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

Quarterly Digest

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

July – September, 2011

Volume: XXIV **Issue No.: 3**

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251. Vinny Parmvir Parmar v. Parmvir Parmar, 2011 (5) Supreme 74

252. Vishal Singh Shekhawat v. Rajasthan State Ganga Nagar Sugar Mills Ltd. (2011 (130) FLR 314

253. Vishram Singh Raghubansi Vs. State of Uttar Pradesh (2011) 7 SCC 776

254. Waman and others Vs. State of Maharashtra (2011) SCC 295

255. Yatindra Kumar Singh @ Raju and others v. State of U.P. Through Secretary, Urban Development, U.P., Lucknow and others, 2011 (114) RD 50

256. Yogesh Dutt v. Union of India and others, 2011(3) E.S.C. 2192

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Administrative Tribunals Act

Abandonment- absence of employee by itself does not amount to abandonment of service?

In G.T.Lad and others v. Chemical and Fibres of India Ltd., 1979 SCC (L & S) 76, it was held by the Supreme Court in paras 5a & 6 as follows:

> "5a. Re Question No. 1: In the Act we do not find any definition of the expression 'abandonment of service'. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the wor d 'abandon' has been explained as meaning to leave completely and finally; forsake utterly, to relinquish, renounce, to give up all concern in something'. According to the Dictionary of English Law by Earl Jowitt (1959 edition) 'abandonment' means 'relinquishment of an interest or claim'. According to Black's Law Dictionary 'abandonment' when used in relation to an office means 'voluntary relinquishment'. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be interred from the Acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute as 'abandonment of office'.
>
> Referring to the above observation, the High Court held-
>
> "to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah, (1964)4 SCR 265: AIR 1964 SC 1272, it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of

service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."

(**Union of India v. CAT and others; 2011(3) E.S.C. 1919 (All)(DB)**

Advocates Act

S.49 – Duty of Advocate towards Court and client stated - An Advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An Advocate is expected to act with utmost sincerity and respect. In all professional functions, an Advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. An Advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. Ignoring even a minor violation/ misconduct militates against the fundamental foundation of the public justice system. An Advocate should be dignified in his dealings to the Court, to his fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An Advocate has a duty to enlighten and encourage the juniors in the profession. An ideal Advocate should belief that the legal profession has an element of service also and associates with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the bar Council of India, In Chapter II, Part VI of the Bar Council of India Rules. As a rule, an Advocate being a member of the legal profession has a social duty to show the people a beacon of light by his conduct and actions rather than being adamant on an unwarranted and uncalled for issue. **(O.P.Sharma & Ors. v. High Court of Punjab & Haryana, AIR 2011 SC 2101)**

Allahabad High Court Rules, 1952

U.P. Financial Hand Book Vol. II

Administrative Judges do not have powers to set aside the orders of compulsory retirement of employees of Subordinate Court.

Under the Allahabad High Court Rules, 1952, the business of the Administrative Judge is enumerated in Chapter-III, Rule 4(B), and which provides as follows:

4. Allocation of administrative work.- The following shall be the allocation of executive and administrative work between the Chief Justice, the Administrative Judge, the Administrative Committee and the Full Court:

(A) Matters for the Chief Justice

... .

(B) Matters for Administrative Judges

1. Review of judicial work of Subordinate Courts, Tribunals, District Consumer Forums and all other Special Courts and control of their working including inspection thereof, to record entries in the character rolls of the officers posted in the division assigned to the Administrative Judge.

2. Perusal of returns, calendars, evaluation of inspection reports made by the Presiding Officers in respect of their own offices, audit reports received form those Courts, Tribunals etc., and to make orders thereon.

3. Any adverse remarks or strictures made by an Administrative Judge about judicial work, conduct or integrity of any officer under his charge will be communicated to the officer concerned, who may make his representations, if any, within a month and the same shall be placed before the Administrative Committee for consideration and decision.

4. Grant of earned leave to officers posted in the sessions division under the charge of the Administrative Judge.

5. Grant of casual leave (including special casual leave) and permission to leave near a quaters to the District and Sessions Judge, Presiding Officers of the Tribunals and Special Courts etc. Howsoever designated.

6. Disposal of appeals against orders of punishment imposed on and representations etc of the employees of the Subordinate Courts.

The Administrative Judges, in making orders on the matters enumerated above, do not exercise judicial powers. They do not have powers to set aside the orders of compulsory retirement of the employees of the subordinate Court. The review of judicial work, perusal of returns, evaluation of inspection reports, considerations and decisions on the adverse remarks given by the District Judge, grant of earned leave and casual leave, and disposal of appeals against the orders of punishment, do not authorize the Administrative Judges, to sit over, to decide and reverse the decision in the matter of compulsory retirement. **(Jamaluddin Khan v. State of U.P. and another, 2011(3) E.S.C. 1985 (All) (DB)**

Arbitration and Conciliation Act

Counter Claim Applicability of principle of Counter Claim

Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than Section 25(a) or Section 32 (2) (a)], refers to a "claim", it shall apply to a "counter-claim" and where it refers to a "defence", it shall also apply to defence to that counter claim. This would mean that a respondent can file a counter-claim giving the facts supporting the counter-claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter-claim) will be entitled to file his defence to such counter-claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter-claims) and if the answer is in the affirmative, proceed to adjudicate upon the same.

A counter-claim by a respondent pre-supposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject-matter of the counter-claim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of Arbitrator, instead of raising a counter-claim in the pending arbitration proceedings. The object of providing for counter-claims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of

a respondent in an arbitration proceedings being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceeding or raise the dispute by way of counter-claim, in the pending arbitration proceedings. **(State of Goa Vs. Praveen Enterprises 2011(4) AWC 3918 (SC)**

Powers of the Chief Justice when question of fraud, coercion etc.

Arbitration and Conciliation Act, 1996 - In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress of undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge-most of the time it runs in six sand seven figures. It may not be proper to burden a party who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate fines some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an afterthought, make-believe or lacking in credibility, the matter must be set at rest then and there. **(Union of India and others Vs. Mater Construction Co. 2011(4) AWC 3629 (SC)**

Role of Civil Courts determining validity of an arbitral award under Sec. 34 - Determination of question regarding breach of contract

A civil court examining the validity of an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) exercises

supervisory and not appellate jurisdiction over the awards of an Arbitral Tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(b)(i) and (ii), or Section 28 (a)(a)or 28(3) read with Section 34 (2) (b) (ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' are excluded from the scope of arbitration. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate Section 34(2) (b) (ii) read with Section 28 (3) of the Act.

The question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by an adjudicatory forum, that is, Court or an Arbitral Tribunal. Adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages include a right to adjudicate upon as to whether there was any breach at all. One of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach.

it is now well-settled that if an award deals with and decides several claims separately and distinctly, even if the Court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. **(J.E. Engineers (P) Ltd. Vs. Union of India and another 2011(5)AWC 4492(SC)**

Time limit for filing an application under Section 8

Through Section 8 of the Arbitration and Conciliation Act, 1996 does not prescribe any time limit for filing an application, under that section, and only states that the application under Section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application there under should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the Court cannot subsequently turn found and sya that the parties should be referred to arbitration

agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the Court, depends upon the conduct of such party in the suit. When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction or appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under Section 8 of the Act, cannot lead to an inference that a defendant subjected himself to the jurisdiction of the Court for adjudication of the main dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of Court. When such talks failed, the appellant filed an application under Section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not, therefore, justified in rejecting the application on the ground of delay. **(Booz-Allen and Hamilton Inc. Vs. S.B.I. Home Finance Ltd. and others 2011 (4) AWC3656 (SC)**

Whether an arbitrator has jurisdiction to grant interest despite the agreement prohibited the same – Held "No"

The Court held that where the parties had agreed that no interest shall be payable, arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendent elite. In such a case, it must be presumed that interest was an implied term of the agreement between the parties. However, this does

not mean that in every case, the arbitrator should necessarily award interest pendent elite. In absence of any specific stipulation of prohibition in contract to claim or grant any such interest, arbitrator is free to award interest. In view of the specific prohibition of contract contained in Clause 1.15, arbitrator ceased to have the power to grant interest. The bar under clause 1.15 being absolute interest could not be awarded without rewriting the contract. Impugned award of arbitrator granting interest in respect of the amount payable to the contractor under the contract was set aside as well as order of Single Judge and Division Bench of High Court confirming the same. **(Union of India v. M/s Krafters Engineering and Leaving (P) Ltd., 2011 (5) Supreme 143)**

Civil Procedure Code

Section 2(2)-Decree-Ingredients-Dismissal u/o XXII Rule 9(2)-Whether amounts to decree?

The Supreme Court referred to a full Bench decision of the Lahore High Court in **Niranjan Nath v. Afzal Hussain - AIR 1916 Lahore 245** and quoted with approval the following observation made by a Full Bench of MP High Court in **Mitthulal vs. Badri Prasad- AIR 1981 Madh. Pradesh 1-**

> "There seems to be a general consensus of judicial opinion that all orders of abatement are not decrees. Only those orders of abatement are decrees in which the Court comes to the conclusion that the right to sue does not survive on the death of the sole plaintiff or on the death of one of the plaintiffs to the surviving plaintiffs. The orders of abatement which follow consequent on the failure of the legal representative of plaintiff to be brought on record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, such orders do not amount to decree. The reason being that the abatement is automatic consequent on the failure of the legal representative to be brought on record within the period of limitation and no formal order is necessary. So there is no adjudication on the

rights of the parties in the suit or appeal by such an order. An order under Order 22, Rule 5 cannot obviously be said to fall within the definition of decree for the following reasons (i) the order is made only for the purpose of determining who should continue the suit as brought by the original plaintiff. It is not intended to determine and it does not, in fact, determine the rights of the parties with regard to any of the matters in controversy in suit. The question that arises for decision and actually decided is not one arising in the suit itself but is one that arises in a collateral proceeding and has to be got decided before the suit can go on; and (ii) In order to operate as a decree, the adjudication must be one between the parties to the original suit or their legal representatives, and with regard to only matters in controversy between the original parties and, therefore, cannot include a decision of the question as to whether certain individual is or is not entitled to represent one of such parties. In cases where the Court comes to the conclusion that the right to sue does not survive consequent on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, there is final adjudication of the rights of the parties and the order amounts to decree."

Thereafter, the Supreme Court summarised the law on this point after a combined reading of the several provisions of Order 22 of the Code as follows:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependent upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9(2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

Held-

Where an application under Order 22 Rule 3 by a non-party is filed requesting the court to make him a party as the legal representative of the

deceased plaintiff, unless the same is allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the rights of parties to the suit with regard to all or any of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree. But where a finding that right to sue does not survive on the death of sole plaintiff has been recorded, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. **(Mangluram Dewangan vs. Sundra Singh, 2011 (2) ARC 750(SC)**

Section 96 - First Appeal, exercise of jurisdiction in deciding - Held, High Court ought to have carefully examined the facts and given cogent reasons for setting aside the trial court judgment.(2005) 12 SCC 146, (2005) 10 SCC 243 and (2005) 12 SCC 186 ref.

The High Court, in the instant appeal, while deciding the First Appeal under Section 96 of the Code of Civil Procedure has allowed the appeal and set aside the judgment and decree of the Court without properly examining the facts and law.

This Court has observed in a number of cases that the first appeal is a valuable right of the appellant and therein all questions of fact and law decided by trail court are open for reconsideration. In a case where the High Court found the trial court judgment is unsatisfactory and wanted to set aside the judgment, the High Court ought to have carefully examined the facts and the law and given cogent reasons for setting aside the trial court judgment.

Learned counsel for the appellant also placed reliance on yet another judgement of this Court Rama Pulp & Papers Ltd. V. Maruti N. Dhitre, (2005) 12 SCC p. 186. In this judgment, this Court observed that in first appeal the High Court has to properly consider the evidence on record

or for that matter even the arguments and the grounds raised in support of their case. It is constrained to observe that in the impugned judgement the High Court has not followed the settled legal position crystallized by a number of judgments of this Court. Consequently, set aside the impugned and remit the matter to the Division Bench of the High Court for fresh consideration in accordance with law and request the High Court to dispose of the appeal as expeditiously as possible.

We direct the parties to maintain status quo, as of today, till the disposal of the appeal by the High Court.

With these observations, the appeal is disposed of, leaving the parties to bear their own costs. **(B.M. Narayana Gowda v. Shanthamma (D) by LRs. And another; (2011 (29) LCD 1393 (SC)**

S.100 – Second appeal – Jurisdiction of High Court to decide second appeal

The very jurisdiction of High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of Code provides that second appeal shall be heard on the question so formulated. It is, however, open to High Court to reframe substantial question of law afresh or hold that no substantial question of law is involved at the time hearing second appeal but reversal of judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of the law and a decision on such question. **(Umerkhan v. Bismillabi @ Babulal Shaikh & ors., 2011 (5) Supreme 543)**

S. 100 – Whether formulation of substantial question of law is condition precedent for entertaining and deciding a second appeal – Held, "Yes"

High Court, while deciding the second appeal, failed to adhere to necessary requirement of Section 100 CPC and interfered with concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before second appeal is heard and finally disposed of by High Court. Judgment of High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating the substantial question of law. Unfortunately, High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiated its decision. If despite three opportunities, no evidence was let in by plaintiff, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. There was No justification at all for High Court in upsetting the concurrent judgment of the courts below. High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed. Impugned judgment and order of High Court was set aside. **(M/s. Shiv Contex v. Tirgun Auto Plast P. Ltd. and ors., 2011(6) Supreme 157)**

Section 115 - Revision under - Against an order issuing a notice to the defendant- On application for grant of temporary injunction filed under Order XXXIX, Rules 1 and 2, C.P.C.- Maintainability of - Held revision would not be maintainable- Reasons explained.

From the discussion above, for an order to be revisable under section 115, C.P.C., as is applicable in the State of U.P., firstly it must be an order which must decide a part of the case or the proceedings. The expression "order" as it is defined in the C.P.C., requires determination which must bring finality by determining the rights of the parties in respect of the controversy in the application. Order XXXIX, Rule 3 is a duty conferred on the Court before granting an injunction to issue notice to the party. It is a procedural provision, a step in the case. The Court, in the event, arrives at a conclusion that the grant of ex parte injunction would be defeated by delay, can in the case of urgency proceed to grant an injunction

under Order XXXIX Rule 1 or Order XXXIX, Rule 2. If the injunction is granted or rejected, as observed earlier, it would be appealable under Order XLIII. The procedure followed under Order XXXIX, Rule 3 is determination by the Court of the urgency of the matter vis-a-vis the relief claimed by the plaintiff. On a failure to grant the injunction, no part of the case or the proceeding is disposed of, but the proceedings merely stand adjourned to the next date. In other words a step in the case or proceedings. In these circumstances in our opinion, it cannot be said that, by merely issuing notice on arriving at a finding that there is no urgency, the same amounts to an "order" within the meaning of section 2(14), C.P.C. In that context, the question of applying Rule 3(ii) or section 115 would not come into play. That can only be applicable if the other precondition of 'an order deciding the case' are satisfied. Therefore, merely issuing a notice on arriving at a conclusion that there is no urgency would not be an order which is revisable. It is not, as if a party is without a remedy if such a view is taken. The ex traordinary jurisdiction of this Court under Article 227 of the Constitution of India would always be available in such a case. (**Ram Dhani and others v. Raja Ram and others, 2011 (113) RD 657)**

Order 1, Rule 9 – Necessary party - Impleadment of a necessary party is mandatory

No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order 1, Rule 9, of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff/petitioner may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In Service Jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the plaintiff/ petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without

removing the person who filled the post manned by plaintiff/petitioner. (**J.S. Yadav v. State of U.P. and Anr., 2011(4)SLR 465(SC)**

Order I, Rule 10- Necessary and proper Party-Impleadment

Held-

It is a settled principle that non-joinder of 'necessary party' may lead to dismissal of the suits, writ proceedings or any other proceedings. However, if nonjoinder is in the case of a 'proper party', it would not be fatal to the case. It can safely be inferred from the scheme of Order 1 Rule 10(2) of the Code of Civil Procedure and also the aforesaid decisions of the apex court that there is no bar on this Court to issue direction for impleading proper parties, or to require the better description of the parties in the suit or other proceedings, including writ proceedings. Applying the principle of Order I Rule 10(2) of the Code of Civil Procedure this Court can issue directions for adding the 'necessary' as well as 'proper party'. (**Chetram vs. Union of India, 2011(3) ARC 98 (All.H.C. Lucknow Bench-DB)**

Order VI, Rule 17. First part of Order VI, Rule 17, C.P.C. is discretionary-While the second part is imperative and enjoins the Court to allow all the amendments- Which are necessary for purposes of determining the real question in controversy between the parties-Amendment will not change the basic nature

A party cannot be refused a just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court generally gives leave to amend the pleadings to a party unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent. In the present case the amendments which have sought to be incorporated will not change the basic nature of the written statement. (sic-plaint.)

After engaging an advocate the party may remain supremely confident that the lawyer will look after his interest. It will not be proper that the party should suffer for the inaction, deliberate omission or misdemeanour of his Counsel. It is well settled that litigant should not suffer for the lapses on the part of his Counsel. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial

and real justice. (**Rajendra Shanker Tripathi v. Ajay Kumar Gupta, 2011 (113) RD 651)**

Amendment in Plaint - Order VI, Rule 17- Order I, Rule 10- Necessary and proper Party-Impleadment

The High Court referred the judgment of the Hon'ble Apex Court in the case of **Kasturi vs. Iyyamperumal (2005) 6 SCC 733** where the court considered the issue of joining necessary party and formulated two tests namely for determination and they are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. The Supreme Court pointed out that in considering application under section 1 Rule 10 CPC, only question involved in the suit has to be considered is whether the amendment is necessary or the proposed person is a proper or necessary party or not and not the controversies that would arise between the parties as a result of issues raised by them. The Apex Court observed:

> "A plain reading of the expression used in sub-rule (2) order 1 Rule 10 CPC "all the questions involved in the suit," it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff-appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title."

The High Court held –

The suit considered by the Apex Court was in respect of specific performance of contract and therefore admittedly in such matters only party against whom specific performance was sought, was the proper party and therefore factual observations in the judgement are in context of the

nature of the suit involved therein. The general legal proposition as noticed above clearly shows if, the decree cannot be passed effectively in absence of person, he is necessary and proper party in the case. In a suit for declaration in respect of property if a person has no interest or right over the said property, he is neither a necessary nor proper party but if he claims to be the owner of the property or otherwise in possession thereto in his own rights, in his absence effective declaration may not be given and therefore he would be necessary and proper party.

Also held-

So far as amendment of the plaint is concerned, it has to be observed that amendment which is likely to change nature of the suit or otherwise may be barred by limitation etc., can only be rejected and not otherwise. For considering amendment in the plaint, the courts have to take lenient view and unless there is any legal or otherwise obstruction amendment generally has to be allowed. (**Amar Nath Shroff vs. Smt. Savitri Singh, 2011(3) ARC 63 (All.H.C- Single Judge)**

Order VI, Rule 17- Amendment- Consideration

The High Court found that the reasons given by the court below are superficial and has applied casual and superficial approach and the amendment sought by the petitioner does not cause any prejudice or loss to the respondents. It was held that while considering the amendment in the pleadings, a lenient and liberal view ought to have been taken by the court in order to advance justice to the parties. The trial court while allowing the amendment application was satisfied that amendment was necessary and the so-called admission of the petitioners in paragraph 1 of the written statement cannot be read in isolation and the entire contents of the written statement has to be taken into consideration while considering the amendment sought by the petitioner. The revisional court has taken a very technical view of the matter and did not examine the matter in proper perspective. In holding so the High Court made reference to the following observation made by the Supreme Court in the case of **Steel Authority of India Limited vs. State of West Bengal, AIR 2009 120.**

> "It is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that

> some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case."

(Bhagwan Swaroop Tripathi vs. Gaushala Committee Shikohabad, 2011 (3) ARC 279 (All. H.C.- Single Judge)

Order IX, Rule 13- Setting aside exparte decree- Sufficient cause- Explained- Approach

The expression 'sufficient cause' used in the aforesaid Rule has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. In fact it is court's discretion which to my mind is quite wide either to treat a 'reason' for non appearance as 'sufficient cause' or not. In **Collector, Land Acquisition**, **Anantnag vs. Mst. Katiji, A.I.R. 1987 SC 1353** the Apex Court while dealing with the expression 'sufficient cause' has observed as under:-

> "The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice that being the life- purpose for the existence of the institution of Courts. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable or removing injustice and is expected to do so."

Further in the case of **State of Bihar vs. Kameshwar Singh, JT 2000 (5) 389** the Apex Court while dealing with the word 'sufficient cause' although in the delay condonation matter has observed as under:

> ....." The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause."

Further in the case of **Ramji Dass vs. Mohan Singh 1978 ARC 496** the Apex Court has held that "we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing."

After analysing the above case laws, the High Court went into the factual matrix of the instant case and found that the (Civil Judge) Junior Division, Kanpur Nagar has rejected the petitioner/defendant application for setting aside the ex parte decree on the ground that the ingredients as provided under Order 9 Rule 13 of the C.P.C. for setting aside an ex parte decree were not satisfied, as the summon was duly served on the defendant and knowing it well the defendant did not appear before the court. The Appellate Court has also arrived at the same conclusion as of the court of civil judge junior division and found that the grounds taken by the petitioner/defendant in the application for setting aside the ex parte decree were not disclosing sufficient cause to set aside the ex parte decree and the other grounds on which appeal was preferred before the Appellate Court, the learned District Judge observed that those grounds may be relevant for the purpose of setting aside the ex parte decree in appeal but the petitioner/defendant instead of filing the appeal has filed an application for setting aside an exparte decree under Order 9 Rule 13 C.P.C. and there the ex parte decree can only be set aside on the ground mentioned therein i.e., summons was not duly served or for sufficient cause the defendant could not appear on the date fixed for hearing. The only ground taken by the petitioner/defendant in the application for setting aside the ex parte decree was that petitioner company has already informed the court after receipt of

summons through letter dated 01.01.1998 that transfer of the shares has already been made in March 1996 prior to the date of filing of the suit, therefore, the petitioner/defendant was under impression that after the receipt of aforesaid letter the court will drop the proceeding of the suit that is why nobody could appear on behalf of company.

