore, did not commit any illegality in issuing the second show-cause notice. **(Maharashtra State Seeds Corpn. Ltd. v. Hariprasad Drupadrao Jadhao, (2006) 3 SCC 690).**

Departmental Enquiry – Appreciation of Evidence- Bar against admissibility of confession made to a Police Officer or in police custody does not apply to departmental enquiry.

The respondent was a Constable in the Delhi Police. Pursuant to an FIR lodged against him under Sections 308/34 of the Penal Code, he was arrested. Subsequently, certain firearms from the armoury were found with certain persons accused therefore. The said persons made confessions stating that the respondent had committed theft of the said arms. The respondent was arrested on the basis of that confessional statement. While in police custody he also made a confession as regards his involvement in the said offence. He also led the investigating team to the room of the armoury and pointed out the place wherefrom, he while working as a sentry on the date specified, had stolen the said firearms. Since apart from that confession there was no material on record, the respondent was discharged from the criminal case. Thereafter, a departmental enquiry was initiated against the respondent on the basis of the said confessional statement made by him. The departmental enquiry culminated in his dismissal from service.

The respondent contended that even in a disciplinary proceeding the provisions contained in Section 26 of the Evidence Act, or at least

principles analogous thereto, were attracted as such confessions in police custody were ordinarily extracted by force.

Sections 25 and 26 of the Evidence Act although seek to achieve the same purpose but they operate in somewhat two different fields. Section 25 raises an embargo as regards proof of confession before a police officer. The same need not be in police custody, whereas Section 26 raises a bar as regards admissibility of such confession if made by an accused in the custody of a police officer although such a confession might have been made before a person who was not a police officer. The policy underlying Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police to any person whomsoever, unless made in the immediate presence of a Magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible except so far as is provided by Section 27 of the Act. A confession would mean incriminating statement made to the police suggesting inference of the commission of the crime and it, therefore, is confined to the evidences to be adduced in a court of law. If the provisions of the Evidence Act are not attracted in a departmental proceeding, a fortiori Sections 25 and 26 shall not apply. **(Commissioner of Police, New Delhi v. Narender Singh; (2006) 4 SCC 265).**

Departmental Enquiry – Weightage to be given to the decision of Civil Court based on same facts in proceedings between the parties – Employee dismissed after enquiry for ante-dating the insurance cover – In civil case the Civil Court allowed the insured sum and held that there was no ante-dating of cover note – The Disciplinary Authority and Appellate Authority was bound to consider this decision.

The Appellate Authority while disposing of the appeal was required to apply his mind with regard to the factors enumerated in Rule 37(2) of the Rules. The judgment of the civil court being inter partes was relevant. The conduct of the appellant as noticed by the civil court was also relevant. The fact that the respondent has accepted the said judgment and acted upon it would be a relevant fact. The authority considering the memorial could have justifiably come to a different conclusion having regard to the findings of the civil court. But, it did not apply its mind. It could have for one reason or the other refused to take the subsequent event into consideration, but as it had a discretion in the matter, it was bound to consider the said question. It was required to show that it had

applied his mind to the relevant facts. It could not have without expressing its mind simply ignored the same. **(Narinder Mohan Arya v. United India Insurance Co. Ltd.; (2006) 4 SCC 713)**

Service – Termination order passed without authority, but rectified by competent authority subsequently – Termination would not be illegal.

Where order of termination of service of an employee was passed by an Authority not competent but act of Authority was subsequently rectified by the competent authority, the order of termination could not be held to be invalid or illegal. **(Maharashtra State Mining Corpn. V. Sunil, 2006 (3) Supreme 797 SC)**

Pension – Effect of financial constrain on revised scheme – Fixing of a cut off a date for granting the benefits is well within the powers of Government so long the grounds are not arbitrary - Financial constrain could be a valid ground for introducing a cut off date while introducing a pension scheme on revised basis.

The only ground on which Article 14 has been put forward by the learned counsel for the respondent is that the fixation of the cut-off date for payment of the revised benefits under the two concerned notifications was arbitrary and it resulted in denying arrears of payments to certain sections of the employees. This argument is no longer res integra. It has been held in a catena of judgments that fixing of a cut-off date for granting of benefits is well within the powers of the Government as long as the reasons therefore are not arbitrary and are based on some rational consideration. A supplementary affidavit filed on behalf of the State Government by Mukesh Nandan Prasad dated 9.9.2002 brings out in paragraph 8 that the total amount of financial burden, which would arise as a result of making effective the payments from 1.1.1986 would be about 2,038.34 crores. In other words, the State Government declined to pay the arrears from 1.1.1986 on the ground of financial consideration, which, undoubtedly, is a very material consideration for any administration. In State of Punjab and Ors. v. Amar Nath Goyal and Ors. (2005) 6 SCC 754 this Court had occasion to consider the very same issue. After referring to a number of other authorities, it was held that financial constraints could be a valid ground for introducing a cut-off date while introducing a pension scheme on revised basis. Thus, refusal to make payments of arrears from 1.1.1986 to 28.2.1989 on the ground of financial burden cannot be held to be an arbitrary ground or irrational

consideration. Hence, the argument based on Article 14 of the Constitution must fail. We see no other contention justifying the striking down of the Validation Act passed by the competent Legislature. At any rate, none has been pointed out to us. Thus, the only argument in favour of the striking down having been found unacceptable, we are of the view that the impugned judgment of the High Court is erroneous and needs to be interfered with. **(State of Bihar and others v. Bihar Pensioners Samaj, 2006(3) Supreme 743 SC)**

Forum of appeal, against order of Appointing Authority.

Authority higher than the appointing authority would also be the designated authority for purpose of Art. 311 of the Constitution of India and if right of appeal is not embellished, an authority higher than appointing authority may also act as a disciplinary authority. **(A. Sudhakar v. Post Master General, Hyderabad and another, 2006(3) Supreme 225 SC)**

Recruitment on ad-hoc basis in violation of recruitment rules – The appointment is a nullity – Question of regularization/confirmation does not arise.

The respondents herein were appointed only on applications made by them. Admittedly, no advertisement was issued in a newspaper nor the employment exchange was notified as regard existence of vacancies. It is now trite law that a ‘State’ within the meaning of Article 12 of the Constitution of India is bound to comply with the constitutional requirements as adumbrated in Articles 14 and 16 thereof. When Recruitment Rules are made, the employer would be bound to comply with the same. Any appointment in violation of such Rules would render them as nullities. It is also well settled that no recruitment should be permitted to be made through backdoor.

The contention of the learned counsel appearing on behalf of the Respondents that the appointments were irregular and not illegal cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The recruitment rules were not followed. Even the selection committee had not been properly constituted. In view of the ban in employment, no recruitment was permissible in law. The reservation policy adopted by the Appellant had not been maintained. Even cases of minorities had not been given due consideration. **(National Fertilizers Ltd. & Ors. v. Somvir Singh; 2006 (4) Supreme 290)**

SPECIFIC RELIEF ACT:

S. 20 & Limitation Act, 1963 – Article 54 – Suit for specific performance of contract of sale and perpetual injunction – Agreement entered into between parties on 18.12.1964 – Suit for specific performance filed on 4.4.1994 after more than 29 years – No date of performance fixed in agreement –Time-bar for suit to apply only on finding that plaintiffs had notice of refusal of performance by defendants – And refusal on which date so as to see whether suit filed within three years from date of knowledge of refusal to plaintiffs – Hence, question of limitation could be decided only after taking evidence.

The question as to how long a plaintiff, even if he had performed the whole of his obligations under an agreement for sale, in which a time for performance is not fixed, could keep alive his right to specific performance and to come to Court after 29 years seeking to enforce the agreement, may have also to be considered by the Court especially in the context of the fact that the relief of specific performance is discretionary and is governed by the relevant provisions of the Specific Relief Act, 1963. But again, these questions cannot be decided as preliminary issues and they are not questions on the basis of which the suit could be dismissed as barred by limitation. The question of limitation has to be decided only on the basis of Article 54 of the Limitation Act, 1963 and when the case is not covered by the first limb of that Article, normally, the question of limitation could be dealt with only after evidence is taken and not as a preliminary issue unless, of course, it is admitted in the plaint that the plaintiffs had notice that performance was refused by the defendants and it is seen that the plaintiffs approached the Court beyond three years of the date of notice. Such is not the case here. It is, therefore, a case where in the context of Article 54 of the Limitation Act, the question had to be decided on the pleadings and evidence to be adduced by the parties on the aspect of the second limb of Article 54 of the Limitation Act. **(Gunuwantbhai Mulchand Shah v. Anton Elis Farel; 2006(2) AWC 1475 (SC))**