The High Court agreed with the view taken by the Courts below 'to the extent that this was not the sufficient ground for setting aside the ex parte decree for the reasons that the petitioner/defendant is not an ordinary illiterate citizen and it is a company incorporated under Companies Act 1956 having high repute in the country, well equipped with the battery of legal experts' and 'the duty of the officer of the company who was entrusted to look into the court's proceeding was to obtain legal advice in this regard from the legal experts with regard to the further steps to be taken after receipt of the summons issued by the court's below in the aforesaid suit, but instead of doing so a simple letter was sent to the court which is not a recognized method under the Code of Civil Procedure to drop the proceeding of a suit or to dismiss the suit', but pointing out the object of establishment of Civil Courts being substantial justice to the parties and referring to the judgments in **Collector, Land Acquisition**, **Anantnag vs. Ms. Katiji, State of Bihar vs. Kameshwar Singh and Ramji Dass, Mohan Singh (supra)**, the High Court held that the court below taking note of that very object should have set aside the ex parte decree and the inconvenience caused to the other side could have been compensated by imposing some costs. The High Court observed-

> "The Code of Civil Procedure is self contained Code having complete mechanism/procedure for deciding a suit and once the suit was entertained and summons were issued such kind of application was not entertainable unless it is filed in consonance with the procedure provided under the Code of Civil Procedure. Such kind of ground if it would have been taken by a rustic villager who happens to be ignorant of the court's proceeding, the matter would have been different and it could have fallen under the category of 'sufficient cause' for setting aside an ex parte decree, but the petitioner/defendant stands on high padestar and that

kind of discretion has rightly not been exercised in favour of the petitioner in that very circumstance, but the court's below should not have limit their discretion only on the ground taken in the application for setting aside its ex parte decree but it must have gone a step further and would have decided the application looking into the object of establishment of court which are respected and known for imparting substantial justice to the parties, on the approach of a party for setting aside an ex parte decree, instead, closing the door of justice particularly in the circumstance when the defendant was not going to gain anything by not filing the written statement and contesting suit proceeding. Further there was no allegation of malafides against defendant/petitioner for not filing the written statement. It was also necessary to look into the matter with an angle that it was not a case of default on particular date of hearing but it was a case where the defendant not at all participated in the proceeding of the suit. There happens to be difference in between the absence on a particular date and not at all participating in the suit proceeding, therefore it could have been interpreted taking note of justice oriented process of court. The reason taken by the petitioner in its recall application should have been looked into taking note of the very purpose of establishment of the court".

(Hindalco Industries Limited vs. Sri Brijesh Kumar Agarwal, 2011(3) ARC 261 (All.H.C.- Single Judge)

Order IX Rule 13- Setting aside ex-parte order

Where no evidence to show that summon has been served, liberal view should be taken and the ex-parte order should be set aside. **Mahendra Rathore vs. Omkar Singh and other, AIR 2002 SC 505** referred. (**Rajesh Gupta vs. Hazi Jamilluddin Khan, 2011(2) ARC 569 (All. H.C.-Single Judge)**

Order XIV Rule 1 Framing of Issues- Prevention of Delay in Civil Litigation- Steps to be taken by Civil Court- Section 35- imposition of Cost- Consideration

Held-

Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the Judge while framing of issues.

The Supreme Court laid down the principles for granting or refusing interim injunction and said that the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable exparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suitis eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits. If an exparte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

The Supreme Court took note of the delaying tactics adopted by the party obtaining exparte injunction and remarked that it is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. This common impression should be dispelled that a party by obtaining an injunction based on even false

averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In **Swaran Singh v. State of Punjab (2000) 5 SCC 668** this court was constrained to observe that perjury has become a way of life in our courts.

The Supreme Court considered the issue of prevailing delay in civil litigation and pointed out that the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law justice.

I. If in a given case, ex part injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides a expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

The Supreme Court thereafter concluded that these aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the aforesaid steps, but once it is observed across the country, then prevailing system of adjudication of civil courts is bound to improve.

Also held-

While imposing costs we have to take into consideration pragmatic realities and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years. (**Ramrameshwari Devi vs. Nirmala Devi, 2011(2) ARC 759 (SC)**

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

Code of Civil Procedure, 1908- Order XV, Rule 5-U.P. Urbad Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- Section 4-Striking off defence-S.C. suit for eviction and recovery of arrears of eviction and recovery of arrears of rent- Section 4 prohibits payment of premium of advance rent- if tenant petitioner had made advance contrary to provisions of Act- He is not entitled to any relief- Even if advance of Rs. 40,000 considered- Arrears of rent was still Rs. 58,000 –Thus, even if hypothetical amount deducted- Still petitioner would be in arrears on rend-Petitioner had not paid monthly rent-Even after claiming aforesaid amount of rent by landlord- He has not complied with Order XV, Rule 5 - No illegality or infirmity in order striking off defence of petitioner. **(Jagdish Dwivedi Vs. Munshi Ram Bhardwaj 2011 (4) AWC 3820)**

Order XVII, Rule 1- Adjournment- Restriction of three adjournments should be maintained- Relaxation in unavoidable situation-Consideration

Held-

No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice

delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit– whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed. **(M/s. Shiv Cotex vs. Tirgun Auto Plast P. Ltd, 2011(3) ARC 182 (SC)**

Order XXIII, Rule 3-Compromise - Order III, Rule 4 - Power of Counsel

Referring to the Judgements in **Pushpa Devi Bhagat (dead) through LR. Sadhna Rai (Smt.) vs. Rajinder Singh, (2006) 5 SCC 566, Gurpreet Singh vs. Chatur Bhuj Goel, (1988) 1 SCC 270,** it was held by the High Court that the counsel who was duly authorized by a party to appear by executing Vakalatnama and to continue on record until the proceedings in the suit are duly terminated, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere. It is true that at the relevant time, namely, when the counsel made a statement during the course of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the CPC as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in **Byram Pestonji Gariwala vs. Union Bank of India, (1992) 1 SCC 31**, in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing. **(Bakshi Dev Raj vs. Sudhir Kumar, 2011(3) ARC 123 (SC)**

Order XXVI Rule 9, 10, 12 and 18- Distinction between a commission u/o XXVI Rule 10 and Rule 18- whether commission report u/r 18 is evidence?

Held-

Order 26, Rule 10 Sub-rule (2) States that the report and the evidence taken by the Commissioner shall be evidence in the suit. Order

26, Rule 10(1) authorises the Commissioner to take evidence regarding those matters which he is competent to investigate and reduce the same in writing and file the same along with his report. It is a principle of natural justice that it is only evidence taken in the presence of a party that can be used against him. It is for this reason that Order 26, Rule 18 contemplates an opportunity to be given to the parties to be present before the Commissioner in the property at the time of investigation. Thus, the inevitable conclusion is that the court cannot take an absolute and final view till the evidence is finally concluded and the court applies its mind on the report of the commissioner. To put it differently, the report of the Commissioner is only one of the pieces of evidence amongst other evidence led by the parties.

The report of the Commissioner may be relied on after examining the Commissioner not as report forming the basis of an investigation contemplated by the Commissioner. The view by the lower court therefore that the report can be treated as evidence in the suit under Order 26, Rule 10, Sub-rule (2), C.P.C. is palpably incorrect. (**Ram Ujagar vs. Smt. Kaliasha, 2011 (2) ACR 611 (All. H.C. Lucknow Bench-Single Judge)**

Order XXVI, Rules 9 and 10. Purpose of appointing commission is not to fill a lacuna- nor to find out some evidence in favour of one or the other party at any stage.

The purpose of appointing commission is not to fill in a lacuna or to find out some evidence in favour of one or the other party at any stage. The Court in adjudication of a dispute try to find out the truth and the basic rational of appointment for a Commission for local investigation is to extract the truth. This Commission can be appointed by the Court on its own or it may find it expedient when an application is made by one of the party but the requirement of a Commission is to be seen by the Court itself whether it is required or not. The basic responsibility to adduce evidence lie upon the parties. This is how the purpose and scope of appointment of Commission under Order XXIV, Rules 10 and 10-A has been observed by a Special Bench of this Court in The Sunni Central Board of Waqfs U.P. Lucknow v. Sri Gopal Singh Visharad, 2010 ADJ 1 (SFB)(L.B.), and in the judgment delivered by myself (Hon'ble Sudhir Agarwal, J.) in para 3749 a similar provision contained in Rule 10-A was referred and the Court observed that if the Court is of the opinion that it would be convenient to

have a Commission appointed to enquire into certain questions or making local investigation and file report, such a Commission may be appointed and not otherwise. The Court also observed in para 3750 of the judgment that it vests in the discretion of Court to appoint a Commission when it thinks necessary and expedient. In effect the Court should be of the opinion that such Commission is necessary to help it in extracting truth. If such a Commission is appointed and submit its report, it is an evidence in the suit subject to remedies available to parties concerned. Here is not a case where the Court find it expedient for appointment of such Commission. **(Radhey Shyam and another v. Additional District Judge, Court No.6 Allahabad and others, 2011 (113) RD 678)**

Order XXXII, Rule 2- Next friend- Word used is not confined to the natural guardian only- Next friend can be any person- Not necessarily any of the guardians enumerated in section 4 of Hindu Minority and Guardianship Act, 1956.

Admittedly, the father is not alive, though the mother is alive, but the suit has been filed through the grand father. Under Order XXXII, Rule 2 of the CPC, the word used is 'next friend'. The 'next friend' is not confined to the natural guardian only. The Patna High Court in the case of Narain Singh v. Sapurna Kuer and other, AIR 1968 Pat. 318, in paragraph 4, has observed that a next friend can be any person, not necessarily any of the guardians enumerated in section 4 of the Hindu Minority and Guardianship Act, 1956. Therefore, the suit filed by the minor through grand father cannot be said to be not maintainable. (**Iqbal Ahmad Khan v. Master Mahmood Raza Khan Sherwani, 2011 (113) RD 673)**

O. XXXIII, R.1and O. 44, R.1 – Appeal by indigent person – Determination of

The appellant had filed two suits for recovery of money against the respondent, who is a retired Deputy Conservator of Forest drawing a pension of 10,500/-. These suits were decreed in favour of the appellant. Being aggrieved, the respondent had preferred Regular First Appeals before the High Court of Kerala alongwith petitions to prosecute the said appeals as an indigent person under Order 44, Rule 1 of the Code of Civil Procedure, 1908. The High Court of Kerala, without holding any inquiry as contemplated under Order 33 Rule 1A of the CPC, permitted the

respondent to institute the said appeals as an indigent person, against which a special leave petition was preferred before this Court. This Court remanded the matter to the High Court for passing fresh orders after conducting an inquiry in accordance with Order 33 Rule 1A of the CPC.

Subsequently, the High Court after conducting the inquiry into the mean and financial capacity of the respondent, has permitted the respondent to prosecute Regular First Appeals as an indigent person vide its order dated 11.08.2008. Aggrieved by the same, the appellant is before Supreme Court by these appeals.

Admittedly respondent was a retired Deputy Conservator of Forest, Government of Kerala drawing a pension of 10,500/-. Deposition of respondent that his son was employed abroad and did not regularly send him money. However, respondent never denied that his son sended him money. Again respondent failed to establish that amount of money received from his son was not substantial or insufficient to pay court fee by not producing passbook of his bank account. Non-production of bank account transaction details, amounted to suppression of the fact and in view of this, an adverse inference could be drawn against respondent that he was receiving a substantial or sufficient amount of money from his son. Amount of money received by respondent from his son and by way of pension amounted to a sufficient means to pay court fee which disentitled him to be an indigent person under Order 33 Rule 1 and Order 44 Rule 1 of the CPC. Hence, respondent could not be declared as an indigent person in order to prosecute Regular First Appeal before High Court. Impugned final order of High Court was set aside. Appeals were allowed. **(Mathai M. Paikeday v. C.K. Anthony, 2011 (5) Supreme 341)**

Order 39, Rs. 1 and 2- Interim injunction, grant of- Held, court should not proceed for mini trial of the suit while granting or refusing an application for temporary injunction filed under Order 39 Rule 1 CPC. 2006 (24) LCD 137 ref.

The present appeal under Order 43 Rule 1(r) CPC has been preferred against the impugned order dated 6.12.2010 passed by Civil Judge (Senior Division), Lucknow in regular suit 587 of 2010, Amir Alam Khan v. Lucknow Development Authority and another.

In view of above the court is set aside the impugned order dated 6.12.2010 passed by learned Civil Judge in regular suit No. 587 of 2010 and direct to restore the injunction application to its original number and decide the same afresh after affording opportunity to the parties expeditiously say within a period of six weeks from the date of production of a certified copy of this order without being influenced by the earlier order. **(Amir Alam Khan v. Lucknow Development Authority, Lucknow and another (2011 (29) LCD 1695) (All. HC Lucknow Bench).**

O.41, R.33 – Scope and ambit of

In this case death of deceased aged 46 years was occurred, in a motor accident. At the time of his death deceased was working as a Bank Manager, State Bank of India and his monthly salary was 23,134/-. Tribunal, awarded a compensation of Rs. 24,12,936/- with interest at 9% per annum. On appeal by insurer, High Court, while upholding findings in regard to income and calculation of compensation, held that Tribunal ought to have deducted 30% of annual income towards income tax. High Court deducted 30% and reduced the compensation to Rs. 16,89,055/- with interest at 9% per annum.

Order 41 Rule 33 of the CPC which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. **(Ranjana Prakash & ors. V. Divisional Manager & anr., 2011 (5) Supreme 382)**

Effect of finality of preliminary decree on the final decree in of partition Suit

By virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully

and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if the law governing the parties is amended before the conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the court to take cognizance of the amendment and give affect to the same. If the rights of the parties to the suit change due to other reasons, the court dealing with the final decree proceedings is not only entitled but is duty-bound to take notice of such change and pass appropriate order. Venkata Reddy case, AIR 1963 SC 992 and Gyarshi Bai, AIR1965 SC 1055 only hold that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree. They do not hold that in a partition suit, a preliminary decree cannot be varied in the final decree proceedings. **(Prema Vs. Nanje Gowda and others; (2011) 6 SCC 462)**

Interpretation of Procedural law- purpose and object of procedural laws Expected approach of Courts in providing justice- Order 41 Rule 22 limitation, etc. principles, etc.- Right of a caveator

The Civil Procedure Code is a law relating to procedural law is always intended to facilitate the process of achieving ends of justice. The courts normally favour the interpretation which would achieve the said object. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve their end object of just, fair and expeditious justice to the parties without seriously prejudicing the rights of any of them.

The court has to give precedence to the right of a party to put forward its case. Unnecessary and avoidable technical impediments should not be introduced by virtue of interpretative process. At the same time any irreparable loss should not be caused to a party on whom the right might have vested as a result of default of other party. Furthermore, the courts

have to keep in mind the realities of explosion of litigation because of which the court normally takes time to dispose of the appeals. It would be a travesty of justice, if after passage of substantial time when the appeal is taken up for final hearing a cross-objector who was heard and participated in the hearing at the admission stage itself, claims that the limitation period for him to file his cross-objection will commence only from the date of service of a fresh notice on him or his pleader, in terms of Order 41 Rule 22 CPC. Such an interpretation would jeopardise the very purpose and object of the statute and prejudicially affect the administration of justice. It is trite that justice must not only be done but must also appear to have been done to all the parties to a lis before the court.

The cross-objections are required to be filed within the period of one month from the date of service of such notice or within such further time as the appellate court may see fit to allow depending upon the facts and circumstances of the given case. Since the provisions of Order 41 Rule 22 CPC itself provide for extension of time, the court would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the court to file cross-objections beyond the statutory period of one month.

On interpreting Order 41 Rule 22 CPC, the following principles may be enunciated:

(a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 CPC

(b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 CPC shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal. The hearing contemplated under Order 41 Rule 22 CPC normally is the final hearing of the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it

shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start form that date.

In law, the rights of a caveator are different from that of cross-objectors per se. In terms of Section 148-A of the Code, a caveator has a right to be heard mandatorily for the purposes of passing of an interlocutory order. The law contemplates that a caveator is to be heard by the court before any interim order can be passed against him. But in the present case when the appeal was listed for hearing at the admission stage itself, the appellants had appeared and argued the matter not only in relation to grant of an interim order but also on the merits of the appeal. **(Mahadev Govind Gharge and others Vs. Special land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka (2011) 6 SCC 321)**

Requirement of filing affidavits in accordance with legal mandate

The rules regarding filing of proper affidavits which have been reiterated time and again, are aimed at protecting the Court against frivolous litigation, must not be diluted or ignored, however, in practice they are frequently flouted by the litigants and often ignored by the Registry of the Supreme Court. The instant petition is an illustration of the same. If the Rules for affirming an affidavit according to the Supreme Court Rules were followed, it would have been difficult for the petitioner to file this petition and so much of judicial time would have been saved. This case is not an isolated instance. There are innumerable cases which have been filed with affidavits affirmed in a slipshod manner. It is therefore directed that the Registry must henceforth strictly scrutinise all the affidavits, all petitions and applications and will reject or note as defective all those which are not consistent with the mandate of Order 19 Rule 3 CPC and Order 11 Rules 5 and 13 of the Supreme Court Rules. **(Amar Singh Vs. Union of India (2011) 7 SCC 69)**

Consolidation of Holdings Act

Practice and Procedure- Transaction- Recital of a measurement or amount in digits is followed by a pronouncement in words- Common understanding should lean in favour of the recital in words- Unless proved to the contrary.

In ordinary parlance and transactions of this kind, where ever the recital of a measurement or amount in digits is followed by a pronouncement in words, the normal and common understanding thereof should lean in favour of the recital in words as the clear intention of the executor, unless proved to the contrary. The illustrations are financial transactions like recitals in cheques and draft or description of a date of birth. These are however presumptive and not conclusive subject to any further evidence being led in this regard. **(Braj Bhushan Lal Srivastava v. Dy. Director of Consolidation, Fatehpur and others, 2011 (113) RD 717)**

Entries- Neither fraudulent nor forged- Having failed to raise the dispute in the first round of consolidation- Could not raise this claim on any other ground after the first round of consolidation had become final- Settlement therein had attained finality. (paras 35 & 36)

Once it has been found that the entries are not fraudulent or forged as alleged by the petitioners, then in that view of the matter, the petitioners having failed to raise this dispute in the first round of consolidation could not have raised this claim on any other ground after the first round of consolidation had become final and the settlement therein had attained finality.

A presumption in favour of the settlement becoming final in the first round of consolidation has to be drawn in favour of the respondents. This being the position, the petitioners would be estopped from raising any such plea. Apart from this, on facts, the Deputy Director of Consolidation having reversed the findings of the Courts below on a cogent and logical reasoning, cannot be said to have committed any error and hence, I find no reason to interfere with the impugned order in the exercise of jurisdiction under Article 226 of the Constitution of India. **(Shahid Khan and others v. Deputy Director of Consolidation, Gautam Buddha Nagar and others, 2011 (113) RD 723)**

Review- Power of - Consolidation Authorities cannot review or recall their final orders in exercise of inherent powers- Power of the review can be exercised only when the statute provides. (Para 5)

It is settled principle of law that if the order passed by Settlement Officer of Consolidation, is an ex parte order, the same can be recalled by such authority. However, as to the exercise of the review jurisdiction, said authority has no such power. In this connection, Full Bench of Allahabad High Court in *Smt. Shivraji v. Dy. Director of Consolidation*, 1997 (88) RD 562 has held that the Consolidation Authorities, cannot review or recall their final orders in exercise of inherent powers. It has been further held in the aforesaid case, that the power of the review can be exercised only when the statute provides for such power. **(Sanjog and others v. Deputy Director Consolidation/ Addl., Collector, Haridwar and other, 2011 (113) RD 649)**

Validity of allotment of pasture land- Land falling under the definition of Section 132 UPZA&LR, Act

The question is as to whether this allotment posture law can be legally sustained or not. A precise issue in relation the allotment of land as defined under Section 132 came up for consideration in the case of Ram Kumar Vs. Zila Adhikari/DDC 2002 (93) RD 403and this court categorically held that the provisions of sub-section (2) of Section 19A of the U.P.C.H. Act empowers the Assistant consolidation Officer to bring about such allotments including the land that falls within the definition of Section 132. In the instant case, even through the proceedings are captioned as a proceeding under Section 42A the power to bring about such an adjustment can be located in the provisions as referred to in the judgment of Ram Kumar. Not only this, the settlement Officer in view of the provisions of Section 44A. Opinion that the proceedings dated 16th July, 1987 can be sustained in view of the legal proposition as indicated above.

Needless to mention that the Gaon Sabha or the land Management committee did no raise any objection to the claim of the petitioner for the past 23 years and, therefore, the principles of estoppels and acquiescence will equally apply against the conduct of the Gaon Sabha and the State. Over and above this, it is evident that the petitioner offered his land for

another purpose, namely, the construct of Chak marg. The offer was, therefore, for public interest and not for any individual interest of the petitioner. It is thereafter the exchange was brought abut with the conscious consent of the Consolidation Authorities and Gaon Sabha. This consent will be presumed to have been given not only under the provision referred to hereinabove but also in view of the responsibility and obligation cast on the Consolidation Authorities under Section 11C of the Consolidation of Land Holding Act. In my opinion, the Consolidation Authorities while protecting the interest of Gaon Sabha land has rightly implemented the exchange as offered by the petitioner in response to the request made by the Gaon Sabha itself. In view of these peculiar facts and circumstances of the case as noted hereinabove, the proceedings at this stage cannot be allowed to be upturned at the instance of the respondent authorities which would be wholly unjustified.

The land once allotted to the petitioner ceases to be public utility land, as he has surrendered his original holding for a public utility, namely, the construction of a road. This contractual transaction was transparent and there is no evidence to describe it as collusive or fraudulent. Then larger interest of all the villagers was taken as the basis for such exchange and was not an outcome of any deceit of fraud. The petitioner therefore cannot be a victim of the circumstances created by the respondents, that too even after a lapse of more than 23 years of possession by the petitioner. **(Jagannath Vs. State of U.P. and others 2011 (5) AWC 4854)**

Constitution of India

Articles 14 and 16 - Seniority-Ad hoc Service-Whether ad hoc service rendered by him prior to his regularisation can be counted for the purpose of Seniority- Held, "No"

Respondent No. 1 who was petitioner before the High Court had not applied for appointment in response to any advertisement issued by the appellant. In his application respondent No. 1 stated that "I have come to know through some reliable sources that there is a post of Research Assistant lying vacant in the Central Council for Research in Homeopathy." Accordingly, respondent No. 1 was offered the post on a purely ad hoc basis vide order dated 03.02. 1984 clearly stating that his

appointment was till 31.3.1984 or till a regularly selected candidate joins, whichever was earlier. Thus, this appointment was made without following any procedure. The tenure was extended by the appellant from time to time.

The post of Research Assistant was advertised in 1986 and respondent No. 1 applied for the post and was called for an interview before a Selection committee on 29.6.1987 but was not found suitable. However, he was continued on ad hoc basis in view of an interim order passed by the High Court in a writ petition.

The post was again advertised in 1995 for regular appointment and respondent No. 1 again applied, and this time he was successful and given regular appointment with effect from 05.01.1996.

It has been held by this Court in Ch. Narayana Rao Vs. Union of India & Ors., 2010 (10) SCC 247: [2010 (6) SLR 79 (SC)], and State of West Bengal & Ors. Vs. Aghore Nath Dey & Ors., 1993 (3) SCC 371: [1993(2) SLR 528 (SC)], that ad hoc service before regularisation cannot be counted for seniority. (**Central Council for Research in Homeopathy v. Bipin Chandra Lakhera and Ors., 2011(4) SLR 477(SC)**

Article 14 & 16 - Candidates, who have obtained B.Ed. degree from State of J & K to which NCTE Act do not form a class to be excluded from selection – Exclusion of such candidates cannot be treated to be valid classification under Articles 14 and 16. (para 12, 13)

We have carefully considered the submissions and agree with the view of learned Single Judge in Kamlesh Kumar's case that the candidates, who have obtain B.Ed. degree from the State of Jammu and Kashmir to which NCTE Act do not form a class to be excluded from selection. The reasoning is not in consonance with constitutional scheme of equality. Jammu and Kashmir is an integral part of Union of India. It has been given special status so far as laws relating to the citizens of Jammu and Kashmir are concerned. The historical reason for which special status was given has been considered in several judgments of the Supreme Court. The citizens of Jammu and Kashmir cannot be excluded from consideration for employment in the other States of the country on the ground that some of the Act such as NCTE Act does not have application in the State of Jammu and Kashmir. Exclusion of such candidates cannot be treated to be valid

classification under Article 14 and 16 of the Constitution of India to support the argument that such class is exclusive class and could be excluded from consideration for Special BTC Training Course.

Special BTC training course is designed to equip those candidates, who have B.Ed. degrees to take teachers training for primary classes for the purposes of employment. It is an employment oriented course. it is not denied that all the successful candidates, who have passed BTC examination are employed in Primary Schools funded by the Central Government under Serv Shiksha Abhiyan. The exclusion of some of the candidates, who have taken degrees from the universities situate in the State to which NCTE Act does not apply would be a hostile and invidious discrimination to them. Such students cannot be put at fault on account of special status given to the State of Jammu and Kashmir. **(Smt. Sadhana Singh v. State of U.P. and others, 2011(4) E.S.C. 2291 (All) (DB)**

Article 14 compassionate appointment – Brother of deceased cannot claim appointment on compassionate ground

In this case**,** Court found that so far as action of respondents denying compassionate appointment to petitioner no. 2, brother of deceased government servant is concerned, the same cannot be faulted because one brother cannot be considered dependent on another brother for purpose of compassionate appointment. (**Rukmani and Pradeep Kumar Kumawat v. The Union of India through its Secretary, Ministry of Home Affairs, New Delhi and others, 2011 (4) SLR 257 (Rajasthan High Court)**

Article 16 and 226- Punjab Civil Services Vol. 1, Part 1 R.326 (d)- compulsory retirement- consideration of

It has come on record that the appellant was promoted as Clerk from the post of Peon on 8.4.2003. In the promotion order one of the Condition incorporated was that he has to pass the type test in Hindi or English at the speed of 25-30 words per minute. He remained unable to pass the test despite various opportunities granted. He was not allowed to draw increments which are in accord with the terms and conditions of his promotion order.

Court has held once the appellant has continuously remained unsuccessful in passing of the type test then his professional utility as a Clerk is considerably reduced and no fault cab be found if he has been

compulsorily retired. After all the basic object of Rule 3.26(d) of the Punjab Civil Services Volume-I, which are applicable to the appellant, is only one i.e. to weed out the inefficient and corrupt who have lost their utility. (**Kulwant Singh v. State Haryana and another, 2011(4)SLR 413 (Punjab & Haryana High Court (D.B.)**

Article 16 - U.P. Non-Technical (class-II) Services (Reservation of Vacancies for Demobilised Officers) Rules, 1973- Reservation and Seniority

Held- Persons who joined the Army after the emergency was over cannot also be given the benefit which was extended to those persons who joined the Army during emergency. Those who joined the Army during the period of emergency virtually joined the war which was being fought by the nation. The benefit extended to such persons cannot be extended to the members of the armed forces who had joined the Army during normal periods. Persons who have joined the Army during the foreign aggression could have opted for other career or softer career or service but the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining the Army where the risk was much more. Such persons formed a class by themselves and the benefit extended to them cannot be extended to the persons who joined the Army during the normal times. The differential treatment given to those who joined the Army during emergency cannot be termed as discriminatory and arbitrary.

Regarding seniority list the court reiterated that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services. (**Rajendra Pratap Singh Yadav vs. State of U.P., 2011 (5) ALJ 183 (SC)**

Article 16 - Compassionate appointment under UP Recruitment of Dependants of Government Servants Dying-in-Harness Rules (1974) Rule 5, 2a-Widowed daughter in-law-whether included in definition of family-held-no

Referring to judgment in **UP Power Corporation vs. Urmila Devi, 2011 (3) ALJ 1 (All. H.C.- FB)** where the Full Bench proceeded to make certain recommendations for the widowed daughter in law being included in the definition of family for the purpose of compassionate appointment and, therefore directed that the State Government may consider this aspect and take appropriate decision so that widowed daughter in law also become entitled to be considered for compassionate appointment, if other criterions are satisfied. The High Court, finding that the recommendation of the Full Bench has not been carried out till date, held that widowed daughter in law is not within the definition of family for being considered for appointment on compassionate ground, in view of the Division Bench of this Court in the case of **Basic Shiksha Adhikari, Hardoi vs. Madhul Mishra, (27) LCD 995 (All. H.C. –DB) (Smt. Sudha Jain vs. State of U.P., 2011(4) ALJ 542 (All. H.C. Single Judge)**

Art. 20(2) – Attractibility of provisions

One Surinder Singh died of gunshot injuries fire by one Suba Singh at the instigation of his father Shingara Singh. Ultimately Shingara Singh was acquitted of all the charges and Suba Singh was convicted under section 304 Part I, IPC.

In the meantime the widow and minor daughter of the deceased filed suit for damages against the accused persons. The suit was allowed awarding compensation of rupees three lakhs along with interest @ 12% per annum from the date of filing of the suit. On appeal the amount was reduced to rupees two lakhs thirty two thousand seven hundred, leaving the rate of interest unchanged. Hence S.L.P. was filed before Supreme Court.

The rule against double jeopardy is contained in sub-article (2) of Article 20 of the Constitution of India which mandates that "no person shall be prosecuted and punished for the same offence more than once". Now, it is elementary that an action for civil damages is not prosecution and a decree of damages is not a punishment. The rule of double jeopardy, therefore, has no application to this case. **(Suba Singh and another v. Davinder Kaur and another, 2011 (6) Supreme 121)**

Art. 21- Right to life means with dignified life which also provide to sex workers, they should given technical skill through which they could earn their livelihood instead of by selling their bodies

In a meeting of Panel on Sex Workers along with representatives of State Government Panel mentioned the State wise figures of sex workers rehabilitated so far. Direction had been given to Central Government and State Government to provide certain funds to Panel so that it could function effectively. However since no funds had been provided, it was hampering the work of Panel. Direction was given to Central government to provide Rupees 10,00,000/-, each state Government a sum of Rupees 5,00,000/- and each union territory Rupees 2,00,000/- to the panel. Chairman of the Panel was directed to furnish to Secretary General of Apex Court accounts of expenditure incurred by Panel from time to time. All the State Legal Services Authorities were directed to provide a helpline number to NGOs and to State machinery as well as to sex workers and victims of sex trade who are in distress and who are compelled to continue with the sex trade, so that they can avail benefit of helpline number for providing legal assistance, to get them rescued or any other assistance which may be offered to them by way of Free Legal Aid. An appeal was made to the youth of the country to contact the members of panel and to offer their services in a manner which the panel may require so that the sex workers could be uplifted from their present degraded condition. **(Budhadev Karmaskar v State of West Bengal, 2011(6) Supreme 6)**

Art. 21 –Free and fair trial is the facet of Article 21

In our criminal justice delivery system the balance tilts in favour of the accused in case of any doubt in regard to the trial. The Courts have to ensure that an accused is afforded a free and fair trial where justice is not only done, but seen to be done and in the process the accused has to be given the benefit of any advantage that may ensure to his/her favour during the trial. As was observed by this Court in Commissioner of Police v. Registrar, Delhi High Court, (1996) 6 SCC 323, Art. 21 of the Constitution enshrines and guarantees the precious right of life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Except in certain matters relating to economic offences or in regard to national security, burden lies heavily on the prosecution to prove its case to the hilt and it is rarely that the accused is called upon to prove his innocence. **(Jahid Shaiklh & ors. V. State of Gujarat & anr., 2011 (5) Supreme 579)**

Art. 32 – Scope – Judgments delivered by Apex Court while exercising its jurisdiction u/A 136 of the Constitution cannot be reopened in writ petition filed u/A 32 of Constitution of India.

The finality of the judgment of the Apex Court has great sanctity and unless there are extremely compelling or exceptional circumstances, the judgments of the Apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed.

This court has consistently taken the view that the judgments delivered by this Court while exercising its jurisdiction under Article 136 of the Constitution cannot be reopened in a writ petition filed under Article 32 of the Constitution. **(Indian Council for Enviro-Legal Action v. Union of India & ors., 2011(5) Supreme 227)**

Art. 226 – Power of High Court U/A 226 of the Constitution to direction investigation by the CBI – Consideration of

A complaint was filed by complainant in the instant case under Sections 409, 420, 471 read with section 34 of IPC against accused persons alleging that they had cheated complainant and her husband. On there being no progress in the investigation on complaint, complainant filed petition under Sec. 482 of Cr.P.C. before High Court, with a prayer to entrust case to CBI for proper investigation. High Court held that as accused No. 1 was an Inspector of Police, investigating agency had not done its duty properly and ordered that complaint be entrusted to CBI for investigation.

Present appeals have been filed against said order of the High Court.

The court held that power of High Court under Article 226 of Constitution to direct investigation by the CBI is to be exercised only spacingly, cautiously and in exceptional situation and an order to CBI is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. In impugned order, High Court had not exercised its constitutional powers under Article 226 of Constitution and directed CBI to investigate into complaint with a view to protect her personal liberty under Article 21 of Constitution or to enforce her fundamental right guaranteed by Part-III of the Constitution. High Court had exercised its power under 482 Cr.P.C. on a grievance made by complainant that her complaint that she was cheated in a loan transaction

of Rs. 3 lakh by the three accused persons was not being investigated properly because one of the accused persons is an Inspector of Police. This was not one of those exceptional situations calling for exercise of extra-ordinary power of High Court to direct investigation into the complaint by the CBI. Impugned order of High Court was held liable to be quashed. **(T.C. Thangaraj v. V. Engammal & ors., 2011 (5) Supreme 407)**

Articles 226, 300 – Compensation – Rape committed on minor by school teacher in school premises-Petition for compensation by victim.

Needless to say "school is a temple of learning". It is the prime duty of the State to appoint persons of high moral character as teachers in the schools. The State is also liable to protect the life of the children studying in schools and ensure their education with dignity. Since the heinous, barbaric and in human act has been committed by the teacher of a Government School, it would be appropriate to hold that this case is governed by the legal maxim "respondent superior" and thus the State is liable for wrong done by its teacher.

Keeping in view of factual background of the case and the future prospects of the deceased-girl as well as her prospective loss of earning to the family, we are of the opinion that a consolidated compensation of Rs. 4,00 lakhs (rupees four lakhs) should be paid to the parents of the deceased-girl, who became victim of such gruesome murder. **(Biranchi Narayan Sahu V. State of Orissa & Ors., 2011 Cri.L.J. 3646 (Orissa High Court)**

Article 236 (a) U.P. Human Rights Commission Act, Ss. 21, 23, 25, 26- Appointment- Whether appointment of appellant as a member of U.P. State Human Rights Commission for a tenure 5 years can be curtailed by Amendment Act, 2006 which has not been suggested its retrospective effect- Held, "No"

Appellant entered the U.P. Judicial services as Munsiff in the year 1972 and was promoted to the post of Additional District Judge in the year 1985 and further promoted to the post of District Judge w.e.f. 14.1.1993. The appellant while working as a Principal Secretary and Legal Remembrancer, Government of U.P., was appointed as a Member of the commission on 29.6.2006 for a period of five years i.e. till 30.6.2011. The Appellant joined on the said post on 1.7.2006. Sections 21, 23, 25, and 26

of The Protection of Human Rights Act, 1993 (hereinafter called 'the Act 1993'), stood amended vide the Protection of Human Rights (Amendment) Act, 2006 (hereinafter referred to 'Amendment Act 2006'). The said amendment came into force on 23.11.2006. After Completion of the tenure by the then Chairperson of the Commission and other Members in October 2007, the appellant remained the lone working Member of the commission. The State of U.P. issued Notification dated 28.5.2008 to the effect that appellant ceases to hold the office as a Member of the Commission. The appellant challenged the said Notification dated 28.5.2008 by filing Writ Petition No. 27315 of 2008, mainly on the grounds that he had been appointed for a tenure of five years and that period could not be curtailed. The amendment Act 2006 could not take away the accrued rights of the appellant as he had been appointed prior to the said amendment.

The question does arise as to whether the State could issue the Notification making a declaration that the appellant ceased to be the member of the Commission and whether the said Notification could take away the accrued rights of the appellant?

The view taken by the High Court in this respect is not in consonance with the statutory provisions. The amendment would apply prospectively, particularly in view of the fact that the Amendment Act 2006 does not expressly or by necessary implication suggest that such a drastic step is permissible giving retrospective effect to the Amendment Act 2006.

An employee appointed for a fixed period under the Statute is entitled to continue till the expiry of the tenure and in such a case there can be no occasion to pass the order of superannuation for the reason that the tenure comes to an end automatically by afflux of time. (Vide: Dr. L.P. Agarwal Vs. Union of India & Ors., AIR 1992 AC 1872; and State of U.P. & Anr. Vs. Dr. S.K. Sinha & ors., AIR 1995 SC 768). (**J.S. Yadav v. State of U.P. and Anr., 2011(4)SLR 465(SC)**

Article 300-A - Disability pension - Military Service - Entitlement of

The Respondent who was enrolled in the Military Service on 29.9.1985 had filed a suit for declaration to the effect that he is entitled to disability pension with effect from 31.3.1990. According to him, during the course of his service, he has sustained 20% disability on account of electric

shock suffered by him while he was on casual leave, on account of this he was declared medically unfit and ultimately discharged on 31.3.1990. According to the present respondent he was entitled to disability pension.

Stand of the present appellants was that he suffered an electric shock while he was on casual leave and working in his house near the tube well. It was pointed out that in any event he had not completed 10 years of service an had been discharged after four years eleven months and two days of service. Therefore, there is no question of granting any disability pension.

The Trial Court held that the respondent was entitled to disability pension. Same view was maintained in appeal by the District Judge, Bhiwani and the High Court.

Placing reliance on the decisions of this Court in Union of India & Others Vs. Keshar Singh, 2007 (12) SCC 675 :) and Union of India & Others Vs. Surinder Singh Rathore, 2008 (5) SCC 747 :, it is submitted by learned Counsel for the appellants that the disability is not attributable to or aggravate by military service. In addition he had not completed the period of requisite service and therefore not entitled to disability pension.

Keeping in view what this court has stated in the case of Keshar Singh and Surinder Singh (supra), the judgment of the High Court is clearly unsustainable and the circumstances. Hence Court set aside the impugned judgment of the High Court. (**Secretary, M/O Defence and Ors. V. Ajit Singh, 2011(4) SLR 278 (SC))**

Article 311-Dismissal of Bank Employee from service on ground of dishonesty and gross negligence would be justified

When a court is considering whether punishment of 'termination form service' imposed upon a bank employee is shockingly excessive or disproportionate to the gravity of the proved misconduct, the loss of confidence in the employee will be an important and relevant factor. When an unknown person comes to the bank and claims to be the account-holder of a long inoperative account, and a bank employee, who does not know such person, instructs his colleague to transfer the account from "dormant" to "operative" category (contrary to instructions regulating dormant accounts) without any kind of verification, and accepts the money withdrawal form from such person, gets a token and collets the amount on

behalf of such person for the purpose of handing it over to such person, he in effect enables such unknown person to withdraw the amount contrary to the banking procedures; and ultimately, if it transpires that the person who claimed to be account holder was an imposter, the bank can not be found fault with if it says that it has lost confidence in the employee concerned. A bank is justified in contending that not only employees who are dishonest, but those who are guilty of gross negligence, are not fit to continue in its service. (**State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya, 2011(4) SLR 458 (SC)**

Article 311 Disciplinary proceedings -Employee who punished by the disciplinary authority after completion and attain finality of proceeding cannot be challenged after several years on the ground that subsequently the criminal court has acquitted him

In this case, the criminal court subsequently acquitted the respondent by giving him the benefit of doubt will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guild or consequential punishment. The standard of proof required in criminal proceeding being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guild in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by no-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him. (**State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya, 2011(4) SLR 458 (SC)**

Curative Petition in Bhopal Gas Leak Disaster Case

No decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code and the 1996 (1996) S SCC 129 judgment never intended to do so. In the 1996 judgment, this Court was at pains to make it absolutely clear that its

findings were based on materials gathered in the investigation and brought before the Court till that stage. At every place in the judgment where the Court records the finding or makes an observation in regard to the appropriate charge against the accused, it qualifies the finding or the observation by saying "on the materials produced by the prosecution for framing charge". "At this stage", is a kind of a constant refrain in that judgment. The 1996 judgment was rendered at the stage of Sections 209/228/240 of the Code and we are completely unable to see how the judgment can be read to say that it removed from the Code Sections 323, 216, 386, 397, 399, 401, etc. or denuded a competent court of the power under those provisions. In our view, on the basis of the material on record, it is wrong to assume that the 1996 judgment is a fetter against the proper exercise of powers by a court of competent jurisdiction under the relevant provisions of the code. **(Central Bureau of Investigation and others Vs. Keshub Mahindra and others (2011) 6 SCC 216)**

Invocation of Writ Jurisdiction of High Court when Alternative Remedy Available

Alternative Remedy vis-a-vis Act 226 of the Constitution-In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well-settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellant by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Court by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits. **(Transport and Dock Workers Union and others Vs. Mumbai Port Trust and another; 2011 (4) AWC 3471 (SC)**

Right to privacy- Guidelines in matters of phone tapping

The service provider has to act on an urgent basis and has to act in public interest. But in a given case, like the present one, where the impugned communication dated 9-11-2005 is full of gross mistakes, the

service provider while immediately acting upon the same, should simultaneously verify the authenticity of the same from the author of the document. The service provider has to act as a responsible agency and cannot act on any communication. Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution. While there is urgent necessity on the part of the service provider to act on a communication, at the same time, Respondent 8 is equally duty-bound to immediately verify the authenticity of such communication if on a reasonable reading of the same, it appears to any person, acting bona fide, that such communication, with innumerable mistakes, falls clearly short of the tenor of a genuine official communication. Therefore, the explanation of the service provider is not acceptable.

People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301; Amar Singh v. Union of India, (2011) 7 SCC 90, referred to

In view of disclosures made in the affidavit of the police authorities as also in the affidavit filed on behalf of Delhi Government, it is strange how the service provider, Respondent 8 could act on the basis of communications dated 22-10- 2005 and 9-11-2005. Any reasonable person or a reasonable body of persons or an institution which is discharging public duty as a service provider, before acting on an order like the one dated 9-11-2005, would at least carefully read its contents. Even from a casual reading of the purported communication dated 9-11-2005, containing so many gross mistakes, one would reasonably be suspicious of the authenticity of its text.

If the service provider could have shown, which it has not done in the present case, that it had tried to ascertain from the author of the communication, its genuineness, but had not received any response or that the authority had accepted the communication as genuine, the service provider's duty would have been over. But the mere stand that there is no provision under the rules to do so is a lame excuse, especially having regard to the public element involved in the working of the service provider and the consequential effect it has on the fundamental right of the

person concerned. In view of the public nature of the function of a service provider, it is inherent in its duty to act carefully and with a sense of responsibility. In discharging the said duty, Respondent 8, the service provider has failed.

It is not being suggested that in the name of verifying the authenticity of any written request for interception, the service provider will sit upon it. The service provider must immediately act upon such written request but when the communication bristles with gross mistakes, as in the present case, it is the duty of the service provider to simultaneously verify its authenticity while at the same time also act upon it. The Central Government must, therefore, frame certain statutory guidelines in this regard to prevent interception of telephone conversation on unauthorised communication, as has been done in this case. **(Amar Singh Vs. Union of India; (2011) 7 SCC 69)**

Consumer Protection Act

Ss. 2 (1) (g) 19 and 21 – Medical Negligence – Applicability of Principle of Res Ipsa Loquitur operates – In a case where negligence is evident, principle of res ipsa loquitur operates

Revision petition has been filed by the petitioner to challenge the order by the State Consumer Commission Bihar, Patna by which the State Commission dismissed the appeal filed by the petitioner challenging the order dated passed by the District Forum in consumer complaint no. 300 of 1998. The District Forum directed the petitioner, who was OP before the District Forum, to pay to the complainant, respondent herein, compensation of a sum of Rs.2lakhs as well as litigation cost of Rs.5,000/- for negligence and deficiency in service on his part in administering treatment to the late husband of the complainant.

Hon'ble Supreme Court in the case of V. Kishan Rao v. Nikhil Super Specialty Hospital and Anr; (2010) 5 SCC 513, has been held that "in a case where negligence is evident, the principle of res ipas loquitur operates and the complainant does not have to prove anything as the thing (s) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence." **(Dr. Kapildeo Singh v. Sagina Khatoon; 2011 (3) CPR 470 (NC)**

S. 2(1) (d) – Maintainability of complaint

It is well settled by now that the complainant/respondent no. 1 is a consumer and his complaint in respect of deficiency qua the transportation of carriage of goods in question is very much maintainable under the Consumer Protection Act. **(Nagpur Golden Transport Co. v. Ghanshyam Poddar and Ors.; 2011 (3) CPR 467 (NC)**

Ss – 2(1) (g), 15, 17 and 21 – possession of flat not handed over despite receiving full consideration – effect of

Since, it is a case, where purchaser of flat in complaints (No. 390/2007) has paid the entire consideration and purchaser of flat in complaint (No. 398/2007) is ready and willing to pay the balance amount, the petitioner/builder cannot deprive them of their legal right to have possession of both flats.

Petitioner/builder, in the present case "wants to have the cake and eat it too" as in one case, admittedly it has received the entire consideration whereas in other case, certain amount is due, which the purchaser is willing to pay. Such type of unscrupulous act on part of petitioner/builder should be dealt with heavy hands who after grabbing the money from the purchasers enjoy and utilize their money but does not hand over the flats, on one pretext or the other. **(R.N.A. Builders (NG) and Anr. v. Shri Sujit Kumar Mishra and Anr.; 2011 (3) CPR 504 (NC)**

Ss. 15, 17 and 21 – Insurance – Mediclaim Policy—Whether detailed and reasoned orders given by fora below can be disturb in revision—Held, "No"

Recently, Supreme Court in Rubi (Chandra) Dutta v. United India Insurance Co. 2011(3) Scale 654, observed that;

"Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21(b) of the Act, under which the said power cab be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view that what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on different (and in commission's opinion, an erroneous) interpretation of the same set

of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21(b) of the Act has been transgressed. It was not a case where such a view could have been taken, by setting aside the concurrent finding of two fora."

Since two Fora below have given detailed and reasoned orders which does not call for any interference nor they suffer from any infirmity or erroneous exercise of jurisdiction. **(New India Assurance Co. Ltd. v. Murari Lal Bhusri; 2011 (3) CPR 500 (NC)**

Ss. 15, 19 and 21 – Insurance – Mediclaim Policy—Repudiation of claim for reimbursement on the grand of exclusion of congenial eternal disease in first year of policy – Neither there is no proof regarding suppression of any material fact on part of complainant nor complainant had any knowledge about existence of such disease – Repudiation claim was unjustified

Revision petition has been filed against order passed by the State Commission, Delhi by which the State Commission has dismissed the appeal of the petitioner Insurance Co. With a modification of reduction in the rate of interest from 10% to 5% earlier allowed by the District Forum and upheld the order of the District Forum accepting the complaint of the respondent subject to this modification. In case there is no averment by the Insurance Co. regarding either prior knowledge about disease in question or suppression of any material facts in this regard by the respondents. He contended that even if a disease is congenital, the complainant had absolutely no idea about the existence there of and hence it cannot be called a preexistence disease as would render the claim of the complainant invalid.