TRANSFER OF PROPERTY ACT:

Section 54, 58(C) & 83 – Sale with a condition to retransfer the property – Such a sale is sale proper and not a mortgage – All rights in rem are transferred reserving only a personal right of repurchase which would expire unless exercised within stipulated time.

There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right, which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document, which effects or purports to effect a sale, the transaction will not be regarded as a mortgage.

Section 58(c) clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of retransfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal rights to the purchaser (sic seller), and such a personal right would be lost, unless the same is exercised within the stipulated time.

Applying the principles laid down above, the two documents read together would not constitute a 'mortgage' as the condition of repurchase is not contained in the same documents by which the property was sold. The proviso to clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a 'mortgage by conditional sale'. **(Bishwanath Prasad Singh v. Rajendra Prasad; (2006) 4 SCC 432)**

TORT:

Overlapping in duties in tort and under contract – Mere negligence in discharge of contractual duties would not be enough to give rise to an independent cause of action in tort.

Tortious acts, being not the ones which could be the subject-matter of departmental proceedings or negligence under a contract of employment, cannot give rise to a civil liability by way of monetary

compensation to the employer except in certain circumstances. A suit for damages would be maintainable only on the ground of breach of the terms and conditions of the contract and when there are acts of malfeasance, misfeasance and non-feasance. As held in Jay Laxmi Salt Works case, (1994) 4 SCC 1, without malice the claim for misfeasance could not be accepted. Non-feasance on the other hand is omission to discharge duty. But the omission to give rise to action in torts must be impressed with some characteristic, namely, malice or bad faith. The expressions 'malfeasance', 'misfeasance' and 'non-feasance' would, therefore, apply in those limited cases where the defendants are liable not only for breach of care and duty but their actions have been actuated by malice or bad faith. The defective planning in the construction of a bundh say, therefore, may be negligence, mistake, omission, but to say that it can only be either malfeasance, misfeasance and non-feasance is not correct.

The appellants have not and in law could not have filed any suit against the respondents herein alleging any tortuous act on their part. A suit for damages by way of tortuous claim is maintainable only when someone has a duty to perform towards others under a statute or otherwise. In this case no tortuous act on the part of the respondents is being dealt with. **(Punjab State Civil Supplies Corpn. Ltd. v. Sikander Singh; (2006) 3 SCC 736)**

TOWN PLANNING:

Town Planning – M.P. Nagar Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachnaon Ka Vyayan Niyam, 1975 – Power of State Government limited to grant of previous approval and grant of lease on concessional terms – direction by the State Government to make allotments etc. is void.

Admittedly the land within the scheme was reserved for auditorium and cinema hall (public and semi-public purposes) at city level. Pursuant to or in furtherance of the said policy decision dated 10.8.1995 a decision was taken to allot the land to the private respondent for the purpose of establishing a printing press and publication of newspaper. Moreover, despite allotment, the quantum of premium and annual rent was not fixed. Establishment of a printing press would be an "industry". It was only subsequently that on 21.9.1998, the decision of the State was communicated to JDA for making allotment of the land to B by extending concession of 50% rate of market value of the land. Thereafter, JDA fixed the value of the land on the basis of the rate for the allotted land for

financial year 1994 – 95treating it as an industry. The value of the land could not be fixed on the basis of the rate which was prevailing in the financial year 1994 – 95when decision to allot the land was taken in the year 1998. The allotment having been made unauthorisedly suffered from the vice of malice in law.