Learned counsel for the respondent/complainant submitted that in the absence of any averment regarding suppression of any material facts on the part of the complainant and the fact that it was a continuous policy subject to similar coverage as in the earlier policy, repudiation of the claim on the strength of clause 4.3, the knowledge of which has been denied by complainant right from the beginning, cannot be sustained in the eye of law and hence the concurrent finding of the fora below in favour of the complainant should be upheld and revision petition dismissed with costs.

(Oriental Insurance Co. Ltd. and Anr. V. Sh. Ram Kumar Garg; 2011 (3) CPR 490 (NC)

Section 21(b)- Revisional Jurisdiction of the National Commission, scope of- Held, the said power can be exercised only if there is some prima facia jurisdictional error appearing in the impugned order

Driving Licence- Genuineness of the Duplicate Licence- Even if the original application was not available, since the duplicate licence was issued by the same licence Authority- Held, it cannot be challenged that the original licence was fake, forged, manufactured or engineered document

Appellant is the owner of bus bearing Registration No. WB-57/6715. Appellant had taken an Insurance Policy Cover from Respondent Insurance Company with respect to the bus, for the period between 13.1.2004 and had paid the insurance premium for the same, acknowledging, the Respondent had issued the receipt in her favour. On the intervening night of 4/5.07.2003 on National Highway No. 34 while the said Bus was proceeding to Hill form Puri, it dashed against a Neem tree and turned turtle. The bus was massively damaged on impact and then slid into a roadside ditch. Thus, not only the body of bus its internal systems also suffered extensive damage. The passengers travelling therein were also injured.

F.I.R. was lodged with the local Police Station and after investigation, the police commenced a case bearing No. 226/2003 under various sections of Indian Penal Code. In the meanwhile, the Appellant had promptly informed the Respondent Insurance Company about the said accident and the consequent damage caused to the bus. Accordingly, she then requested for assessment of loss sustained including cost of repairs. The Respondent duly appointed Mr Sujit Kumar Sarkar as Surveyor, who submitted his preliminary report on 21.07. 2003 assessing the total loss at Rs. 2,90,000/- Following the receipt of this report, the Respondent then appointed Mr. Surya Dutt to prepare a detailed Final Report dated 31.12.2003 and as per his investigation, the total amount of damages was computed to be Rs. 2,72,517.90/-.

It is correct that Act does not contain any provision for grant of interest, but on account of catena of cases of this Court that interest can

still be awarded, taking recourse to Section 34 of the Code of Civil Procedure, to do complete justice between the parties. We accordingly do so. This principle is based upon justice, equity and good conscience, which would certainly authorize us to grant interest, otherwise, the very purpose of awarding compensation to the Appellant would be defeated. The court accordingly deem it fit to award interest at the rate of 9% per annum on the aforesaid amount from the date of filing the complaint till it is actually paid.

The order of National Commission is set aside and quashed, accordingly, hold that Respondent is liable to pay the aforesaid amount of Rs. 2,72,517/- to the Appellant together with interest at the rate of 9% per annum, from the date of filing of the application till it is actually paid. Appeal thus, stands allowed to the aforesaid extent. Respondent to bear the cost of the litigation throughout. **(MRS. Rubi (Chandra) Dutta v. M/S. United India Insurance Co.Ltd.; (2011 (29) LCD 1445) (SC)**

S, 21- Revision – Scope of revision U/S 21(b) of Consumer Protection Act is very limited

It is well settled that scope of revision under Section 21(b) of the Consumer Protection Act, 1986 is very limited and on this point, we refer to the latest judgment of Hon'ble Supreme Court Mrs. Rubi (Chandra) Dutta v. M/s United India In surance Co. Ltd. wherein it has been observed;

"Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21(b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. this is not the manner in which revisional powers should be invokde. In this view of the matter, National commission is of the considered opinion that the jurisdiction conferred on the National Commission under Section 21 (b) of the Act has been transgressed. It was not a case where such a view could have been

taken by setting aside the con current findings of two fora." (**Shri D.K. Chopra v. Shri Susheem Pandey; 2011 (3) CPR 497 (NC)**

Contempt of Courts Act

Apology must be bonafide and complete

The contempt jurisdiction is to uphold the majesty and dignity of the law courts. Any action taken on contempt or punishment enforced is aimed at protection of the freedom of individuals and orderly and equal administration of laws and not for the purpose of providing immunity from criticism to the Judges. The superior courts have a duty to protect the reputation of judicial officers of subordinate courts, taking note of the growing tendency of maligning the reputation of judicial officers by unscrupulous practising advocates who either fail to secure desired order or do not succeed in browbeating for achieving ulterior purpose. Such an issue touches upon the independence of not only the judicial officers but brings up the question of protecting the reputation of the institution as a whole.

The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the institution of judiciary. And advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an advocate plays a vital role in the preservation of the society and justice system. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable.

In the instant case the appellant contemnor abused the Judge in most filthy words which tantamount to interference with the due course of judicial proceedings. The charge which stood proved against the appellant cannot be taken lightly and in such a fact situation the apology tendered by him, being not bona fide, is not acceptable. Besides, he had tendered the same belatedly only on receiving show-cause notice from the High Court. There has been no repentance or remorse on the part of the appellant at an initiate stge. Had it been so, instead of making grossest and scandalous allegations against the judicial officer, writing complaint against him to the administrative Judge in the High Court, the appellant could have gone to the judicial officer concerned and tendered apology in open court. Hence,

apology tendered by the appellant was neither sincere nor bona fide, and is hence, unacceptable.

The appellant instead of yielding to the court honestly and unconditionally advanced a well-guarded defence by referring to all the fact that led to the incident. Apology tendered by the appellant gives an impression that the same was in the alternative and not a complete surrender before the law. Such attitude has a direct impact on the court's independence, dignity and decorum. In order to protect the administration of public justice, action must be taken as his conduct and utterances cannot be ignored or pardoned. The appellant had no business to overawe the court. Thus, the apology tendered by the appellant had neither been sincere nor bona fide and thus, not worth acceptance. Hence, a copy of the judgment and order be sent to the Chief Judicial Magistrate concerned for taking the appellant into custody and sending him to jail to serve out the sentence imposed by the High Court.

The conduct of the appellant seems to have been in complete violation and in contravention of the "standards of professional conduct and etiquette" laid in Section 1 of Chapter II (Part VI) of the Bar Council if India Rules which, inter Alia, provides that an advocate shall maintain towards the court a respectful attitude and protect the dignity of the judicial office. He shall use his best efforts to restrain and prevent his client from resorting to unfair practices, etc. The advocate would conduct himself with dignity and self-respect in the court, etc. **(Vishram Singh Raghubansi Vs. State of Uttar Pradesh; (2011) 7 SCC 776)**

Contract Act

S. 52 – Applicability of

In this case the terms of the contract makes it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfill her obligation in regard to payment of price as provided in clause 4 and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, section 52 of the Contract Act does not

help the appellant but actually supports the vendors-respondents. (**Mrs. Sardamani Kandappan v. Mrs. S. Rajalakshmi & ors., 2011 (5) Supreme 1)**

S. 55 – Whether time is the essence of the contract depends upon terms of the contract – Held, "Yes" even if time is not the essence of the contract, the contract is take performed in reasonable time

The intention to make time stipulated for payment of balance consideration will be considered to essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract. **(Mrs. Sardamani Kandappan v. Mrs. S Rajalakshmi & ors., 2011 (5) Supreme 1)**

Criminal Procedure Code

S. 53-A - D.N.A. Test in rape cases

Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.P.C. the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences. **(Krishan Kumar Malik Vs. State of Haryana, (2011) 3 SCC (Cri) SC 61)**

S.125 - Maintenance in presumed marriages

Maintenance in case of live-in relationship/Presumed marriage/De facto marriage/ Cohabitation - Long cohabitation without valid marriage, Entitlement of such woman to maintenance – Considering that there was divergence of judicial opinion on interpretation of word "wife" in S. 125, matter referred to large Bench in light of Protection of Women from

Domestic Violence Act, 2005, which gave wide interpretation to terms like "domestic abuse" and "domestic relationship" which included live-in relationship and entitles such women to reliefs under 2005 Act – Opinion expressed that a broad and expansive interpretation should be given to term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonable long period of time, and strict proof of marriage should not be a precondition for maintenance under S.125 CrPC. Hindu Marriage Act, 1955 –S.7-Long cohabitation - Presumption - Respondent 1 brother of appellant's husband, living in same house and by social custom they were treated as husband and wife after death of appellant's husband-Their marriage solemnized with katha and sindur – Hence held, there is strong presumption in favour of marriage-Family and Personal Laws-presumed marriage. **(Chanmuniya v. Virendra Kumar Singh Kushwaha and another, (2011)2 SCC (Cri) SC 666)**

S. 154 - Delay F.I.R. no effect if explained

It is well settled that delay in lodging the FIR cannot be a ground to doubt the claimant's case. Knowing the Indian condition as they are, we cannot expect a common man to first rush to the police station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the police station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. **(Ravi Vs. Badrinarayan and others, (2011) 2 SCC (Cri) SC 751)**

S. 154 – F.I.R. – Delay in lodging FIR if properly explained is not fatal

There is some delay in lodging the FIR but that delay has been well explained. A young girl who has undergone the trauma of rape is likely to be reluctant in describing those events to anybody including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution. **(Om Prakash v. State of Haryana, 2011 (6) Supreme 244)**

Delay in lodging F.I.R. – How to be appreciate testimony of witness – stamped witness –Related witness

Delay in Lodging F.I.R.- Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In cases, there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIRT does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint may prove to be fatal. In such case of delay, it also cannot be presumed that the allegations were an afterthought or had given a coloured version of events.

Thus, from the above it is evident that the Criminal Procedure Code provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not ante-timed of ante-dated. The magistrate must be immediately informed of every serious offence so that he may be in position to act under Section 159 Cr.PC, if so required. Section 159 Cr.PC empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself of through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction.

Unexplained inordinate delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence.

The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "convincing evidence is required to discredit an injured witness." Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide Abdul Sayeed v. State of M.P. (2010)10 SCC 259: (2010) 3 SCC (Cri) 1262; Kailas v. State of Maharashtra (2011) 1 SCC 793: (2011) 1 SCC (Cri) 401; Durbal v. State of U.P. (2011) 2 SCC 676: (2011) 1 SCC (Cri) 877; and State of U.P. v. Naresh (2011) 4 SCC 324: (2011) 2 SCC (Cri) 216).

In a case like at hand, where two persons died on the spot and other received grievous injuries, the eyewitnesses also make an attempt to save themselves and recue the persons under attack. In such a fact situation, the witness in not supposed to be perfectionist to give the exact account of the incident. Some sort of contradiction, improvement, embellishment is bound to occur in his statement.

Evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. [Vide M.C. Ali v. State of Kerala (2010) 4 SCC 573 : (2010) 2 SCC (Cri) 885 : AIR 2010 SC 1639; and Himanshu v. State (NCT of Delhis) (2011) 2 SCC 36: 2011) 1 SCC (Cri) 593] **(Bhajan Singh and others Vs. State of Haryana; (2011) 7 Supreme Court Cases 421)**

S. 156(3) – Powers of Magistrate

Court held - Application under Section 156(3) Cr.P.C. is pre-cognizance stage. Long back, Hon'ble Apex Court has dubbed power of Magistrate under Section 156(3) Cr.P.C. as "reminder to the police to exercise its plenary power of investigation, "Such being the nature of an order passed under Section 156(3) Cr.P.C., an application moved thereunder by no st retch of imagination, can be converted into State Case.

Such being a position, prayer of the revisionist seeking a direction to the Magistrate that he must treat application under Section 156(3) Cr.P.C. as State case, is wholly unmerited and is rejected. **(Bahadur Singh Vs. State of U.P. & Others, 2011 Cri.L.J. 3346 (All.H.C.)**

S. 156(3) Cr.P.C. – Direction by the Magistrate that application U/s. 156(3) be registered as complaint – Judicial discretion exercised by the Magistrate in consonance with the scheme postulated by the Court – No occasion for High Court to substitute the judicial discretion exercised by the Magistrate merely because other view was possible

There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse. There was no occasion for the learned Single Judge of High Court to substitute the judicial discretion exercised by the appellant merely because another view is possible. The appellant was the responsible judicial officer on the spot and after assessing the material placed before her she had exercised the judicial discretion. In such circumstances, the Court is of the opinion that the High Court had no occasion to interfere with the discretion exercised judiciously in terms of the provisions of Code.

Normally, an order under section 200 of the Code for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has developed over the years is that examination of the complainant and his witnesses under section 200 of the Code would be directed by the Magistrate only when a case is found to be serious one and not as a matter of routine course. If on a reading of a complaint the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for

investigation under section 156(3) of the Code will not be conducive to justice, he will be justified in adopting the course suggested in section 200 of the Code. **(Smt. Mona Panwar v. Hon'ble High Court of Judicature at Allahabad; 2011(74) ACC 216 (SC)**

Section 156(3) - Investigation-Direction for CBI Investigation by High Court vis-à-vis- Separation of Power

The High Court referred the Judgment of Supreme Court in the case of **State of West Bengal vs. Committee for Protection of Democratic Rights, West Bengal (2010) 3 SCC 571** and quoted the following observation:-

> "In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

There after the High Court opined that the Court normally does not interfere in the matter of police investigation but the Courts also have a duty to take action in the matters where on the face of it, it is absolutely clear that the investigation conducted is not fair and proper.

Held-

> "We deem it necessary to emphasize that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

(Ravi Kant Gupta vs. Union of India, 2011(5) ALJ 34 (All.H.C.-DB)

Stages of recording statements under ss. 161-164 Cr.PC

The prosecution also adopted a peculiar mode in the case as the first statement of the prosecutrix was recorded under Section 164 Cr.PC on 27.6.1994 before the Judicial Magistrate, First Class, Kurukshetra. Only thereafter on 28.6.2004, her further statement under Section 161 Cr.PC was recorded. In fact, the procedure should have been otherwise. This further shown that right from the beginning the prosecution was doubtful

of the trustworthiness of the prosecutrix herself. Precisely that was the reason that she was fist bound down by her statement under Section 164 Cr.PC. **(Krishan Kumar Malik Vs. State of Haryana; (2011) 7 SCC 130)**

S. 162 (1) – Statement of the witness made to the police and subsequent denial in court – Statement of witness to the police can be taken into consideration in view of proviso of S.162(a) Cr.P.C.

The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of section 162(1), Cr.P.C., but as mentioned in the proviso to section 162(1), Cr.P.C. it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the Trial Court, and in her cross-examination, she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such statement.

The court is of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to section 162(1), Cr.P.C., and her subsequent denial in Court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in the Court she denied that she had made such statement before the police. The court is of the opinion that her statement to the police can be taken into consideration in view of the proviso of section 162(1) Cr.P.C. **(Bhagwan Das v. State (NCT) of Delhi; 2011 (74) ACC 211 (SC)**

S. 164 – Statement recorded there under is a public document recorded by Judicial Magistrate – It does not require any formal proof by summoning the Magistrate to prove his writing or signatures – Formal proof may be done by production of any clerk or stenographer or other official of the Court familiar with handwriting or signature of Magistrate

Keeping in view Nazir Ahmed v. Emperor; AIR 1936 PC 253, Dhananjay v. State of Karanataka; 2001(42) ACC 829 (SC), it is held that "at present, the Courts are struggling with mounting arrears and the Magistrates are over-burdened with judicial work. To expect from the Magistrate that he may leave his judicial work aside and appear in Court to give his evidence simply to prove a statement recorded by him in due discharge of his duties, is too much. Even if the Trial Court considers that the statement of Shakuntala recorded under section 164 Cr.P.C. requires any formal proof, the same may be done by production of any clerk or stenographer or other official of the Court, who may be familiar with the handwriting or signatures of the Magistrate. Summoning of the Magistrate for the aforesaid purpose cannot be appreciated. **(Saleem alias Karia v. State of U.P. & Another; 2011(74) ACC 744 (All HC)**

S.169 - Duty of Magistrate about release of accused

Court held - If an accused is arrested and is sent to the jail by a judicial order (judicial custody remand) but during investigation the Officer-in-charge of the police station concerned/I.O. of the case moves an application with a prayer not to extend the judicial custody, then the Magistrate concerned is having no option except to direct the accused to be released from the jail on furnishing the personal bond with or without surety. Such a power to move the application even after completing the investigation is conferred to the Officer-in-charge of the police station concerned under S. 169, Cr.P.C. When the Officer Incharge/I.O. in exercise of powers conferred under S. 169 moves an application before the Magistrate concerned to release such person on executing a personal bond with or without sureties, the Magistrate concerned has no power to call upon police to submit charge sheet when the officer in charge or I.O. sends a report that no case is made out for sending the accused for trial. When the Magistrate concerned passes an order on such application under S. 169 moves by the Officer in charge of the police station concerned I.O. releasing the accused person on executing a personal bond without or without sureties, such order always comes in purview of S. 169 it cannot be treated as passed under Section 437 Cr.P.C. granting the bail to the accused.

The provision of Section 169 is very clear to show that order is passed releasing a person on executing a personal bond with or without

sureties as such officer may direct to appear if any when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him on trial. **(Dr. Rajesh Talwar Vs. C.B.I., Delhi & Anr., 2011 Cri.L.J. 3691 (All.H.C.)**

S. 169 - Importance of Mobile Phone call details

Court held – In this case a report under Section 169, Cr.P.C. has been filed by that investigating officer of the case, who has conducted further investigation. From perusal of such report it is evident that the investigating officer has given too much importance to the call details of the mobile phone of the complainant. It appears that he has forgotten that it cannot be presumed that only the owner of a mobile phone can use his mobile phone and no other person can use or misuse the same. While considering this point the learned lower Court has given a very logical finding when it says that when the presence of the complainant at the police station after 35 minutes of the incident is not doubted how it can be taken as a gospel truth that at the time of the incident he was at a distance of 35 kms. from the said police station.

Before parting with this judgment I find myself unable to restrain from saying that the role of the further investigating officer of the case does not appear to be impartial. The accused cannot be given the benefit of doubt at this stage. Once a charge sheet has been filed in the case it indicates that the first investigating officer had found sufficient material against the accused persons named in the charge-sheet and if the same finding has been prima facie approved by the learned Magistrate who had taken cognizance of the case, a report under Section 169, Cr.P.C. exonerating the accused, appears to be suspicious. **(Chhotu Gupta alias Luvkesh Kumar Gupta Vs. State of U.P. & Anr., 2011 Cri.L.J. 3711 (All.H.C.)**

S. 173 – Demand for transfer of investigation to CBI – Consideration for

Present writ petition has been filed by petitioner seeking direction that investigations into financial transactions of petitioner's late husband and his associates through various firms, and the mysterious cause of her husband's death in Hotel Marriott, Senapti Bapat Road, Pune be transferred to CBI and further to hand over all complaints made by various

investors against firms owned by her family members to CBI for investigation.

The court observed that Apex Court has transferred the matter to CBI or any other special agency only when Court was satisfied that accused had been very powerful and influential person or State authorities like high police officials were involved and investigation had not proceeded with in proper direction or it had been biased. However, instantly petitioner herself was the accused. A huge amount of Rs. 60 crores had been collected from innocent persons given them false assurances that their amount would have a high premium. It had not been alleged in the petition that any of the investor was very powerful or capable to manage the investigation against the petitioner or that case of suicide of her husband was not property investigated. It was no body's case that police had unnecessarily harassed the petitioner. No allegation of mala fide or bias had been alleged against any investigating authority nor had it been pleaded that charge sheet had been filed against petitioner without investigating the case or having any vindictive attitude towards petitioner. None of the grounds taken by petitioner for transfer was hence held tenable. No cogent reason was found to interfere in the matter. **(Disha v. State of Gujarat & ors., 2011 (95) Supreme 562)**

S. 173 (2) & (8) – Report under sub section (2) of Section 173 after initial investigation as well as further report under sub section (8) – Both are police report under section 173 – Magistrate to apply his judicial mind – Whether to take cognizance or not

Sub section (8) of section 173 further provides that where upon further investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall also forward to the Magistrate a further report regarding such evidence and the provisions of sub-section (2) of section 173, Cr.P.C., shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2). Thus, the report under sub-section (2) of section 173 after the initial investigation as well as the further report under sub-section (8) of section 173 after further investigation constitute "police report" and have to be forwarded to the Magistrate empowered to take cognizance of the offence. It will also be clear from section 190(b) of the Cr.P.C. that it is the Magistrate, who has the power to take cognizance of

any offence upon a "police report" of such facts which constitute an offence. Thus, when a police report is forwarded to the Magistrate either under sub-section (2) or under sub-section (8) of section 173, Cr.P.C., it is for the Magistrate to apply his mind to the police report and take a view whether to take cognizance of an offence or not to take cognizance of offence against an accused person.

It follows that where the police report forwarded to the Magistrate under section 173(2) of the Cr.P.C. states that a person has committed an offence, but after investigation the further report under section 173(8) of the Cr.P.C. states that the person has not committed the offence, it is for the Magistrate to form an opinion whether the facts, set out in the two reports, make out an offence committed by the person. This interpretation has given by the Court in Abhinandan Jha and others v. Dinesh Mishra; AIR 1968 SC 117, to the provisions of section 173 and section 190 of the Criminal Procedure Code, 1898, which were the same as in the Cr.P.C., 1973.

After referring to the law laid down in Abhinandan Jha (supra) the Court has further held in Mrs. Rupan Deol Bajaj and another v. Kanwar Pal Singh Gill and another; AIR 1996 SC 309, that where the police in its report of investigation or further investigation recommends discharge of the accused, but the complainant seeks to satisfy the court that a case for taking cognizance was made out, the court must consider the objections of the complainant and if it overrules such objections, it is just and desirable that the reasons for overruling the objections of the complainant be recorded by the court and this was necessary because the court while exercising power under section 190, Cr.P.C. whether to take cognizance or not to take cognizance exercises judicial discretion. **(Dharmatma Singh v. Harminder Singh & Ors.; 2011(74) ACC 266 (SC)**

S. 174- Importance of Inquest Report

The whole purpose of preparing an inquest report under Section 174 Cr.P.C. is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating, as in what manner, or by what weapon or instrument, such wounds appear to have been inflicted. For the purpose of holding the inquest, it is neither necessary nor obligatory, on the part of the

investigating officer, to investigate into or ascertain, who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.P.C., is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned. **(Brahm Swaroop and another Vs. State of Uttar Pradesh, (2011) 2 SCC (Cri) SC 923)**

Ss. 177, 178 and 179 – Territorial jurisdiction

The Apex Court held -The crucial question is whether any party of the cause of action arose within the jurisdiction of he court concerned. In terms of Section 177 of the Code, it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.

We hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, as the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment and ill-treatment meted out to the complainant, clause © of Section 178 is attracted. Further, from the allegation in the complaint, it appears to us that it is continuing offence of ill-treatment and humiliation meted out to the appellant at the hands of all the accused persons and in such continuing offence, on some occasions all had taken part and on other occasions one of the accused, namely, the husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted. **(Sunita Kumari Kashyap Vs. State of Bihar and another, (2011) 3 SCC (Cri) SC 173)**

S.188 – Sanction – Sanction u/s 188 Cr.P.C. is not condition precedent for taking cognizance of offence, if need be, it could be obtained before trial begins

Petitioner in the instant case married Respondent No. 2 as per Hindu rites in Andhra Pradesh. Petitioner left India for Botswana and later on

Respondent 2 went to Botswana to join Petitioner. Case of Respondent 2 that While in Botswana, she was alleged to have been severely ill-treated by Petitioner and various demands were also made including a demand for additional dowry of 5 lakhs. Respondent 2 addressed a complaint to Superintendent of Police, Andhra Pradesh, from Botswana and the same was registered as Case under Sections 498-A and 506 I.P.C. together with Sections 3 and 4 of the Dowry Prohibition Act. An order was passed by Magistrate taking cognizance of said case. Petition there against for quashment of said proceedings was dismissed by High Court.

Present Special Leave Petition has been filed against said order of High Court. Plea of petitioner that in view of proviso to Section 188 Cr.P.C. in respect of an offence committed outside India, same could not be proceeded with without previous sanction of Central Government.

The Court held that upto the stage of taking cognizance, no previous sanction would be required from the Central Government in terms of the proviso to Section 188 Cr.P.C. However, trial cannot proceed beyond cognizance stage without previous sanction of Central Government. No reason was found to interfere with High Court's decision to reject petitioner's prayer for quashing of proceedings. It was further held that Magistrate may proceed with the trial relating to the offences alleged to have been committed in India. However, in respect of offences alleged to have been committed outside India, Magistrate not to proceed with the trial without sanction of Central Government as envisaged in the proviso to Section 188 Cr.P.C. **(Thota Venkateswarlu v. State of A.P. Tr. Princl. Sec. & anr., 2011 Supreme 97)**

Section 190, 193, 197- Acting or purporting to act in the discharge of official duties- Fake Police Encounter- Whether sanction for prosecution necessary

Referring to judgments in **P.K. Pradhan vs. State of Sikkim, AIR 2001 SC 2547, Prakesh Sing Badal vs. State of Punjab, AIR 2007 SC 1274** and other judgments on the point the High Court observed as follows:-

> "Whether it is duty of a police officer to be a part of a fake police encounter? The answer has to be in negating without any second thought. Fake encounter is a murder

> under the colour of performance of official duty. No government servant can be allowed to commit crime under the garb of performance of official duty. If the version of informant is to be believed, which it has to be at the present stage of trial, then it was the police party who had trespassed into the room and shot dead deceased in a dare devil manner. The dead body thereafter was plunged into a pond and after some time was fished out and was thrown on a roof. This is nothing but a cold blooded murder. Protection of sanction is provided for observance of law and not for committing murders. Crime is a crime. To seek protection from prosecution of a crime under section 197 of the code it has to be prima facie establish that the same was committed while performing such official duty non performance of which would have amounted to dereliction of it."

Regarding need of sanction the High Court remarked that taking cognizance is a judicial act by a court under section 190 and /or 193 of the Code. At that stage accused has no right to be heard and the court has to look to the papers submitted to it by the I.O. or the investigating agency or by the complainant. Accused does not come into picture at all at that time. It is on the material submitted by the prosecution that the concerned court has to apply its judicial mind to determine as to whether there is need for sanction or not?

Held-

If the court finds that there is no requirement of sanction it can take cognizance straight way without deliberating on the said aspect of the matter at all. At that stage it is not essential for it to conduct a pre-cognizance trial to determine requirement of sanction. Otherwise also question of sanction is a mixed question of facts and law both. It is in a given set of facts that the same has to be decided. Since at the stage of taking cognizance, court is not required to scan entire material meticulously in all its pros and cons, therefore there is no need to decide question of applicability of sanction by passing a detailed order. However if the court conversely is of the view that sanction is needed before summoning an accused and he is protected under section 197 of the Code, then the court has to pass a detailed order stating it's reasons for not taking cognizance against such an accused. **(Jai Prakash Tiwari vs. State of U.P., 2011 (4)ALJ 342 (All.H.C. Single Judge)**

Meaning of the expression aggrieved person under Sec. 198 Cr.PC and Chapter XX I.P.C. –Maintainability of complaint by the 2nd wife u/s 494 and 495 I.P.C. meaning of concealment under Sec. 495 I.P.C. – Meaning to be attached to the expression husband under Sec. 498-A & 304- B I.P.C.

The second wife suffers several legal wrongs and/or legal injuries when the second marrieage is treated as a nullity by the husband arbitrarily, without recourse to the Court or where a declaration sought is granted by a competent court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleges, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by the wife living and not by the woman with whom the subsequent marriage takes place during the lifetime of the wife living and which marriage is void by reason of its taking place during the life of such

wife. The complaint can also be filed by the person with whom the second marriage takes place which a void by reason of its taking place during the life of the first wife.

A bare reading of the complaint together with the statutory provisions makes it abundantly clear that the appellant having a wife living, married with Respondent 2 herein by concealing from her the fact of former marriage and therefore her complaint against the appellant for commission of offence punishable under Section 494 and 495 IPC is maintainable and cannot be quashed on this ground. To hold that a woman with whom second marriage is performed is not entitled to maintain a complaint under Section 494 IPC though she suffers legal injuries would be the height of perversity.

The offence mentioned in Section 495 IPC is an aggravated form of bigamy provided in Section 494 IPC. The circumstance of aggravation is the concealment of the fact of the former marriage to the person with whom the second marriage is contracted. Since the offence under Section 495 IPC is in essence bigamy, it follows that all the elements necessary to constitute that offence must be present here also. A married man who by passing himself of as unmarried induces an innocent woman to become, as she thinks his wife, but in reality his mistress, commits one of the grossest forms of frauds known to law and therefore severe punishment provided in Section 495 IPC.

The concealment spoken of in Section 495 would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of the former marriage, would also be entitled to lodge a complaint for commission of offence punishable under Section 495 IPC. Where the second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of Section 198 Cr.PC.

The nomenclature ‘‘dowry’ does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498-A. The

legislature has taken care of children born form invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The First exception to Section 494 has also some relevance. According to it, the offence of bigamy will not apply to 'any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction'. It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any of the purposes enumerated in the relevant provisions- Section 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Section 498-A and 304-B IPC.

Such an interpretation, known and recognised as purposive construction has to come into play in a case of this nature. The absence of a definition of 'husband' to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as 'husband' is no ground to exclude them form the purview of Section 304-B or 498-A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions". **(A. Subash Babu Vs. State of Andhera Pradesh and another; (2011) 7 SCC 616)**

Sanction for prosecution-accused having occupied many offices when Sanction being seeked for having occupied a public office earlier

The appellants were MLAs when charges under the PC Act were framed against them. However the charges pertained to wrongdoing committed during earlier periods of time during which they had also been MLAs or MPs. The charges did not pertain to their current tenure as MLAs during which the charges were framed and trial initiated. On the date when charges were framed no sanction under Section 19, PC Act was

obtained. And objection regarding the absence of sanction was raised before the Special Judge, who in the common order held that the charge-sheet did not contain the allegation that the appellants had abused their current office as MLAs and, therefore, no sanction was necessary. The High court by the impugned order under Section 482 Cr.PC did not interfere with the said prosecution.

Dismissing the appeals, the Supreme Court

Held:

It may be that the appellants in this case held more than one offices during the check period which they are alleged to have abused; however, there will be no requirement of sanction if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction, if he continues to be a public servant but in a different capacity or is holding a different office than the one which is alleged to have been abused, still there will be no question of sanction. In case of the present appellants, there was no question of the appellants' getting any protection by a sanction. The High Court was absolutely right in relying on the decision in Parkash Singh Badal case to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19, PC Act.

Where the public servant had abused the office which he held in the check period but had ceased to hold "that office" of was holding a different office, then a sanction would not be necessary. Where the alleged misconduct is in some different capacity then the one which is held at the time of taking cognizance, there will be no necessity to take the sanction. (**Abhay Singh Chautala Vs. Central Bureau of Investigation; (2011) SCC 141)**

S. 311 – Discretionary power of court to be exercised judicially for reasons stated by the Court and not arbitrarily

There is no manner of doubt that the power under section 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the

evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under section 311 should be exercised for the just decision of the case. The wide discretion conferred on the Court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the section, power to summon any person as a witness can be exercised if the Court forms an opinion that the examination of such a witness is essential for just decision of the case. **(Vijay Kumar v. State of U.P. & Others; 2011(74) ACC 879 (SC)**

S. 311- Examination of complainant as court witness

It is held that at this stage, it will be useful to take a brief look at the facts and circumstances that led the High Court to interfere in the matter. While the trial was going on, the accused purported to enter into some sort of a settlement with the complainant (his wife). In terms of the settlement, he accepted to take her (the complainant) back at his house even though he had taken a second wife in the meanwhile. Hence, when the complainant was examined before the trial court she did not press the charges but expressed her willingness to live with her husband and his second wife. Later on, however, before the conclusion of the trial she filed a petition before the trial court stating that the accused (the husband) had breached the settlement and had thrown her out from his house.

In those circumstances, the trial court recalled her for re-examination as a court witness under Section 311 Cr.P.C. On her examination as a court witness, she fully supported the allegations made by her in the complaint. Eventually, the trial court convicted the petitioner under Sections 494 and 498-A of the Penal Code.

In appeal, the appellate court held that the order passed by the trial court, recalling the complainant for examination as a court witness was bad and invalid and her evidence as a court witness could not be taken into account for recording the finding of guilt against the petitioner. In revision, the High Court set aside the order of the appellate court on his score and

consequently the order of the trial court stood restored. **(Lal Kishore Jha Vs. State of Jharkhand and another, (2011) 2 SCC (Cri) SC 1013)**

Framing of charge-purpose-effect of defect in framing of charge-whether trial vitiated- rights of accused during investigation and trial-meaning of phrase prejudice to accused- Applicability of Sec. 313 Cr.PC

Refering to its earlier decisions in Dinesh Seth Vs. Sate (NCT of Delhi), (2008) 14 SCC 94 : (2009) 2 SCC (Cri) 783; Shivaji Sahabrao Bobade V. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033; Willie (William) Slaney Vs. State of M.P. , AIR 1956 SC 116 : 1956 Cri LJ 291, the Hon'ble Court held-

During the conduct of the trial, framing of a charge is an important function of the court. The purpose of framing of a charge is to put the accused at notice regarding the offence for which he is being tried before the court of competent jurisdiction. For want of requisite information of the offence and details thereof, the accused should not suffer prejudice or there should not be failure of justice. However, the requirements of putting the accused at notice and there being a charge containing the requisite particular, a contemplated under Section 211 Cr.PC, has to be read with reference to Section 251 CrPC. Every omission would not vitiate the trial. In all cases, non-framing of a charge or some defect in drafting of the charge per se would not vitiate the trial itself. It will have be examined in the facts and circumstances of a given case. Of course, the court has to keep in mind that the accused "must be" and not merely "may be" guilty of an offence. The mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

A person charged with heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence.

Vide Willie (William) Slaney Vs. State of M.P. , AIR 1956 SC 116 : 1956 Cri LJ 291; Dalbir Singh Vs. State of U.P. (2004) 5 SCC 334: 2004 SCC (Cri) 1592; Lakhjit Singh Vs. State of Punjab, 1994 Supp (1) SCC 173 : 1994SCC (Cri) 235; Shamnsaheb M. Multtani vs. State of Karnataka, (2001) 2SCC 577: 2001 SCC (Cri) 358.

With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial:

(a) The Accused has the freedom to maintain silence during investigation as well as before the court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the court would be entitled to draw inference including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial;

(c) Presumption of innocence (not guilty);

(d) Prosecution must prove its case beyond reasonable doubt.

These are the basic and crucial tenets or our criminal jurisprudence. Wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in the weakening of the case of the prosecution and benefit the accused in accordance with law. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accuse is able to shoe that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the court.

The courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the fact and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication. **(Rafiq Ahmad Vs. State of Uttar Pradesh; (2011) 8 SCC 300)**

S. 313 - Criminal Procedure Code-Object

The High Court pointed out that the well enunciated principle in law is that underlying object behind section 313 Cr.P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on maxim audi-alteram partem which is one of the constituents of principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in section 313 Cr. P.C therefore make it obligatory on the court to question the accused on the evidence and the circumstances appearing against him so as to apprise him of the exact case which is required to be met by him.

The Court referred the case of **Dharam Pal Singh v State of Punjab (2010 (9) SCC 608** where the Apex Court observed as under:

> "As part of fair trial, section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put the entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial could be vitiated on this score only when on fact it is found that it had occasioned a failure of justice."

Held-

It was obligatory on the part of the trial court to have put specific question relating to the incriminating circumstances that accused was seen running away keeping his trouser on his shoulder from the place where the

dead body of the deceased was found. It was a very significant incriminating circumstance question in respect of which must have been put to the accused under section 313 Cr. PC before drawing any adverse inference against him. Therefore, this incriminating circumstance cannot be read in evidence against the appellant. **(Munna vs. State, 2011(5) ALJ 1(All. H.C.-DB)**

S. 313 - Circumstances not put to accused-Effect

Referring to its earlier judgments in **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; State of Maharashtra v. Sukhdeo Singh & Anr., AIR 1992 SC 2100; and Paramjeet Singh @ Pamma v. State of Uttarakhand, AIR 2011 SC 200**, the Supreme Court held-

> "No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration".

(State of U.P. vs. Mohd. Iqram, 2011 (5) ALJ 177 (SC)

S. 319 – Power to proceed against a person not being an accused can be exercised suo motu or on application by someone – Phrase "any person not being accused" does not exclude and accused released by police under section 169 Cr.P.C.

Considering Joginder Singh v. State of Punjab; (1979) 1 SCC 345, MCD v. Ram Kishan Rohtagi; (1983) 1 SCC 1, Michael Machado &

Another v. CBI; (2000) 3 SCC 262, Shashi Kand Singh v. Tarkeshwar Singh; (2002) 5 SCC 738, Krishnappa v. State of Karnataka; (2005) 12 SCC 327 and Guria alias Tabassum Tauqir v. State of Bihar; (2007) 8 SCC 224, held that "the legal position that can be culled out from the material provisions of section 319 of the Code and the decided cases of the Court is this:

(i) The Court can exercise the power conferred on it under section 319 suo motu or on an application but someone.
(ii) Power applies to all courts including Session Court.
(iii) It does not exclude an accused who has been released by the police under section 169 and is shown in column 2 of the charge sheet.
(iv) Power must be exercised only where there appears during enquiry or trial sufficient evidence indicating his involvement in the offence and not otherwise. Word evidence contemplates evidence of witnesses given in court in the enquiry or trial. Court cannot add persons as accused on the basis of materials available in the charge sheet of case diary but must be based on evidence adduced before it.
(v) Power not to be exercised in a routine manner. It is an extra ordinary power and should be used very sparingly and only if evidence has come which sufficiently establishes that the other person has committed the offence.
(vi) The Court must keep full conspectus of the case including the stage the trial has proceeded and evidence collected.

(Saroj Ben Ashwin Kumar Shah v. State of Gujarat & Another; 2011 (74) ACC 951 (SC)

S. 320 - Compounding the offences by the Court

Court held - We must immediately state that the offence under Section 307 is not compoundable in terms of Section 320(9) of the Code of Criminal Procedure, 1973 and, therefore, compounding of the offence in the present case is out of question. However, the circumstances pointed out by the learned senior counsel do persuade us for a lenient view in regard to the sentence. The incident occurred on May 17, 1991 and it is almost twenty years since then. The appellants are agriculturists by occupation and

have no previous criminal background. There has been reconciliation amongst parties, the relations between the appellants and the victim have become cordial and prior to the appellants' surrender, the parties have been living peacefully in the village. The appellants have already undergone the sentence of more than two and a half years. Having regard to these circumstances, we are satisfied that ends of justice will be met if the substantive sentence awarded to the appellants is reduced to the period already undergone while maintaining the amount of fine. **(Rajendra Harakchand Bhandari & Others Vs. State of Maharashtra & Another, 2011 Cri.L.J. SC 2891)**

Sec. 326 – Applicability to summary trial

Under Sec. 326(1), successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he may recall that witness and examine him, but there is no need of re-trial. In fact Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred or is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 326 is that second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it. However, a bare perusal of sub section (3) of Section 326 makes it more than evident that sub section (1) which authorizes the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub section (3) of Section 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another, his jurisdiction ceases in the former station when the transfer takes effect.

The mandatory language, in which Section 326 (3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-section (1)

and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice. **(Nittinbhai Saevatila Shah & anr. v. Manubhai Manjibhai Panchal & anr., 2011 (6) Supreme 173)**

Transfer of Case under S. 406

The Hon'ble Supreme Court while considering the plea of transferring the case out of Gujarat under Section 406 Cr.PC referred to its earlier judgments in G. X. Francis Vs. Bnke Behari Singh (AIR 1958 SC 309); Meneka Sanjay Gandhi Vs. Rani Jethmalani (1979) 4 SCC 167) and a plethora of other landmark judgments laid down that the apprehension of not getting a fair and impartial inquiry of trial is required to be reasonable and not imaginary, based upon conjectures and surmises. The mere existence of a surcharged atmosphere without there being proof of inability of the court of holding a fair and impartial trial, could not be made a ground for transfer of a case. The alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crimes committed by the accused seeking transfer of the case. It was observed that no universal and hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each cases.

The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offence were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush

and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable. The accused have their remedies elsewhere and the prosecution still has to prove its case. **(Jahid Shaikh and others Vs. State of Gujarat and another; (2011) 7 SCC 762)**

S. 437 – Bail – Grant of – Court can impose conditions which should not be unreasonable

It is well settled that the Court while granting bail to an accused can impose certain conditions enumerated under section 437(3)(a) to (c) of the Code but that conditions cannot be unreasonable, unjust, arbitrary and onerous. If the Court finds that the accused may be enlarged on bail, it cannot impose any such condition beyond section 437(3) or 438(2) of the Code which is too harsh to be complied with by the accused. Such condition will amount to denial of bail. **(Makhan Kant Sharma v. Union of India through The Director of Revenue Intelligence; 2011(74) ACC 107 (All HC, LB)**

Ss. 437 and 439 – Cancellation of Bail

Bail – Cancellation of – Grounds for – Held, there is a difference between yardsticks for cancellation of bail and appeal against order granting bail – Very cogent and overwhelming circumstances are necessary for order directing cancellation of bail already granted – Generally speaking, grounds for cancellation of bail are, interference or attempt to interfere with due course of administration of justice or evasion or attempt to evade due course of justice or abuse of concessions granted to accused in any manner – These are all only a few illustrative grounds – Satisfaction of court on basis of materials placed on record, of the possibility of accused absconding, is another reason justifying cancellation of bail – In other words, bail once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow accused to retain his freedom by enjoying concession of bail during trial. **(Central Bureau of Investigation, Hyderabad v. Subramani Gopala Krishnan and another, (2011)2 SCC (Cri) SC 618)**

Bail-Cancellation of

This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. Their version that Ramnarayan Gupta was shot in a police encounter has been found to be false during the investigation. It is true that we are not deciding the case finally as that will be done by the trial court where the case is pending, but we can certainly examine the material on record in deciding whether there is a prima facie case against the accused which disentitles them to bail.

In our opinion, the High Court was perfectly justified in cancelling the bail granted to the appellant-accused. **(Prakash Kadam and others Vs. Ramprasad Vishwanath Gupta and another, (2011) 2 SCC (Cri) SC 848)**

S. 438(2) – Applicability of – The provision is applicable to an accused or arrestee

Decision of this Court in D.K. Basu v. State of West Bengal, (1997) 1 SCC 416. In this case, the Court, extensively considered the issues of arrest or detention in the backdrop of Articles 21, 22 and 32 of the Constitution and made a number of directions to be followed as preventive measures in all cases of arrest or detention till legal provisions are made in that behalf. The direction at serial number 10 in paragraph 35 is as follows:

> "(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

Strictly speaking the aforesaid direction does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and on going to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him. Taking a cue, therefore, from the direction made in DK Basu and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of this advocate or any other person duly authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation. **(Senior Intelligence Officer v. Jugal Kishore Samra, 2011 (5) Supreme 298)**

Compensation to victim

Fine converted as compensation to victim. Three policemen convicted for voluntarily causing grievous hurt to a person illegally confined in police station. Apart from sentencing them to imprisonment, fine also imposed on them. Strict default stipulations made, to compel payment of fine. Fine of '50,000 imposed on constable cutting off penis of victim with default stipulation of six months' RI; victim while his penis

was being cut off; and ’10,000 fine imposed on SHO with default stimulation of one month’s SI – Fine, held, to be paid to victim as compensation. **(Central Bureau of Investigation Vs. Kishore Singh and others, (2011) 2 SCC (Cri) SC 970)**

S. 468(2) - Limitation for filing the complaint

In the present case the applicant is charge-sheeted under Sections 323, 353, 504 I.P.C. Offences under Sections 353, 504 IPC are punishable upto two years. In view of the provision of Section 468 (2) (c) Cr.P.C. the limitation for filing the complaint shall be three years. The incident in the present manner took place on 20.9.2001. The charge-sheet was filed on 3.10.2002. Thus the charge sheet was filed much before the completion of three years, therefore, in view of settled law the case is not barred by limitation. The submission of learned counsel that the cognizance was taken on 27.11.2007 and therefore, the cognizance was illegal and without jurisdiction, is misconceived. In fact it was the process against the accused which was issued on 27.11.2007. It may be remembered that the Court may have its own reason chosen to issue process after taking cognizance on a date later than the date of filing of a complaint but this does not affect the limitation. **(Ganesh Pal Singh Vs. State of U.P. & Another, 2011 Cri.L.J. 3350 (All.H.C.)**

S. 482 – Inherent powers – Exercise of

Respondent accused persons were prosecuted in the instant case along with others for assaulting appellant with rods and sticks. While the case was pending for trial, Respondent Nos. 1-3 filed petition under Sec. 482 of the Code to quash criminal proceedings against them. Said petition was allowed by High Court. Hence, the present appeal has been filed against said order of High Court.

When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge the scope of exercise of power under sec. 482 and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in detail in Bhajan Lal

(Supra). The powers possessed by the High Court under Section 482 are very wide and at the same time the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercise to stifle a legitimate prosecution. It would not be proper for the High Court to analyze the case of the complainant in the light of all the probabilities in order to determine whether conviction would be sustainable and on such premise arriving at a conclusion that the proceedings are to be quashed. In a proceeding instituted on a complaint, exercise of inherent powers to quash the proceedings is called for only in a case in which complaint does not disclose any offence or is frivolous, vexatious or oppressive. There is no need to analyze each and every aspect meticulously before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. The statement of witnesses made on oath to be verified in full and materials put forth in the charge sheet ought to be taken note of as a whole before arriving any conclusion. It is the material concluded during the investigation and evidence led in court which decides the fate of the accused persons. **(Padal Venkata Rama Reddy @ Ramu v. Kovvuri Satryanayana Reddy & ors., 2011 (5) Supreme 454)**

S. 482 – Quashing of summoning order in part as well as quashing of proceeding of complaint in part – Not illegal

So far as the question of quashing of the summoning order in part as well as quashing of the proceeding of complaint case in part is concerned, if the summoning order as against the petitioner is found to be illegal the same may be quashed as against the petitioner, likewise the proceeding of complaint case as against the petitioner may also be quashed. The learned Counsel for the complainant could not show any legal hurdle in quashing the impugned summoning order and the proceeding of complaint case as against the petitioner. **(Manjit Singh, CEO, Multi Screen Media Pvt. Ltd., New Delhi v. State of U.P. & Another; 2011(74) ACC 44 (All HC, LB)**

Quashing FIR:-

In our opinion, the matter appears to be purely civil in nature. There appears to be no cheating or a dishonest inducement for the deliver of property or breach of trust by the appellant. The present FIR is an abuse of process of law. The purely civil dispute is sought to be given a colour of a criminal offence to wreak vengeance against the appellant. It does not meet the strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been succinctly held by this Court in Devendra V. State of U.P., (2009) 7 SCC 495.

A distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out. **(Joseph Salvaraj A. Vs. State of Gujarat and others, (2011) 3 SCC (Cri) SC 23)**

Inherent powers of High Court under Section 482

Section 482 Cr.P.C. saves the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It has been held by this Court in R.P. Kapur V. State of Punjab, AIR 1960 SC 866 that Section 561-A of the Criminal Procedure Code, 1898 (which corresponds to Section 482 of the Criminal Procedure Code, 1973) saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice and such inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code and, therefore, where the Magistrate has not applied his mind under Section 190 Cr.P.C. to the merits of the reports and passed the order, the High Court ought not to consider a request for quashing the proceedings. **(Dharmatma Singh Vs. Harminder Singh and others, (2011) 2 SCC (Cri) SC 834)**

Criminal Trial

Age-Determination of Prosecutrix

Shri S. Thananjayan, learned counsel appearing for the State has vehemently opposed the appeals contending that there are concurrent findings of fact recorded by the courts below, particularly on the most material issue i.e. regarding the age of the prosecutrix, Shankari to the effect that she was minor,. The school register and birth certificate issued by the Municipality are admissible pieces of evidence under the Evidence Act, 1972 and have rightly been relied upon. In case the finding on the issue of age of the prosecutrix is not disturbed, the question of entertaining any other issue does not arise. The appeals are devoid of any merit and are liable to be dismissed. **(Murugan Alias Settu Vs. State of Tamil Nadu, (2011) 2 SCC (Cri) SC 842)**

Appreciation of evidence

Apex Court held- We must, however, understand that a particularly foul crime imposes a greater caution on the court which must resist the tendency to look beyond the file, and the insinuation that the rich are always the aggressors and the poor always the victims, is too broad and conjectural a supposition. It has been emphasized repeatedly by this Court that a dispassionate assessment of the evidence must be made and that the Court must not be swayed by the horror of the crime or the character of the accused and that the judgment must not be clouded by the facts of the case.

The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. **(Rathinam alias Rathinam Vs. State of Tamil Nadu and another, (2011) 3 SCC (Cri) SC 111)**

Appreciation of Evidence

While considering the case under Section 498-A, 304-B , cruelty has to be proved during the close proximity of time of death and it should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide.

Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. It may also be pertinent to mention herein that the expression "soon before her death" has not been defined in either of he statutes. Therefore, in each case, the Court has to analyze the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. **(Bansi Lal Vs. State of Haryana, (2011) 3 SCC (Cri) SC 188)**

Appreciation of Evidence in murder case

In this case accused alleged to have poured kerosene on body of his wife/deceased and set her on fire. No explanation by accused anywhere as to how presence of kerosene has been found on undergarments and saree of deceased, not defence of accused that death was suicidal or accidental. Fact that witness who carried deceased to hospital turned hostile is immaterial, as circumstances clinches the proof that it is accused alone who committed offence. Deceased was in fit mental condition to make statement, failure to make an attempt to record second dying declaration will not render earlier declaration incredible –Conviction can be based on dying declaration. **(Gopal Vs. State of Karnataka, 2011 Cri.L.J. SC 2894)**

Appellate powers of Hon'ble High Court in criminal cases

The Apex Court held - The High Court should not interfere in an appeal against acquittal save in exceptional cases, and that interference in such an appeal was called for only if the findings of the Trial Court were not borne out by the evidence and were perverse. The High Court however, can reappraise the evidence so as to find out as to whether the view taken by the Trial Court was justified or not and if it finds that the Trial Court's findings were not possible on the evidence, interference must be made failing which there would be a travesty of justice. **(Kilakkatha Parambath Sasi & Ors Vs. State of Kerala, 2011 Cri.L.J. 3132 (SC)**

Adjudication against accused in absence of defence counsel

Practice and Procedure- Adjudication against accused in absence of defence counsel Unsustainability – Impugned order of High Court deciding criminal appeal in absence of defence counsel and upholding conviction, set aside Even assuming that non-appearance was due to fault of defence counsel, a criminal appeal against the accused, held, cannot be decided in absence of his counsel. That would violate Arts. 21 and 22(1) – Therefore, if defence counsel could not show sufficient reason for non-appearance, another counsel practicing on criminal side should be appointed as amicus curiae. **(Mohd. Sukur Ali v. State of Assam, (2011)2 SCC (Cri) SC 481)**

Age of accused – Medical examination for determination of age can be directed only in absence of school certificate

As per the Juvenile Justice Act, it is clear that only in the absence of relevant school certificate, the medical examination can be done for ascertaining the age. **(Smt. Neha Bee v. State of U.P.; 2011(74) ACC 139 (All HC) (DB)**

Bribery Case – Recovery of tented money – By itself cannot prove the charge – Demand of money, payment and acceptance thereof voluntarily by the accused must be established

In C.M. Girish Babu v. C.B.I., Cochin, High Court of Kerala; 2009(3) SCC 779, the Court while dealing with the case under the Prevention of Corruption Act, 1988, by referring to its previous decision in the case of Suraj Mal v. State (Delhi Admn.); 1979 (4) SCC 725, held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained. (**State of Kerala & Another v. C.P. Rao; 2011(74) ACC 551 (SC)**

Child witness – Evidence of the child must reveal that he was able to discern between right and wrong and able to understand sanctity of

giving evidence on oath – No corroboration required if his evidence inspires confidence

Considering Panchhi & Ors. V. State of U.P.; AIR 1998 SC 2726, Rameshwar v. State of Rajasthan; AIR 1952 SC 54, Mangoo v. State of Madhya Pradesh; AIR 1995 SC 959, Nivrutti Pandurang Kokate v. State of Maharashtra; AIR 2008 SC 1460 and State of U.P. v. Krishna Master; 2010 (94) AIC 257 (SC), it is held that "Para 13-the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. **(State of M.P. v. Ramesh & Another; 2011(74) ACC 193 (SC)**

Common intention – Necessary ingredients

A bare reading of section 34 shows that the section could be dissected as follows:

(a) Criminal act is done by several persons;
(b) Such act is done in furtherance of the common intention of all; and
(c) Each of such persons is liable for that Act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the Court is determining whether an accused is liable to be convicted with the aid of section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once criminal act and common intentions are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise.

The criminal act, according to section 34, IPC must be done by several persons. The emphasis in this part of the section is on the word 'done'. It only flows from this that before a person can be convicted by

following the provisions of section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. Under section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy though this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. **(Nand Kishore v. State of M.P.; 2011 (74) ACC 618 (SC)**

Conviction – Grounds for

Conviction cannot be based on uncorroborated, inconsistent evidence suffering form significant improvements and omissions. **(Jalpat Rai & ors. v. State of Haryana, 2011 (5) Supreme 739)**

Custodial crime against women in custody by police demands harsh punishment

Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment. The horrendous manner in which PW1 was treated by the policemen was shocking and atrocious, and calls for no mercy.

Satya Narayan Tiwari Vs. State of U.P., (2010) 13 SCC 689 : (2011) 2 SCC (Cri) 393; Sukhdev Singh Vs. State of Punjab, (2010) 13 SCC 656: (2011) 2SCC (Cri) 374, relied on

Custodial violence in police custody is in violation of directives issued in D.K. Basu case, (1997) I SCC 416. A warning is given to all policemen in the country that this will not be tolerated. The graphic description of the barbaric conduct of the accused policemen in this case shocks the conscience. Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people. **(Mehboob Batcha and Others Vs. State; (2011) 7 SCC 45)**

Death Sentence

The killings by the appellant Surendra Koli are horrifying and barbaric. He used a definite methodology in committing these murders. He would see small girls passing by the house, and taking advantage of their weakness lure them inside the house No. D-5, Sector 31, Nithari Village, Noida and there he would strangulate them and after killing them he tried to have sex with the body and would then cut off their body parts and eat them. Some parts of the body were disposed off by throwing them in the passage gallery and drain (nala) beside the house. House No. D-5, Sector 31 had become a virtual slaughter house, where innocent children were regularly butchered.

In our opinion, this case clearly falls within the category of rarest of rare case and no mercy can be shown to the appellant Surendra Koli. **(Surendra Koli V. State of U.P. & Ors., 2011 Cri,L.J. 3137 (SC)**

Evidence – Minor discrepancy – Effect of

Every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct perspective and in light of the attendant circumstances brought on record by the prosecution. **(Om Prakash v. State of Haryana, 2011 (6) Supreme 244)**

Eye-witness – Not named in the FIR – No hard and fast rule that names of all eye-witnesses should invariably be mentioned in FIR

It would suffice to say that the evidence of a person whose name did not find mention in the FIR as a witness does not perforce becomes a suspect. It is settled by catena of decision that non-mention of a name of witness is not fraught with the consequences of affecting the prosecution case. There can be no hard and fast rule that the names of all witnesses, more particularly, eye-witnesses should invariably be mentioned in the FIR. In State of M.P. v. Man Singh; 2003(10) SCC 414, the Apex Court observed that mere non-mention of the name of eye-witness does not render the prosecution version fragile. **(Hakimuddin @ Hakim v. State of U.P.; 2011 (74) ACC 124 (All HC) (DB)**

Filing false affidavits in the court

Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge. **(Muthu Karuppan Vs. Parithi Ilamvazhuthi & Anr., 2011 Cri.L.J. SC 2680)**

Motive – Constitutes a link in chain of circumstances – Given importance in case of circumstantial evidence – Recedes in background in case of ocular evidence.

The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of the Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye-witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. **(Sheo Shankar Singh v. State of Jharkhand; 2011(74) ACC 159 (SC)**

Identification of the Accused – Unknown to the witnesses – Identification in court constitutes substantive evidence – Accused cannot claim a right to hold of TI parade

It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a T.I.P. then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification

parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the evidence of identification in the Court even without insisting on corroboration. The decisions of the Court on the subject are legion. **(Sheo Shankar Singh v. State of Jharkhand & Another; 2011 (74) ACC 159 (SC)**

Education & Service Cases

Retirement –Retiral benefits- Delay in payment of- Interest thereon- Petitioner had completed all requisite formalities for payment of pension, gratuity and other retrial benefits in time and there was no delay on the part of petitioner- Delay on the part of the respondents in providing necessary information to the relevant authorities and other procedural matters- Held, the respondents liable to pay interes to petitioner.

It is, thus, evident that the petitioner had completed all the requisite formalities for payment of pension, gratuity and other retrial benefits in time, and there was no delay on the part of the petitioner in this regard.

From the averments made in various Counter-affidavits, it appears that there was delay on the part of the respondents in providing necessary information to the relevant authorities and other procedural matters. This delay on the part of the respondents cannot evidently be attributed to the petitioner.

In the circumstances, we are of the opinion that the respondents are responsible for inordinate delay in making the payments of pension, gratuity and other retrial benefits to the petitioner, therefore, the respondents are liable to pay interest to the petitioner with effect from the date of retirement at the rate of 12% per annum.

We may refer in this regard to the decision in Smt. Kavita Kumar v. State of U.P. and others, (2008) 119 FLR 787 (DB), wherein a Division Bench of this court held as under (paragraph No.4):

"The consistent view of the apex Court is that for delayed payment of post-retiral benefits, interest should be awarded if it is found that the delay was caused due to inaction of the respondents. Reference in this regard may be made to the following decisions:

1. State of Kerala and others v. M.Padmanabhan Nair, AIR 1985 SC 356 (paras 2 and 3)
2. O.P.Gupta v. Union of India and others, 1987 UPLBEC 583 (SC) (Para 24)
3. R.Kapur v. Director of Inspection (Painting and Publication) Income Tax and another, (1995) 1 UPLBEC 89 (SC)(paras 9 and 10)
4. S.R.Bhanrate v. Union of India and others, AIR 1997 SC 27 (paras 4 and 5)
5. Dr. Uma Agrawal v. State of U.P. and another, (1999)2 UPLBEC 1006 (SC)(paras 1,2 and 5)
6. Vijay L. Mehrotra v. State of U.P. and others, (2000)1 UPLBEC 1599 (paras 3 and 4)
7. S.K.Dua v. State of Haryana and another, (2008)1 UPLBEC 301 (SC) (para 11)

(Rajeshwar Swarup Gupta v. State of U.P. and others, 2011(3) E.S.C. 1496 (All.)(DB)

Evidence Act

Additional Evidence before Revisional Court.

Civil Procedure Code Additional Evidence before revisional Court-Notwithstanding the exclusion of provision of Order XLI, Rule 27 C.P.C. in exercise of revisional jurisdiction a revisional court in exercise of its inherent powers may admit additional evidence when the ends of justice require the same to be done. Meaning thereby in appropriate causes depending on facts and circumstances of the case of a particular case the Court in exercise of its inherent power may permit a party to file additional evidence, in this regard, a reference was also made Gayatri Devi and others vs. Additional District Judge, 1992 (1) ARC 148: 1992 (1) AWC 273, wherein also it court should look into the matter whether additional

evidence is necessary for doing justice between the parties or not. **(Sekhar Bahuguna Vs. Suresh Chadra Kapoor; 2011(4) AWC 3954)**

Approach when two views possible-burden of proof- appreciation of Evidence- under S. 149 IPC

The Hon'ble Supreme Court referring to its earlier judgement in Shivaji Sahabrao Babode vs. State of Maharashtra (1973) 2 SCC 793: 1973 SCC (Cri.) 1033, Ramesh Babulal Doshi Vs. State of Gujarat (1996) 9 SCC 225:1996 SCC (Cri.) 972; Jaswant Singh Vs. State of Haryana (2000) 4 SCC 484 : 2000 SCC (Cri.) 991, Raj Kishore Jha Vs. State of Bihar (2003) 11 SCC 519: 2004 SCC (Cri.) 212, State of Punjab Vs. Karnail Singh (2003)11 SCC 271 : 2004 SCC (Cri.) 135, State of Punjab Vs. Phola Singh (2003) 11 SCC 58 : 2004 SCC (Cri.)276, Suchand Pal Vs. Phani Pal (2003) 11 SCC 527 : 2004 SCC (Cri.) 220 and Sachchey Lal Tiwari Vs. State of U.P. (2004) 11 SCC 410 : 2004 SCC (Cri.) supp 105

Held –if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the fact of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

Emphasising that expressions like “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. Are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the Court stated that such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guild of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal.

Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the Court to completely discard such evidence.

In the present case, it has been establishment that more than five persons constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death.

Section 149 consists of two parts: the first part deals with the commission of an offence by any member of an unlawful assembly in prosecution of the common object of that assembly; the second part deals with the commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know the likelihood of the offence being committed in prosecution of that object. In either case, every member of that assembly is guilty of the same offence, which other members have committed in prosecution of the common object. **(State of Rajasthan Vs. Abdul Mannan; (2008) 8 Supreme Court cases 65)**

Appreciation of Evidence in relative witnesses

Court held - The question of reliance by the prosecution on witnesses who are related to the deceased, we find that the law is well-settled that merely because the witnesses are related is not a ground to discard their evidence. On the other hand, the court has held that in many

cases, the relations are only available for giving evidence, having regard to the trend in our present society, where other than relations, witnesses are not available,. It is of course true that the evidence of the interested witnesses have to be carefully scrutinized. We find that the High Court has scrutinized the evidence of the relations with due care and caution. **(Birender Poddar Vs. State of Bihar, 2011 Cri.L.J. 3120 (SC)**

Appreciation of circumstantial evidence-Honour killing- Admissibility of Evidence of Statement recorded under S. 161 Cr. PC- Evidence of hostile witness Extra- judicial compassion

It is settled law that a person can be convicted on circumstantial evidence provided the links in the chain of circumstances connects the accused with the crime beyond reasonable doubt vide Vijay Kumar Arora Vs. State (Govt. of NCT of Delhi) (2010) 2 SCC 353 : Aftab Ahmad Ansari Vs. State of Uttraanchal (2010) 2 SCC 583 : (2010) 2 SCC (Cri) 846, etc. In cases of circumstantial evidence motive is very important, unlike cases of direct evidence where it is not so important vide Wakkar vs. State of U.P.(2011) 3 SCC 306 : (2011) 1SCC (Cri) 846.

"Honour" killings have become commonplace in many parts of the country, particularly in Haryana western Uttar Pradesh and Rajashthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in Lata singh Case that there is nothing "honourable" in "honour" killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds. In our opinion hour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilised behaviour. All persons who are planning to perpetrate "honour" killing should know that the gallows await them.

Many people feel that they are dishonoured by the behaviour of the young man/woman, who is related to them or belonging to their caste because he/she is marrying against their wish or having an affair with someone, and hence they take the law into their own hands and kill or physically assault such person or commit some other atrocities on them. We have held in **Lata Singh vs. State of U.P. (2006) 5 SCC 475 : (2006)**

2 SCC (Cri) 478 that this is wholly illegal. If someone is not happy with the behaviour of his daughter or other person, who is his relation or of his caste, the maximum he can do is to cut off social relations with her/him, but he cannot take the law into his own hands by committing violence or giving threats of violence.

Admissibility of Evidence recorded before the Police under Section 161 Cr.PC a statement to the police is ordinarily not admissible in evidence in view of Section 162(1) CrPC, but as mentioned in the proviso to Section 162(1) CrPC it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seem. On being so confronted with her statement to the police she denied that she had made such a statement.

We are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC, and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was revoked from the bed and placed on the floor. When she was confronted with this statement in court she denied that she had made such a statement before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC. "**Held**- An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who given the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession saw made and the credibility of the witnesses who speak of such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical

to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably covey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

In the above decision it was also held that a conviction can be based on circumstantial evidence. Similarly in **B.A. Umesh Vs. State of Karnataka (2011) 3 SCC 85 : (2011) 1 SCC (Cri) 801** the Court relied on the extra-judicial Confession of the Accused.

No doubt Smt. Dhillo Devi was declared hostile by the prosecution as she resiled from her earlier statement to the police. However, as observed in **State of U.P. Vs. Ramesh Prasad Mishra; (1996) 10 SCC 360**: (SCC p. 363, para 7)

"..... the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

Similarly in **Sk. Zakir Vs. State of Bihar (1983) 4 SCC 10 : 1983 SCC (Cri) 761 : AIR 1983 SC 911** this court held: (SCC p. 16, para 5)

" ..... It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court form finding an accused guilty if there is otherwise acceptable evidence in support of the prosecution."

In **Himanshu Vs. State (NCT of Delhi) (2011)2 SCC 36 : (2011) 1 SCC (Cri) 593**, this court held that the dependable part of the evidence of hostile witness can be relied on. Thus, it is the duty of the Court to separe the grain from the chaff, and the maxim "falsus in uno flaus in omnibus" has no application in India vide Nisar Ali vs. State of U.P. AIR 1957 SC 366 : Cri LJ 550. **(Bhagwan Dass v. State (NCT of Delhi; (2011) 6 SCC 396)**

Approach for appreciating circumstantial Evidence

It is obviously true that his case rests solely on circumstantial evidence. It is true that in cases where death takes place within the matrimonial home, it is very difficult to find direct evidence. But for appreciating circumstantial evidence, the court has to be cautious and find out whether the chain of circumstance led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guild of the accused. It is well settled that if any hypothesis or possibility arises from the evidence which is incompatible with the guild of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidence is difficult to be sustained. (See Hanumant Govind Nargundkar Vs. State of M.P. AIR 1952 SC 343: 1953 CriLJ 129; Bhagat Ram Vs. State of Punjab AIR 1954 SC 621 : 1954 Cri LJ 1645 and Eradu Vs. State of Hydrabad AIR 1956 SC 316 : 1956 Cri LJ 559. **(Birender Poddar Vs. State of Bihar; (2011) 6SCC 350)**

S.3 – Circumstantial evidence – Grounds for admissibility

There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused. We respectfully agree with the principles drawn in the above mentioned cases and hold that the prosecution was successful in establishing the above mentioned circumstances against the appellant, individual, as well as, cumulatively. There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved circumstances against him nor could there be any quantitative test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and the times,

even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances. **(Mohd. Arif @ Ashfaq v. State of NCT of Delhi, 2011 (5) Supreme 646)**

S. 3 – Circumstantial Evidence – Can be sole ground of conviction – consideration of

It is too well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by this Court. **(Mustkeem @ Sirajudeen v. State of Rajasthan, 2011 (5) Supreme 66)**

Appreciation of the principle of res gestae under S. 6 Evidence Act

Section 6 of the Evidence Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences. **(Krishan Kumar Malik Vs. State of Haryana; (2011) 7 SCC 130)**

Application of evidence of interested witness- principles reiterated

As to admissibility/acceptability of evidence of interested witness, the court discussed the following cases

Sarwan Singh Vs. State of Punjab (1976) 4 SCC 369: 1976 SCC (Cri) 646 a three-Judge Bench of this Court, while considering the evidence of an interested witness held that (SCC p. 376 Para 10)

"10.... it is not the law that the evidence of an interested witness should be equated with that of a tainted [witness] or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of the interested [witness has] a ring of truth such evidence could be relied upon even without corroboration."

The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution wa the brother of

the wife of the deceased and was living with the deceased for quite a few years. The court held that: (Sarwan Singh case, SCC p.379 para 16)

"16.... but that itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent an true,"

In Balraje Vs. State of Maharashtra (2010) 6 SCC 673 (2010) 3 SCC (Cri) 211 the Supreme Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that: (SCC p. 679 para 30)

"30.... if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same."

The same principles have been reiterated in Prahalad Patel v. State of M.P. (2011) 4 SCC 262 : (2011) 2 SCC (Cri) 205.

State of U.P. v. Naresh (2011) 4 SCC 163 : (2011)2 SCC (cri) 216; Jarnail Singh Vs. State of Punjab (2009) 9 SCC 719: (2010) 1 SCC (Cri) 107 ; Vishnu Vs. State of Rajasthan (2009) 10 SCC 477 : (2010) 1 CC (Cri) 302.

In this light the Court held:

It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the court have to scrutinise their evidence meticulously with the little care.

The Hon'ble Court referring to its earlier decisions in Gurbachan Sigh Vs. Satpal Singh (1990) 1 SCC 445; Sohrab vs. State of M.P. (1972) 3 SCC 751 in the context of contradiction appearing as to contradictions in

the deposition of witnesses laid down-

It is clear that not all the contradictions have to be thrown out form consideration but only those which go to the root of the matter are to be avoided or ignored.

Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case. **(Waman and others Vs. State of Maharashtra; (2011) SCC 295)**

Circumstantial evidence – Chain of circumstances must be complete and conclusive – So as to unmistakably point to the guilt of the accused – Any hypothesis incompatible with guilt of accused – Conviction cannot be sustained

It is true that in cases where death takes place within the matrimonial home, it is very difficult to find direct evidence. But for appreciating circumstantial evidences, the Court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused. It is well settled that if any hypothesis or possibility arises from the evidences which is incompatible with the guilt of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidences is difficult to be sustained. [See: Hanumant Govind Nargundkar and another v. State of Madhya Pradesh; AIR 1952 SC 343; Bhagat Ram v. State of Punjab; AIR 1954 SC 621 and Eradu and Others v. State of Hyderabad; AIR 1956 SC 316]. **(Birender Poddar v. State of Bihar; 2011(74) ACC 283 (SC)**

Circumstantial Evidence – Last seen theory – Comes into play where time get between point of time accused and deceased last seen alive

and when deceased found dead is so small that possibility of any other person being author of crime becomes impossible

Considering Mohd. Azad alias Samin v. State of West Bengal; (2008) 15 SCC 449; and State through Central Bureau of Investigation v. Mahender Singh Dahiya; (2011) 3 SCC 109, it is held that "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 when 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. **(S.K. Yusuf v. State of West Bengal; 2011(74) ACC 293 (SC)**

Circumstantial Evidence – Extra-judicial Confession of co-accused could not be fastened upon two other appellants for holding them guilty

The extra-judicial confession of Sunil Rai could not be fastened upon the other two appellants for holding them guilty of murder and the High Court was quite wrong in using the confessional statement of Sunil Rai as a circumstance against the other two appellants. **(Sunil Rai @ Paua & Others v. Union Territory, Chandigarh; 2011(74) ACC 666 (SC)**

Ss. 17 and 21- Admission made in a court of law- Held, is valid and relevant piece of evidence to be used in other legal proceedings.