In the case of Y also, allotment was directed to be made by the State. It might be that ultimately allotment was made by JDA. But if the State had no role to play in the matter, even advice given by it would be ultra vires. The State as already held, could not implement its purported policy decision as regards allotment of land on concessional rates. Such a direction or even a policy decision in that behalf was ultra vires and contrary to the statutory rules framed by it. An action by way of policy decision or otherwise at the hands of a statutory authority must be in consonance with the statutory rules and not dehors the same. **(K.K. Bhalla v. State of M.P., (2006) 3 SCC 581)**

U.P. CONSOLIDATION OF HOLDINGS ACT:

S. 5(2) and 49 – Civil suit – Jurisdiction of civil court – Suit for cancellation of sale deed in respect of agricultural land – Questions to be decided were whether sale deed obtained by impersonation – And whether plaintiff wrongly shown as minor at time of execution of sale deed – Grounds showing sale deed to be voidable – Hence, only civil court has jurisdiction to decide dispute.

The sole question involved in the present writ petition is that whether the suit which was filed for cancellation of the sale deed upon the operation of the U.P. Consolidation of Holdings Act whether the same will abate or not? The petitioners submit that in view of the provisions of Section 5(2)(a) of the Act the proceedings before any Court stood abated if the village in question or where the property in dispute is situate, is notified under the aforesaid Act. It has been submitted that the courts below have not taken the correct view that only the civil court has the jurisdiction and consolidation courts will have no jurisdiction and the proceedings will not abate. It has further been submitted that as to whether respondent No. 3 had any right or title to sell out the entire disputed land by way of sale deed in favour of the deceased Ram Deo Singh is a question involving right and title and in view of the consolidation operation and bar of Section 49 of the Act, the suit is liable to be abated but the courts below have not taken into consideration the aforesaid fact. The jurisdiction of the consolidation authorities is wider than the civil and

revenue courts and in view of Section 5(2) of the Act the suit pending in the trial court or in appeal before any appellate authority in which title and interest over land are involved, will stand abated. The suit of the plaintiff was clearly bared by Section 49 of the Act.

I have considered the rival submissions made on behalf of the parties and have perused the record as well as the decisions cited above. From the perusal of the record and the plaint it is clear that regarding the rights and title of the property, as there was no dispute that the plaintiff was not a co-sharer in the property in dispute. The sale deed has been got executed by impersonation. There is no dispute to this effect that plaintiff respondent was not a co-sharer of the property in dispute. Therefore, the Court was justified in holding that the relief sought in the plaint can only be decided by the civil court and the revenue court will have no jurisdiction. The revisional court has also considered that the ground for relief of cancellation contained in the plaint that if the same is voidable and there is no dispute of title in the land in question, the relief of cancellation of sale deed was triable by the civil court only. The revisional court has also considered that 1 am of opinion when there is no dispute of title of the land in question, the relief of cancellation of sale deed was triable by the civil court only. The question which requires to be decided is whether the sale deed was obtained by impersonation and at the time of execution of the sale deed the plaintiff was major but wrongly shown as minor coupled with the other grounds, therefore, when the deed is voidable it is only the civil court, which has jurisdiction to decide the dispute. **(Ram Asrey Singh v. State of U.P.; 2006 (2) AWC 1607)**

Ss. 9,12,27 and 52- Partition of Chak- Provision relating to partition of joint holding would apply.

The provisions for partition applicable to the holding of a tenure holder under sections 9 and 12 of the U.P. Consolidation of Holdings Act will also be applicable to a chak of which a tenure holder was given possession after preparation of new record of right under section 27 in case a cause of action arose thereafter and

before notification under section 27 in case a cause of action arose thereafter and before notification under section 52 of the U.P. Consolidation of Holdings Act. It is further held that the chak could also be partitioned before notification under section 52 of the U.P. Consolidation of Holdings Act in case cause of action for partition arises. (Diwakar Rai V. Dy. Director of Consolidation, Azamgarh & Ors., 2006 (2) ALJ 428)

S. 28 – A – Whether application for re-determination of compensation by the petitioner/ land owner- Who failed to make reference under S. 18 can entitle to rely upon award passed by reference Court U/S. 28-A of the Act.