The aforesaid provision requires giving of one month's notice to the tenant. From perusal of the Notice, dated 27.8.1991 sent by Appellant on 28.8.1991, it is clear that one month's clear Notice was given to the Respondent seeking upon him to vacate the premises. Thus, there has been compliance of Section 13(6) of the Act and once the Respondent's tenancy was determined on his failure in compliance there for, suit was maintainable.

Learned Single Judge of the High Court had not been able to point out any perversity in the Judgement and decree of the appellate Court, yet, Committed a grave error of law in allowing the Respondent's Second Appeal on absolutely flimsy and cursory ground. The same cannot be sustained in law and in our opinion is against the well settled principles of law.

In this view of the matter, judgment and decree of the learned Single Judge do not appear to be in conformity with law. Other ground of bona fide requirement was already held in favour of the Appellant. In our considered opinion appellant's suit was rightly decreed by the lower Appellate Court and the same could not have been set aside by the learned Single Judge, moreso when he had noticed that there was no substantial question of law involved in the second Appeal.

Thus, looking to the matter from all angles, it is considered opinion that the impugned judgement and decree of the learned Single Judge cannot be sustained in law. The same are hereby set aside and quashed. The judgment and decree of the lower appellate court are hereby restored and Appellant's suit for eviction is decreed. Appeal is thus allowed.

In the facts and circumstances of the case, parties to bear their respective costs. **(Mritunjoy Sett(D) by LRs. V. Jadu Nath Dasak (D) by LRs.; (2011 (29) LCD 1395) (SC)**

S. 27 – Application of

With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to be conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. (**Mustkeem @ Sirajudeen v. State of Rajasthan, 2011 (5) Supreme 67)**

S. 32 Dying Declaration-Certificate of Doctor regarding Fitness of Mental Condition of the maker-Absence of such certificate- Effect

Referring to the judgment of Supreme Court in **Varipuppal Srinivas vs. State of A.P., AIR 2009 SC 1487, Mohan Lal vs. State of Haryana, AIR 2007 SC (Supp.) 1139, Kanti Lal vs. State of Rajasthan, AIR 2009 SC 2703 and Shaikh Rafiq vs. State of Maharashtra, AIR 2008 SC 1362**, it was held-

It is trite law that dying declaration, like any other piece of evidence, can be accepted or rejected in the same manner in which the

depositions of a living witness can be done. If adjudged to be true containing true and faithful narration of events it does not require any corroboration to establish guilt of the accused and by itself is sufficient to prove the charge. For a dying declaration to be acted upon has to be above board and free from all suspicion. Section 32 of Evidence Act is an exception to the general rule of cross examination by the defence and therefore, before it is acted upon, an unblemished credence has to be attached to it and it has to be proved convincingly that recording of D/D was done taking all possible precautions and it is free from any tutoring, embellishment and was true and voluntary. Natural corollary of it is that if the D/D suffers from the vices of tutoring, concoction, embellishment and full of un-naturalities and contradictions etc it has to be rejected like any other evidence. Further if the dying declaration is directly and substantially contradicted by the other surrounding circumstances and depositions of witnesses, it cannot be accepted as a gospel truth and has to be rejected as untruthful.

Regarding certification of mental condition by the doctor, the court held that in absence of any certificate by the doctor prior to recording of the dying declaration that she was in a fit mental state to give the declaration in a coherent and convincing manner, no reliance can be placed on the said statement especially when it is mentioned in her autopsy report that she had 90% superficial and deep burns. It is further noted that the said D/D was not recorded in the presence of the doctor nor there is evidence to that effect and hence it is difficult to rely upon such a D/D in total absence of any evidence regarding mental and physical condition of the deceased. (**Govind Hari Swamy vs. State of U.P., 2011(5) ALJ 90 (All.H.C. Single Judge)**

S.32(1)- Dying declaration recorded by Magistrate evidentiary value

Dying declaration-Credibility-Matters to be considered - Dying declaration allegedly recorded by Magistrate-PW 10 brother of deceased made an application to SDM for recording dying declaration-No nothing on dying declaration that SDM had gone to hospital on application of PW 10-SDM had not been approached by police or medical authorities for recording dying declaration nor had he obtained any opinion in writing from doctor about deceased's fitness to make a statement. Hospital did not fall within his jurisdiction either-Endorsement had been taken from doctor

after dying declaration had been recorded-Application of PW 10 had not been produced before I.O., but produced for first time in court – Earlier, deceased's statement recorded by doctor and attested by ASI in which deceased stated that she had been burnt in an accident-Repeated efforts by I.O. to record her dying declaration by Magistrate failed because of incapacity of victim –Held, dying declaration, raises a deep suspicion about its veracity. **(Subhash v. State of Haryana, (2011)2 SCC (Cri)** SC **689)**

Presumption of Civil Death- S. 108

Presumption under section 108 Evidence Act -even if the suit was not filed, the presumption could be drawn, if the conditions imperative for raising the presumption were satisfied. Once a presumption of civil death is raised on the satisfaction of the conditions given in Section 108 of the Indian Evidence Act, the burden of proof that he is alive, is then shifted to the person who affirms that the person reported missing was seen and is alive. The provision of Section 108 of Evidence Act would be applied for claiming compassionate appointment. **(Ramakant Singh Vs. State of U.P. and others; 2011 (4) AWC 4268)**

S. 118 – Competent witness – Determination of

The legal position as to who should give evidence in regard to the matters involving personal knowledge has been laid down by this court in Man Kaur (dead) by LRS v. Hartar Singh Sangha, (2010) 10 SCC 512. This court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent lone can give evidence in regard to the transaction. **(Mrs. Sardamani Kandappan v. Mrs. S Rajalakshmi & ors., 2011 (5) Supreme 1)**

S. 138 - Cross examination by defence counsel

Court held - Provisions of Section 138 of the Evidence Act, gives defence right to cross-examine the witness. The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief, to sift the facts already stated by the witness, to

detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. Section 138 does not mandate that cross-examination should be confined to the facts spoken during the examination-in-chief. The parties have liberty to elicit anything from the witness as long as it relates to the relevant facts. However, irrelevant topics sometimes pursued at great length, and persistence shown in going over the same ground again and again in the hope of making the witness to give discrepant statements must not be permitted. Control over the Court proceedings by the Presiding Officer in such a situation is expected. **(Sunil Atmaram More Vs. State & Anr, 2011 Cri.L.J. 3281 (Bombay High Court)**

Incorrect calculation of pay-scale and payment thereof no fault on the part of the employee shall not make out a ground to recover the same. (para 9)

In another case, Union of India v. Rakesh Chandra, 2004 ESC (All.) 455, a Division Bench of this Court after considering catena of judgments of Hon'ble Supreme Court held that incorrect calculation of pay scale and payment thereof of no fault on the part of the employee shall not make out ground to recover the same. (**Mahendra Pratap Singh v. State of U.P. and others, 2011(4) E.S.C. 2493 (All)(DB)(LB)**

Ss. 302, 364, 342 and 201:– **Ragging in colleges- Appreciation of Evidence in circumstantial evidence cases**

It is held that ragging in Medical College leading to murder of junior student by senior – Murder held proved because: (i) motive established being ill will nurtured by senior because deceased student refused to succumb to ragging demands of accused, (ii) deceased before his disappearance was last seen alive in company of respondent-accused, (iii) conduct of respondent-accused after crime was suspicious, (iv) commission of crime was confessed by respondent-accused after 13 days, (v) various incriminating articles were also recovered based on above said confession, and (vi) identity of dead body was scientifically established even though parts of body were recovered from different locations – Senior student of a medical college alleged to have killed his junior, killing taking place in senior's hostel room severed head recovered from a canal in university area on basis of information disclosed by respondent-accused- Torso found in a

different city, three bones of leg found at seashore, Medical examination pointing out that all these parts belonged to same person. Deceased last seen with respondent-accused on 06-11-1996 between 12.45 p.m. to 2 p.m. by several witnesses and thereafter deceased not seen alive - Accused's subsequent conduct was suspicious inasmuch as he left hostel with two suitcases conduct was suspicious inasmuch as he left hostel with two suitcases at about 8.00 p.m. on 6-11-1996 and returned on 8-11-1996 early morning at 4.00 a.m. with those suitcases, on next day (9-11-1996), respondent-accused did not take lunch in mess and was also found in sad mood, foul smell coming from his hostel room, on 9-11-1996 itself, accused again going to railway station with a suitcase at about 4.30 p.m. in order to travel to another place. Held, circumstantial evidence was sufficient to prove that it was respondent-accused who killed deceased. **(Inspector of Police, Tamil Nadu v. John David, (2011)2 SCC (Cri) SC 647)**

Ss. 302, 376, 366 and 201: – **Appreciation of evidence and punishment of death sentence**

Appellant- accused convicted on basis of circumstantial evidence for kidnapping, raping and killing a minor girl and causing disappearance of evidence of offence. Death sentence, confirmed – Held, appellant (working as a mason in house of grandfather of victim) was a matured man aged about 43 yrs. He held a position of trust and misused the same, in a calculated and pre-planned manner, to rape a girl aged about 7 yrs. He sent the girl to buy betel and few minutes thereafter, in order to execute his diabolical and grotesque desire, proceeded towards the shop where she was sent. She was of thin build and 4 ft of height and such a child was incapable of arousing lust in a normal situation. Appellant won the trust of child and she did not understand desire of appellant, which was evident from fact that while she was being taken away by appellant, no protest was made and the innocent child was made prey of appellant's lust – Post-mortem report shows various injuries on face, nails and body of child. These injuries show the gruesome manner in which she was subjected to rape. victim was an innocent child who did not provide even an excuse, much less a provocation for murder such cruelty towards a young child is appalling. Appellant had stooped so low, as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt invited

extreme indignation of community and shocked the collective conscience of society. Their expectation from authority conferred with the power to adjudicate, is to inflict death sentence, which is natural and logical, Appellant is menace to society and shall continue to be so and he cannot be reformed, Undoubtedly, case in hand falls in the category of rarest of rare case. Hence, High Court was right in confirming death sentence of appellant. **(Modh. Mannan Alias Abdul Mannan v. State of Bihar, (2011)2 SCC (Cri) SC 626)**

Fatal Accidents Act, 1855

Applicability of Act – The Act being antiquated, need to b ring a contemporaneous and comprehensive legislation on the subject of compensation for fatal accidents re-emphasized.

It is a matter of grave concern that such sensitive matters like payment of compensation and damages for death resulting from a wrongful or negligent act are governed by a law which is more than one and a half centuries old. Twenty one years ago a Constitution Bench of this Court in Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, a case arising from the Bhopal Gas Tragedy, had taken note of this antiquated law and in paragraph 168 made the following observations :

> "168. While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts,. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. Court is therefore, of the opinion that the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:
>
> (i) The payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum;
> (ii) The creation of a special forum with specific power to grant interim relief in appropriate cases;
> (iii) The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of

claims and avoid the high degree of formalism that attaches to proceedings in regular courts; and

(iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks."

It is unfortunate that the observations of the Supreme Court have so far gone completely unheeded. We hope and trust that the Union Government would at least now take note of the urgent need to bring a contemporaneous and comprehensive legislation on the subject and proceed to act in the matter without any further delay. **(Suba Singh and another v. Davinder Kaur and another, 2011 (6) Supreme 121)**

Guardian and Wards Act, 1890

Guardians & Wards Act, 1890 - The solitary test for determining the jurisdiction of the Court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted, it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision of visitation fights of the respondent father of the child. In the ordinary course the Court ought have done so not only because even an interim order of custody in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor upbringing and grooming to face the realities of life be undermined. It is in that view important for the child's healthy growth that we grant to the enable the two to stay in touch and share moments of joy, learning and happiness with each other. **(Ruchi Majoo Vs. Sanjeev Majoo; 2011 (4) AWC 4295 (SC)**

Hindu Adoptions and Maintenance Act

V.P. Recruitment of dependant of Government Servants Dying in harness Rules 1974

Adopted son/daughter is also included in definition of family as defined under Rule 2(c)(ii) and (iii) of Rules- Held, adopted son is as good as real son. (paras 15,19 and 21)

However after the enactment of the Act of 1956 the mythological purpose has disappeared but so far as the modern purpose is concerned, the Act provides for adoption of a child and once a child has been adopted either by adoptive father or mother it has a definite effect which has been provided under Rule 12 of the Act of 1956.

For better appreciation Section 12 of the aforesaid Act is quoted below.

12. Effects of adoption.- An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that-

(a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) The adopted child shall not divest any person of any estate which vested in him or her before the adoption.

From the perusal of above section, it is clear that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her

birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Otherwise also the Act of 1956 has been enacted by the Parliament and the provisions contained in this Act, unless something otherwise is provided under this Act, will prevail over any Act of the State legislation or Rules framed under Article 309 of the Constitution of India. In the present case, the Rule which is under consideration has been framed under Article 309 of the Constitution of India, therefore, also the effect of adoption providing same status to adopted child as of a natural child will prevail over the rule in question and both the adopted child as well as the natural child will be treated at par, without there being any difference amongst two.

For the above reason, I am of the view that the Rules of 1974 itself provide that the adopted son/daughter is also included in the definition of family as defined under Rule 2(c)(ii) and (iii) of the Rules.

After observing so, this Court has held that adopted son is as good as real son. In this view of the matter, I am of the definite opinion that the adopted son has got the same status under law as the natural son has and there can be no difference in between the two (adopted or natural) either for mythological purpose or for secular purpose to perpetuate the line of family. The view taken by me also finds support from several decisions of this Court rendered in Sunil Saxena v. State of U.P. and others, 1994 (68) FLR 283; Singhasan Gupta v. State of U.P. and another, (1996)1 UPLBEC 4 and Ravindra Kumar Dubey v. State of U.P. and others, 2005(4) ESC 2706 (All.) **(Jagat Pal v. State of U.P. and others, 2011(3) E.S.C. 1558 (All)**

Hindu Marriage Act

S. 25 – Dissolution of marriage of parties by mutual consent – Enhancement of maintenance – factors to be consider – Status of the wife before her marriage is also one of the relevant factors for determination of amount of maintenance.

In the light of the details furnished by both parties, held that the amount of Rs. 1,40,000/- determined as net monthly income of the respondent-husband was not acceptable. Equally, direction for payment of maintenance at the rate of Rs. 20,000/- per month to appellant-wife was

also inadequate. Status of the appellant before her marriage is also one of the relevant factors for determining the amount of Maintenance. No dispute that before her marriage with respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant was not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, held that ends of justice would be met by fixing maintenance at the rate of Rs. 40,000/- per month instead of Rs, 20,000/- per month as fixed by the Family Court and affirmed by High Court. **(Vinny Parmvir Parmar v. Parmvir Parmar, 2011 (5) Supreme 74)**

Human Rights Act

Section 21- State Commission- Appointment as member- Eligibility- Appointment of Additional District Jude- Whether permissible on the basis that the District Judge includes Additional District- Held- No

Referring to the judgments in **Union of India v. Pushpa Rani, (2008) 9 SCC 242; and State of Karnataka vs. K. Govindappa, AIR 2009 SC 618**, the Supreme Court pointed out that a cadre generally denotes a strength of a service or a part of service sanctioned as a separate unit. It also includes sanctioned strength with reference to grades in a particular service. Cadre may also include temporary, supernumerary and shadow posts created in different grades. The expression "cadre", "posts" and "service" cannot be equated with each other. There is no prohibition in law to have two or more separate grades in the same cadre based on an intelligent differential. Admittedly, the post of District Judge and Additional District Judge in the State of U.P. is neither inter-changeable nor inter-transferable. The aforesaid Rules merely provide for an integrated cadre for the aforesaid posts.

Therefore it was held that the Legislature in its wisdom has prescribed a minimum experience of seven years as District Judge knowing it fully well the existing statutory and constitutional provisions and it does

not require to be interpreted ignoring the legislative intent. We cannot proceed with an assumption that Legislature had committed any mistake enacting the said provision. Clear statutory provision in such a case is required to be literally construed by considering the legislative policy. Thus, no fault can be found with the impugned judgment and order of the High Court on this count. (**J.S. Yadav vs. State of U.P., 2011(4) ALJ 180 (SC)**

Indian Penal Code

Ss. 84 and 302- Accused should prove legal insanity and not medical insanity

In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Penal Code and it has mainly been treated as equivalent to insanity. But the term "insanity" carries different meaning in different contexts and describes varying degrees of mental disorder. Even person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or the behaviour is queer, are not sufficient to attract the application of Section 84 of the Penal Code. **(Surendra Mishra Vs. State of Jharkhand, (2011) 3 SCC (Cri) SC 232)**

General Exception-Unsoundness of mind- Principles for application of S. 84 I.P.C.

From the deposition of the two witnesses wife and mother of accused who happen to be the close family members of the appellant it is not possible to infer that the appellant was of unsound mind at the time of the incident or at any time before that. The fact that the appellant was working as a government servant and was posted s a watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant. Equally important is the fact that his spouse D (who was murderously assaulted by him) who was living with him under

the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The deposition of PW 3, the appellant's mother that her son was getting treatment for mental disorder is also much too vague and deficient for the Supreme Court to record a finding of unsoundness of mind especially when the witness had turned hostile at the trial despite multiple injuries sustained by her which she tried to attribute to a fall inside her house. It is obvious that the mother has switched sides to save her son from the consequences flowing from his criminal act.

There is no evidence suggesting any mental derangement of the appellant at the time of the commission of the crime for neither the wife nor even his mother have is so many words suggested any unsoundness of mind leave alone a mental debility that would prevent him from understanding the nature and consequences of his actions. The doctor, who is alleged to have treated him for insomnia, has also not been examined nor has anyone familiar with the state of his mental health stepped into the witness box to support the plea of insanity. There is no gainsaying that insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned. Non-production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant in that view is noteworthy. Suffice it to say that the plea of insanity taken by the appellant was neither substantiated nor probabilised.

Whether the appellant was entitled to the benefit of Section 84 IPC which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or who is incapable of knowing that what he is doing, is either wrong or contrary to law. Burden of proving the existence of circumstances that would bring the case within the purview of Section 84 IPC. Intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implied that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of

knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 IPC lies squarely upon the person claiming the benefit of that provision. **(Elavarasan Vs. State; (2011) 7 SCC 110)**

Section 120-A - ingredient of criminal conspiracy discussed

The essential ingredient of the offence of "criminal conspiracy", defined in Section 120-A IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, IPC, then in that event mere proof of an agreement between the acc used for commission such crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. **(Sushil Suri Vs. Central Bureau of Investigation and another, (2011) 2 SCC (Cri) SC 764)**

Ss. 148, 302/149, 307/149 r/w S. 3/27 of Arms Act –Grounds for conviction of accused persons (A7 to A9) and acquittal for accused persons (A1 to A6).

Accused persons were prosecuted in the instant case for causing death of two persons and injuries to one other by firing on them and assaulting them with deadly weapons. Trial Court convicted accused persons. On appeals there against, High Court while acquitting A1 to A6, altered conviction of A7 to A9 under Sections 302/149 and 307/149 IPC to one under sections 302/34 and 307/34 IPC.

Hence, Present appeals have been filed against said order of High Court.

There was complete consistency and credible evidence as far as three accused persons, A7 to A9 were concerned. However, in respect of other six, there was no direct evidence and case pleaded by prosecution was unacceptable. Hence High Court rightly acquitted them of all the

charges. Though there was a little discrepancy as to distance from upper portion of house and actual scene of occurrence, it could not be concluded that injuries on deceased persons were not caused by fire arms. Again mere non-recovery of pistol or cartridge did not detract the case of prosecution where clinching and direct evidence was acceptable. Likewise, absence of evidence regarding recovery of used pellets, blood stained clothes etc. Could not be taken or construed as no such occurrence had taken place. Apart from that gunshot injuries tallied with medical evidence. Deposition of doctor PW1 that deceased received 8 and 7 gunshot wounds respectively while PW-2 also received 8 gun shots scattered in front of left thigh. The reliable eye-witnesses stated that there was previous enmity between them and litigation was going on between the accused and the complainant. Even in absence of motive, in view of assertion of eye-witnesses, coupled with the medical evidence case of prosecution could not be thrown out. The materials placed by prosecution clearly proved the guilt against three convicted accused, who were armed with guns and with their common intention they fired gunshots resulting in death of two persons as well as causing injuries to PW-2. Acquittal of accused persons A1 to A6 called for no interference. Appeals were dismissed. **(State of Rajasthan v. Arjun Singh and ors, etc., 2011(6) Supreme 69)**

Ss 149, 143 & 302

The Apex Court held - In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the criminal courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Sections 302/149 if the charge is that the persons before the court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the court does not make Section 149

inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. **(Shaji and others Vs. State of Kerala, (2011) 2 SCC (Cri) SC 857)**

S.149 - Applicability – Mandatory for court before convicting accused with aid of S. 149 to give clear finding regarding nature of unlawful common object. In absence of such finding as also any overt act on part of accused, mere fact that they were armed not sufficient to prove common object, Moreover, in order to attract S. 149, it must be shown that incriminating act was done to accomplish common object of unlawful assembly and it must be within knowledge of other members as one likely to be committed in prosecution of common object, Essential ingredients of S.141 also need to be established – In instant case, there was no material to show that all the accused shared the common object, the object itself not being proved and their participation in it was not made out by credible evidence, besides, no overt act was attributed to any other accused except A-1 towards murder of deceased – Hence, conviction under S. 149 unsustainable. **(Kuldip Yadav and others v. State of Bihar, (2011)2 SCC (Cri) SC 632)**

S. 300 - Murder – Existence of probable motive

Existence of probable motive and sufficiency of motive are altogether different aspects, particular reasons offering sufficient motive to commit crime would be deferring from person to person. It would also depend upon relationship between accused an victim-Prosecution in such a case is required only to establish probable motive and not sufficiency of motive. **(Mohan Ranganathan Vs. State of Maharashtra & Another, 2011 Cri.l.J. 2725 (Bombay High Court)**

Section 300 - Difference between murder or culpable homicide not amounting to murder discussed

In this case the court held that the following conditions must be complied with for the application of Exception 1 to Section 300 IPC.

(1) the deceased must have given provocation to the accused,

(2) the provocation must be grave,
(3) the provocation must be sudden,
(4) the offender, by reason of the said provocation, shall have been deprived of his power of self-control,
(5) he should have killed the deceased during the continuance of the deprivation of the power of self-control, and
(6) the offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

(Gurudev Singh Vs. State of Madhya Pradesh, (2011) 2 SCC (Cri) SC 775)

Principles for bringing a case under Exception 4 to S. 300 I.P.C.