The petitioner is entitled to rely on a award passed by the reference Court under Section 28-A (3) of the Act in reference no. 133 of 1992 (Jhillu Vs. Collector and others) for maintaining his application under Section 28-A of the Act. Therefore, the impugned order dated 11-9-2001 is apparently illegal and liable to be quashed. (Babu Nandan V. State of U.P. & Ors., 2006 (2) ALJ 778)

S. 48 – Withdrawal of revision-When permissible.

Though Order 23 Rule 1 of the C.P.C. is not applicable to the U.P. Consolidation of Holdings Act, but Consolidation authorities can exercise discretion to secure end of justice in the case and as

revision was not competent, the Deputy Director of Consolidation rightly permitted to withdraw the same. An Authority having no jurisdiction to entertain the revision has no jurisdiction to decide the revision on merit. The order was rightly passed by the Deputy Director of Consolidation permitting to withdraw the revision.

(Shankar Dayal Tewari & Anr V. Dy Director of Consolidation Gorakhpur & Anr. , 2006(2) ALJ 685).

U.P. IMPOSITION OF CEILING ON LAND HOLDINGS ACT:

S. 13A – Rectification of mistakes – Order cannot be review by prescribed authority by invoking S. 13A in garb of rectification.

Section 13A of the Act reads as under:

> 13A. Re-determination of surplus land in certain cases.-(1) The prescribed authority may at any time, within a period of two years from the date of notification under sub-section (4) of Section 14, rectify any mistake apparent on the face of record:
>
> Provided that no such rectification which has the effect of increasing the surplus land shall be made, unless the prescribed authority has given notice to the tenure-holder of its intention to do so and has given him a reasonable opportunity of being hear.

Thus prescribed authority cannot be permitted to go into merits and into validity of the order passed by appellate authority in respect to the extent of land which was declared as surplus. The extent of land, which was declared as surplus by judgment of appellate authority, could have been reviewed/varied either by appellate authority himself or by this Court being higher forum but in no case by the prescribed authority. The contention of petitioner can only be stretched to a case where there can be error apparent on record or such kind of error, which is not to reopen declaration of land as surplus at the level of appellate authority or further

higher forum. As the appellate authority has already reduced declaration of land as surplus which was made from 8.23 acres to 3.71 acres, if on merit for any reason, as argued, the judgment was faulty and land was not to be declared as surplus, remedy of petitioner if any, was to file application before the appellate authority or he would have challenged the order of appellate authority before this Court by filing writ petition as it was earlier done by him and thus, this Court is of the considered view that rejection of petitioner's application for review by both courts which was moved in the garb of moving application under Section 13A of the Act is legally sound. The scope of correction as permitted to the prescribed authority under referred provision cannot be extended to the extent to sit over the judgment of appellate authority and if it can be so then it can be further stretched to the confirmed order of appellate authority even from this Court which if is permitted, then that may lead to a very unhealthy situation. If there is some apparent error or there is such error which can be corrected in the forum of review, in a final judgment given by a court on merits, then it has to be reviewed/corrected by that very court or in the superior forum but in no case it can be in a reverse gear. Interference and variance by a lower court in a final judgment given on merits by a higher court, in law, cannot be corrected. **(Swami Prasad v. A.D.J., Hamirpur; 2006 (2) AWC 1788)**

U.P. LAND REVENUE ACT:

S. 33/34 & S. 9, 48(3) of U.P. Consolidation of Holdings Act – Mutation without hearing on the basis of forged Patta in respect of public utility land – The order is bad for non-affording opportunity of hearing.

On 14.5.2002, respondent No. 6 is alleged to have moved an application before the Collector on Tehsil Diwas alleging that the pattas on the basis of which the petitioners have got their names mutated was forged and fabricated and the petitioners have got their names mutated fraudulently. A report was called for. Tehsildar after making enquiries submitted his report on 4.7.2002 pointing out that the Land Management Committee has never passed any resolution for allotment of any land in favour of the petitioners. Their names have been mutated on the basis of forged patta in connivance with the Consolidation Officer and other subordinate consolidation staff. In the meantime, another application-dated 30.5.2003 was filed by respondents No. 4 and 5 to the same effect. The respondent No. 1 again called for a report from the Consolidation Officer who after making enquiries submitted a report dated 31.5.2003 again confirming that the land in dispute was a public utility land and the

mutation of the names of the petitioners is a result of fraud and manipulation. Respondent No. 1, on the basis of the aforesaid reports, passed the impugned order dated 3.6.2003 to expunge the names of the petitioners.

There is no manner of doubt that the enquiry was conducted behind the back of the petitioners and the impugned order has also been passed without any notice or opportunity to them. Respondent No. while passing the impugned order has found that the entries of the names of the petitioners in the revenue record was a result of fraud and manipulation.

It is no doubt correct that entries made in revenue records on the basis of forged or non-existing order cannot be allowed to continue as soon as the facts come to light. However, the question which arises for consideration is whether in such a situation the affected persons are entitled for an opportunity of hearing before the entries of their names could be expunged. **(Rakesh v. Collector/D.D.D., Consolidation, Baghpat; 2006 (2) AWC 1774)**

U.P. ZAMINDARI ABOLITION AND LAND REFORMS ACT:

S. 122B – Suit for permanent injunction in respect of Abadi land – Application for temporary injunction – Eviction orders passed by Assistant Collector confirmed in revision – Hence, possession of plaintiff-petitioners prima facie illegal – No case for grant of temporary injunction made out – Property descriebe in Section 117 of U.P.Z.A. and L.R. Act includes abadi sites.

Possession of land held by the plaintiffs, was subject of challenge by the respondent-Gaon Sabha in the proceeding under Section 122B of the Act in which the eviction orders have been passed by the Assistant Collector and the revision of the petitioners has also been dismissed by the Collector. Therefore, the copies of these orders filed on record being Annexure – 3 and 4 prima facie go to show that the possession of the plaintiffs over the land in question has been illegal. If the plaintiffs-petitioners had to prove that their possession is legal, the relevant documents for the purpose should have been filed on record. These documents are the orders of allotment of the land in the form of proposal by the Land Management Committee and its approval by the Assistant Collector/S.D.O. concerned. Unless and until the allotment has been made in accordance with the procedure prescribed by the statute, any possession so held by any villager over the Gaon Sabha property is an illegal possession and for that purpose only the provisions of Section 122B

of the Act have been enacted. Mere filing of a receipt taken from the then Pradhan of the village in the year 1970, is not sufficient to show the prima facie case of the petitioners for his legal possession over the disputed property. It is true that the orders passed in the proceeding under Section 122B of the Act are no findings regarding the ownership and title of the parties over the property. But once the orders of the authorities have been passed for eviction in a particular case, that order as such cannot be said to be wholly irrelevant, beyond jurisdiction and illegal. The argument of the learned counsel for the petitioners is that the jurisdiction of the Assistant Collector under Section 122B of the Act, does not extend to an abadi land. 1 am surprised at the submissions itself when it is already admitted by the petitioners themselves that this land was subject of an allotment in their favour by the Gaon Sabha. Obviously, this property vested in Gaon Sabha under Section 117 of the Act, which says that after the notification under Section 4 of the Act the State Government may declare all or any of the properties detailed in sub-section (i) to (vi) to vest in Gaon Sabha. The property so described in sub-section (i) to (vi) of Section 117 of the Act also includes the abadi sites. Therefore, the abadi sites, which is vested in Gaon Sabha by the order of the State Government, is definitely a property of Gaon Sabha and if an order of Assistant Collector under Section 122B of the Act for eviction from such abadi site has been passed against the plaintiffs, that order cannot be said to be without jurisdiction and this aspect has not been specifically stated in Likhi Ram's case by the Division Bench of this Court. The plaintiffs have neither filed the allotment order which includes the proposal of Land Management Committee nor the approval of the same by the Assistant Collector/S.D.O. concerned whereby alone any right would legally have been created for the plaintiffs-petitioners over the disputed land. On the contrary, there is eviction order of the petitioners passed under Section 122B of the Act and in such fact situation if the courts below have found that the petitioners did not have prima facie case for grant of temporary injunction and have given concurrent findings to that effect. I do not propose to make any interference against those orders in extraordinary jurisdiction of a writ petition under Article 226 of Constitution of India. **(Bhagwana Singh v. Gaon Sabha Village Paijaniya, Bijnor; 2006(2) AWC 1684)**

THE UTTAR PRADESH JUDICIAL SERVICE RULES:

Rules 4(m) 6, 7, 10, 15 and 19 – Recruitment to the post of Civil Judge (Junior Division) – Relaxation of Age – Public Service

Commission issued the advertisement based on erroneous interpretation of Rules which stated that candidates who were within the age on 1st July 2001 and 1st July 2002 shall be treated within age – Relaxation can be granted only if permissible under the Rules – No right can accrue on the basis of advertisement.

The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1st July, 2001 and 1st July, 2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. It the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules. The Rules postulate the timely determination of vacancies and timely appointments. The non-filling of vacancies for long not only results in the avoidable litigation but also results in creeping of frustration in the candidates. Further, non-filling of vacancies for long time, deprives the people of the services of the Judicial Officers. This is one of the reasons of huge pendency of cases in the courts.

It is absolutely necessary to evolve a mechanism to speedily determine and fill vacancies of Judges at all levels. For this purpose, timely steps are required to be taken for determination of vacancies, issue of advertisement, conducting examinations, interviews, declaration of the final results and issue of orders of appointments. For all these and other steps, if any, it is necessary to provide for fixed time schedule so that system works automatically and there is no delay in filling up of vacancies. The dates for taking these steps can be provided for on the pattern similar to filling of vacancies in some other services on filling of seats for admission in medical colleges. The schedule appended to the Regulations governing medical admissions sets out a time schedule for every step to be strictly adhered to every year. The exception can be provided for where sufficient numbers of vacancies do not occur in a given year. The adherence to strict time schedule can ensure timely filling of vacancies. All State Governments, Union Territories and/or High Courts are directed to provide for time schedule for the aforesaid purposes so that every year vacancies that may occur are timely filled. All State Governments, Union

Territories and High Courts are directed to file within three months details of the time schedule so fixed and date from which time schedule so fixed would be operational. **(Malik Mazhar Sultan & Anr. V. U.P. Public Service Commission & Ors. 2006(3) Supreme 493)**

STATUTE SECTION:

The
Contempt of Courts (Amendment) Act, 2006[1]
[No. 6 of 2006]

[March 17, 2006]

An Act further to amend the Contempt of Courts Act, 1971

Be it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows: -

Prefatory Note – Statement of Objects and Reasons. – The existing provisions of the Contempt of Courts Act, 1971 have been interpreted in various judicial decisions to the effect that truth cannot be pleaded as a defence to a charge of contempt of court.

2. The National Commission to Review the Working of the Constitution has also in its report, inter alia, recommended that in matters of contempt, it shall be open to the Court to permit a defence of justification by truth.

3. The Government has been advised that the amendments to the Contempt of Courts Act, 1971 to provide for the above provision would introduce fairness in procedure and meet the requirements of Article 21 of the Constitution.

4. Section 13 of the Contempt of Courts Act, 1971 provides certain circumstances under which contempt is not punishable. It is, therefore, proposed to substitute the said section, by an amendment.

5. The Contempt of Courts (Amendment) Bill, 2003 was introduced in the Lok Sabha on the 8th May, 2003 and the same was referred to the Department-related Parliamentary Standing Committee on Home Affairs for examination. The Hon'ble Committee considered the said Bill in its meeting held on the 2nd September, 2003. However, with the dissolution of the 13th Lok Sabha, the Contempt of Courts (Amendment) Bill, 2003 lapsed. It is proposed to re-introduce the said Bill with modifications of a drafting nature.

6. The Bill seeks to achieve the above objects.

1. Short title. - This Act may be called the **Contempt of Courts (Amendment) Act, 2006.**

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[1] Received the assent of the President on March 17, 2006 and published in the Gazette of India, Extra, Part II, Section 1.

2. Substitution of new section for Section 13. – In the Contempt of Courts Act, 1971 (70 of 1971), for Section 13, the following section shall be substituted, namely: -

"13. *Contempts not punishable in certain cases.* – Notwithstanding anything contained in anylaw for the time being in force. –

(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.".

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