In order to bring a case under Exception 4 to Section 300 IPC, the evidence must show that the accused acted without any premeditation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner. Every one of these circumstances is required to be proved to attract Exception 4 to Section 300 IPC and it is not sufficient to prove only some of them. In the facts of this case, none of the above ingredients have been proved from the evidence to bring the case under Exception 4 to Section 300 IPC. The High Court's finding to the contrary is totally against the evidence of record. **(State of Rajasthan Vs. Islam and others; (2011) 6 SCC 343)**

Ss. 302, 364, 201 – Death by throttling of young boy aged 10/12 yrs. and thereafter buried him a ditch – conviction by Trial Court – Appeal dismissed by High Court – S.L.P. has filed before Supreme Court against impugned judgment – Case solely based on circumstantial evidence – Considerations for conviction.

In this case, appellant was prosecuted in the instant case for causing death of young boy aged 10/12 years by strangulating him and thereafter burried him in a ditch. Trial Court convicted appellant for said offence. Appeal there against was dismissed by High Court.

Hence, the present appeal has been filed against said order of High Court.

Instant case was based on circumstantial evidence. Circumstances not only established, but they formed a complete chain, that left no manner of doubt, that crime with which appellant stood charged was committed by him and no one else. The deposition of the mother of the deceased, that deceased wanted to go to appellant to fetch two parrots which the latter had promised, that he did after returning from drawing tuition go to appellant on getting a signal from him, set the stage for drawing deceased out of the house. Deceased was shortly thereafter seen talking to appellant who and carried him away on his bicycle towards Kanchan Oil Mill which fact had been proved by two witnesses. The fact that deceased and appellant were seen together in Sitaldihi jungle around 6.00/6.30 p.m. on date of occurrent was a highly incriminating circumstance, especially when according to medical evidence time of death of deceased was also around the same time. The deceased have been last seen with the appellant around the time he was killed was a circumstance which together with other circumstances proved in the case, was explainable only on one hypothesis that appellant was guilty of killing deceased. The fact that appellant had borrowed the spade, tide it with 'Sutli' after wrapping wooden part with newspaper was fully established by statement of PW6. The presence of newspaper near the ditch where deceased was burried and recovery of 'Sutli' from around neck of deceased where it had left a ligature mark were also telling circumstances explainable only on the hypothesis that appellant was author of crime. Recovery of cap worn by appellant on the date of occurrence and recovery of bicycle with appellant owned from Sitaldihi jungle, from near the place where the dead body was burried was not explained on any hypothesis except guilt of accused-appellant. Neither any illegality, nor any miscarriage of justice was found in impugned judgments so as warrant interference. **(Amitava Banerjee @ Amt @ Bappa Banerjee v. State of West Bengal, 2011 (5) Supreme 620)**

Ss. 302, Exception 4 of Sec. 300 – Attractibility of Exception 4 of Sec. 300 of IPC

Appellant-accused Sayaji Hanmat Bankar came home under the influence of liquor and abused his wife deceased-Suman. There was petty quarrel between the appellant and the deceased Suman and in that quarrel the appellant hit her left knee with a water pot made of brass and thereafter

threw a burning kerosene lamp upon her. At that time, she was wearing nylon sari which immediately caught fire and she was engulfed by flames. The deceased was immediately taken to the hospital by her parents where her dying declaration was recorded. The medical report of the doctor showed that the deceased was brunt to the extent of 70%. A dying declaration was recorded. During investigation the deceased gave the above version. In her dying declaration, it has also been mentioned that the accused-appellant also tried to douse the fire. It is established that he had received burn injuries to the extent of 18%.

The trial court as well as the High Court have taken the view on the basis of dying declaration that the act on the part of the accused showed his intention to commit the murder or such bodily injury as was likely to result in her death.

The medical report of the doctor showed that the deceased was burnt to the extent of 70%. However, evidence on record showed that there was no intention on the part of the accused to cause death or such bodily injury as would have resulted in death of his wife. There would be much more activity on the part of the accused if his intention was to commit the murder of his wife. As soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw water pot and thereafter a kerosene lamp. The burning appeared to be more out of the fact that unfortunately at that time, lady was wearing nylon sari. Had she not been wearing a nylon sari, it was difficult to imagine how she could have been burnt to extent of 70%. This was a case which clearly fell under Exception 4 of Section 300 IPC since there was sudden fight. There was no premeditation either. Hence accused-appellant was held liable to be convicted for offence punishable under Section 304 Part-I. Conviction of accused was altered from Section 302 IPC to section 304 Part I IPC. Appeal was allowed partly to said extent. **(Sayaji Hanmat Bankar v. State of Maharashtra, 2011 (5) Supreme 90)**

S. 302 - Grounds of conviction

Deceased was a worker in Singereni Collaries. On the fateful day, he did not go for his duty. At the time when the incident happened, he was sleeping on his cot along with one son. It is the prosecution case that besides him was another cot on which his wife Heeramani (PW-1) was

sleeping along with another son. Besides these two cots, there was another cot on which was one Haridas (PW-9) who was the cousin of Heeramani (PW-1) was sleeping.

It is the case of the prosecution that at that time suddenly the appellant came and assaulted Krishna which incident was seen by Heeramani (PW-1) who raise cry which attracted the neighbours who were mostly the relatives of her husband including his parents. The deceased was immediately carried in an auto rickshaw to Singereni hospital where he was declared as brought dead. On that Maloth Heeramani (PW-1) had lodged a report before Kothagudem Police station. Since she was illiterate, Heeramani (PW-1) got scribed the report by Rayala Satyanarayan (PW-14) and submitted it to Kothagudem police station at 6.30 in the morning. The offence was registered and the investigating officer rushed to the spot, got executed inquest Panchanama as also got drawn the map of the spot and sent the body for autopsy. Autopsy was conducted by (PW-16). The autopsy was conducted at 11 a.m. in the morning. According to the doctors, the approximate time of death was 8 to 10 hours before the autopsy. After the completion of the investigation, the charge-sheet was filed. At the trial, the prosecution examined as many as 20 witnesses and marked 31 documents. In his defence, the plea of accused is of total deny. There was no defence evidence tendered by him.

The Sessions Judge acquitted the accused which acquittal was challenged by the State by filing an appeal which appeal was allowed convicting the accused for the offence under Sec. 302, IPC and awarding sentence of life imprisonment. Hence appeal filed before Supreme Court.

Hon’ble Supreme Court has held that nothing could be brought out in cross-examination of PW1, wife of deceased which would bring her testimony into dark. PW1 lodged the FIR barely within 4-4= hours of the incident. The theory of false implication by PW1 was just not possible as lady hardly had any time to think about false implication of her brother-in-law.

There were some suspicious circumstances mentioned in the judgment of the trial Court. Trial Court held that time of incident was not mentioned in the FIR, but ignored the fact that subject of bulb was brought in the cross-examination by the defence. Second circumstance was about

PW-1 sitting on cot and talking with her husband and not mentioning that husband was also lying on the cot. Said circumstance was absolutely insignificant as it had been shown that her husband was actually lying on cot as per her version in the Court. Another circumstance was account of darkness. However held that even in the light that was available, it was quite possible for PW-1 to identify which identification was further corroborated by her immediately naming the accused. Blood stained clothes of PW-1 were not seized to establish her presence. Said circumstance was explained by very good explanation given by investigating officer. Even though relatives completely turned hostile and not supported the version. This was for simple reason that they were all interested in the accused. The notice looses all its significance in the wake of eye-witness's account. Held trial court got sw3ayed away by so-called irrelevant suspicious circumstance which resulted into the acquittal of appellant. High Court considered the evidence without being influenced by all these irrelevant and imaginary suspicious circumstances. Hence, appeal was dismissed. Court further observed that it is not the quantity but quality of the evidence which clinches the issue in criminal trial. **(Maloth Somaraju v. State of A.P., 2011 (5) Supreme 502)**

S. 302 - Appreciation of Circumstantial Evidence

Court held - For bringing home the guilt on the basis of the circumstantial evidence, the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn, are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete, that there is no escape from the conclusion, that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner.

In order to sustain conviction, circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused, but inconsistent with his innocence. No hard-and-fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence, which

exercise is to be done in the facts and circumstances of each case. **(Rukia Begum and others v. State of Karnataka, (2011)2 SCC (Cri) SC 488)**

S.302 – Appreciation of Evidence

Murder trial Circumstantial evidence – Appellant - accused alleged to have assaulted deceased with barchha resulting in his death, Motive for commission of crime proved, Appellants seen immediately before occurrence at place of occurrence and deceased had come there shortly thereafter – Thus, they had opportunity to kill deceased. After occurrence they were seen running away together from place of occurrence. Furthermore, bloodstained barchha recovered at instance of appellants from a place which was not visible to all. Extra-judicial confession made by the appellants before PW 10, completed chain of circumstances pointing to guilt of appellants-accused.

Circumstances from which guilt is to be drawn should be fully established and should be of a conclusive nature and exclude all possible hypotheses except the one to be proved – Facts so established must be consistent with hypothesis of guilt of accused and chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with innocent of accused and must show that in all human probability the act must have been done by accused. **(Kulvinder Singh and another v. State of Haryana, (2011)2 SCC (Cri) SC 608)**

S.306 – Death of deceased in matrimonial home by commission of suicide – Conviction of Husband/appellant by Trial Court for harassing or tormenting deceased just because she did not give birth a child – Appeal dismissed by High Court – Hence, appeal has filed before Supreme Court.

The appellant was married to one Sudesh who is said to have committed suicide on 23rd February, 1989. According to the prosecution Sudesh was married to the appellant in April/May, 1980 but she could not conceive. The appellant had been maltreating and beating Sudesh and saying that if she dies, he will be re-married. She was physically assaulted and sent to her father's house where she stayed for one and half years but due to the intervention of the panchayat members and the promise of the appellant that he would not harass her again and his request for pardon, she

came back. However, it appears that she was again harassed and tormented and ultimately driven to suicide.

The appellant was convicted by the trial court for abetting the suicide under Sec. 306 IPC, and his conviction was upheld by the High Court and he was given sentence of seven years rigorous imprisonment.

It is natural that everyone wants children, but if a woman does not have a child that does not mean that she should be insulted or harassed. In such a situation, the best course would be to take medical help, and if that fails, to an adopted child. Experience has shown that an adopted child gives as much happiness to the adoptive parents as any natural child does. Hence, court see no justification to condone such an act of harassing or tormenting a woman just because she did not give birth to a child. It may not be the fault of the wife that she did not have a child. At any event, that is no justification for tormenting or beating her and this reveals a feudal, backward mentality.

Accordingly, court uphold the conviction of the appellant recorded by the courts below but keeping in view the fact that the appellant has already undergone about five years rigorous imprisonment out of seven years, as submitted by the learned counsel for the appellant, we deem it appropriate to reduce the sentence to the period already undergone by him. **(Sudarshan Kumar v. State of Haryana, 2011 (5) Supreme 488)**

S. 354- Should be made non-bailable

Court held Outraging modesty of women Offence should be made non-bailable – India has international obligation to protect and safeguard women. Court recommended that State of U.P. along with Union of India would amend provisions of S. 354 and First Schedule to Code of Criminal Procedure by prescribing higher sentence for offence and for making it non-bailable and triable by Court of Session. **(Amit Kumar alias Mittal Vs. Sate of U.P. & Ors., 2011 Cri.L.J. 3710 (All. H.C.)**

Sec. 368 – Applicability of – Accused having no knowledge of kidnapping of the prosecutrix, Sec. 368 would not be applicable.

In the case of Smt. Saroj Kumari v. The State of U.P. [1973) 3 SCC 669], this Court while explaining the constituents of an offence under Section 368 of the IPC clearly held that when the person in question has

been kidnapped, the accused knew that the said person had been kidnapped and the accused having such knowledge, wrongfully conceals or confines the person concerned then the ingredients of Section 368 of the IPC are said to be satisfied. **(Om Prakash v. State of Haryana, 2011 (6) Supreme 244)**

S. 376 (2)(g) – Attractibility of

A plain reading of Section 376(2(g) with Explanation I thereto shows that where a woman is raped by one or more of a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of Section 376(2)(g) of the IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused.

To attract the provision it has to be shown that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. When no common intention is shown and the role of the accused is limited to wrongfully confining the prosecutrix and no rendering help when asked for, then section 376(2)(g) would not be attracted. **(Om Prakash v. State of Haryana, 2011 (6) Supreme 244)**

S. 376- Promise of marriage by accused with prosecutrix – Effect of – in rape case

There is nothing on record to show that the appellant had made honest promise to the prosecutrix to solemnize the marriage with her. He kept hidden the fact that he was already married having two children. Had this been disclosed to the prosecutrix earlier, she would not have submitted herself to have sex with the appellant. He did not allow her deliberate on the point to choose between good or bad. The promise to marry made to her by him was dishonest and not genuine. The appellant, when the had made the said promise did not have the intention of keeping to his promise, thus his promise/assurance was a really hoax to obtain the consent o the prosecutrix, which in the light of Section 90 of the Indian Penal Code would have amounted to consent in law, which would indeed constitute an offence of rape, punishable under Section 376 of the Indian Penal Code. The evidence on record convincingly proves that the exception practiced on the prosecutrix, the appellant had induced her to have sexual intercourse with him, which proves that but for the deception practiced by him, the prosecutrix, would not have had sexual intercourse with him.

The substantive sentence passed upon the appellant by the learned trial Court is reduced to four years from seven years, without disturbing the other part of the impugned judgment. Ordered accordingly. **(Gurmeet Singh Vs. State of Himachal Pradesh, 2011 Cri.L.J. 3529 (Himachal Pradesh H.C.)**

S.376 - Appreciation of evidence in rape cases

Rape - A woman who is victim of sexual assault is not an accomplice to the crime –Her evidence cannot be tested with suspicion as that of an accomplice, as a matter of fact, evidence of prosecutrix is similar to evidence of injured complainant or witness-Testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions for rape, the law does not require corroboration-Evidence of prosecutrix alone may sustain a conviction-It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. **(State of Uttar Pradesh v. Chhotey Lal, (2011) 2 SCC (Cri)** 674 **(All. H.C.)**

Section 506 I.P.C. is cognizable and non-bailable

Court held - It is true that in the first schedule of Criminal Procedure Code, the offence under Section 506 IPC is described as non-cognizable and bailable, but by virtue of Section 10 of Criminal Law Amendment Act, the same was made cognizable and non-bailable in U.P. by the U.P. Government Notification No. 777/VIII-94 (2)-87 dated 2.8.1998. Section 10 of the Criminal Law Amendment Act, 1932 gives power to the State Government to declare certain offences including Section 506 IPC to be cognizable and non-bailable and it provided that on issuance of the said notification the Code of Criminal Procedure, 1898 shall stand amended accordingly.

To my mind, the decision of Mata Sewak Upadhyay (supra) has not been overruled nor anything has been argued in this respect by the learned counsel for the applicants. It appears that at the time of hearing of the case of Virendra Singh (supra) the decision of Mata Sewak Upadhyay was not brought to the notice of the Hon'ble Division Bench. In view of the decision of Full Bench of the same subject, the decision of Division Bench

cannot be given effect to. **(Parveen Kumar & Ors v. State of U.P. & Anr., 2011 Cri.L.J. 3689 (All.H.C.)**

Police encounter in good faith and in due discharge of his duty discussed

Court held - Case of death of innocent persons in fake police encounter, Exception presupposes that a public servant who causes death, did so in good faith and in due discharge of his duty as a public servant and without ill will towards the person whose death is caused. Appellants had fired without provocation killing two innocent persons and injuring one. This finding completely dislodged defence case that accused police personnel were nevertheless entitled to claim benefit of Exception 3 and question of any good faith does not arise. Obligation to prove an Exception is on preponderance of probabilities by it nevertheless lies on defence. Even on this touchstone defence cannot succeed in present case – Conviction under Ss. 302/307 r/w S. 34, confirmed. (**Satyavir Singh Rathi, Assistant Commissioner of Police and others, (2011) 2 SCC (Cri) SC 782)**

Industrial Disputes Act

Industrial Disputes Act, 1947- Sections 2(j), 2(s) and 25-F-Telecom Department- Is an Industry- Respondent workman was employed as daily wager for cabin line work in Telecom Department and has worked for 240 days- He is a workman- His services terminated without following section 25-F- Therefore, the award by Labour Court holding the termination illegal and for reinstatement is modified without back wages and with continuity in service.

The Labour Court has rightly come to the conclusion that the Telecom Department is an "industry" and the respondent is a "workman" within the meaning of sections 2(j) and 2(s) respectively of the Act of 1947 and further the respondent-workman has completed 240 days in the last preceding calendar year. **(Divisional Engineer, Telecom Project, Department of Telecom, Jodhpur v. Lachha Ram; (2011 (130) FLR 775 (Raj. HC)**

Industrial Disputes Act, 1947- Section 2(oo)(bb)- Retrenchment- Engagement of petitioners was not no contract basis- Hence the Termination of service does not fall under section 2(oo)(bb) of Act-

Award by Labour Court holding that the dispute fell within the ambit of section 2(oo)(bb) is set aside.

It is not the case of either of the parties that the engagement of the petitioners was on contract basis. So, the findings of learned Presiding Officer, Labour Court, Bhubaneswar that dispute fell under section 2(oo)(bb) of the Industrial. Disputes Act cannot be sustained.

The award dated 29.5.1997 passed by the learned Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No. 113 of 1994 is set aside and the case is remanded bake to the Presiding Officer, Labour Court Bhubaneswar for fresh adjudication. **(Akhil Kumar Sahu and another v. State of Orissa and others; (2011 (130) FLR 856) (Orissa HC)**

Industrial Disputes Act, 1947- Section 11-A-U.P. Industrial Disputes Act, 1947- Section 6(2-A)- Termination of services- Of petitioner-conductor- For carrying passengers without ticket- Though these passengers were of another bus which met with accident-Therefore, it was a fit case, where the employee should have been awarded either no punishment or lesser punishment- Labour Court should have exercised powers under section 6 (2-A) of Act- Petitioner, therefore, shall be reinstated.

In my opinion it was a fit case where the employer should have awarded either no punishment or lesser punishment than termination. Similarly the Labour Court should also have exercised its powers under section 6(2-A) U.P.I.D. Act equivalent to section 11-A of Industrial Disputes Act.

Impugned award is set aside and substituted by a direction to the respondent No. 2 to reinstate the petitioner latest by 1.6.2011 on which date petitioner shall appear before his appointing authority. Termination order is set aside and petitioner shall be treated to be in continuous service for all other purposes except for payment of salary since the date of termination till the date of joining. **(Dilip Srivastava v. Presiding Officer, Industrial Tribunal U.P. Kanpur and another; (2011 (130) FLR 393) (All.HC).**

Industrial Disputed Act, 1947- Section 33-2 (b)-Dismissal order-Approval of- Disciplinary authority differed with findings of enquiry officer- Should have recorded its tentative reasons for disagreement

and call for an explanation on it from the petitioner- But not done so- Violates principles of natural justice- Order of dismissal therefore deserves to be quashed and the order of approval is also quashed.

As rightly submitted by learned Counsel for the petitioner, in the present case, the disciplinary authority has not given any chance to petitioner to file show cause on the tentative reasons of his disagreement with the view of the enquiry officer. So, there was violation of the principles of natural justice. The Tribunal while according approval to the order of dismissal passed by the disciplinary authority did not take this fact into consideration. **(Dandapani Muli v. P.O., Industrial Tribunal, B.B.S.R. and other; (2011 (130) FLR 773 (Orissa HC).**

Industrial Disputes Act, 1947- Section 33-B- Transfer of proceedings- Government has power to transfer and withdraw any proceedings- Therefore, there was no occasion for a direction to Counsel to move an application for transfer of proceedings- Even if such an application moved, the Labour Court has no Jurisdiction to transfer the case.

Section 33-B of U.P. Industrial Disputes Act, 1947 provides power to the State Government for withdrawing any proceeding pending before a Labour Court or Tribunal etc. And transferring the same to another Labour Court. Therefore, there was no occasion for a direction to Sri Sardendu Prakach, Advocate to move an application to the Labour Court for transfer of proceedings itself to another Labour Court of co-ordinate jurisdiction which if deserves from the reference order referred to it by the State Government. Even if such and application would have been moved, the Labour Court, Saharanpur would have no jurisdiction to transfer the case to Labour Court, Meerut in view of section 33-B of the Industrial Disputes Act, 1947. **(Meerut Development Authority, Meerut v. Labour Court, Saharanpur and another; (2011 (130) FLR 868) (All. HC**)

Industrial Disputed Act, 1947- Section 33-C(2) - Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971- Section 59- Minimum Wages Act, 1948- Difference in wages- In Minimum Wages Act and wages actually paid- Claim of- Application under section 33-C(2)- Allowed by Labour Court- Application under section 33-C(2) is of the nature of execution application- Actual figure which they are entitled to not stated in the

application- Application is not maintainable- Labour Court erred in allowing the claim without verifying the muster roll- Previous complaint claiming wages as per Minimum Wages Act is still pending- Hence the present complaint is barred by section 59 of Act 1971- Labour Court, therefore, erred in allowing the application under section 33-C(2) of Act- Which is set aside.

Proceedings under section 33-C(2) are in the nature of execution when the right on the basis of which the claim have been preferred is established right. In the present case, Respondent has not stated the exact calculations before the Labour Court. Therefore, it must be held that the application as filed by the Respondent before the Labour Court under section 33-C(2) is not maintainable.

As the Labour Court without verifying whether the working days shown by the Respondents in their application tallied with the working days shown by the Petitioner in the muster roll, allowed their claim as stated in their application, it must be held that the labour Court erred in doing so.

Considering these facts and authorities cited by the Counsel, the Labour Court erred in allowing the Respondent' application under section 33-C(2) of the said Act and the impugned order is liable o be set aside. **(Sri Warana Agriculural Goods Processing Co-Opterative Society Limited, Warana Nagar, Kolhapur v. Dilip D. Patil and others; (2011 (130) FLR 813) (Bom. HC)**

Industrial Disputes Act, 1947- Section 33-C (2)- Application under- Alleged entitlement of salary in regular pay scale from a back date was not admitted by employer and also never adjudicated by any competent forum- Therefore, application under section 33-C(2) before Labour Court was not maintainable.

The alleged entitlement of respondent No. 1 of salary in regular pay scale from a back date, i.e., 1.2.1985 was not admitted by the employer and also was never adjudicated by any competent forum. The employer claim that only a status of regular employee was conferred upon the workman retrospectively but monetary benefit were provided prospectively. There is no principle of law which provides that on conferment of certain status retrospectively in a peculiar manner no other benefits not specifically

stated by employer would be deemed to have given. Therefore, also I am clearly of the view that the kind of application filed by respondent No. 1 under section 33-C(2) of the Act before Labour Court was not maintainable and wholly without jurisdiction. In the result, the impugned order cannot be sustained being without jurisdiction. **(State of U.P. v. Ram Sahi and another; (2011 (130) FLR 871) (All. HC).**

Industrial Disputes Act, 1947- Sections 33-C (2) and 2(k)- Claim of wages- Respondents employees serving as clerk with petitioners- Getting wages equal to pay scale of Class-III employee in the pay scale of Clerk- They were called upon to perform duties on each Saturday inspite of fact that five days week was declared by Government- They are entitled for wages.

Once it is accepted that the Respondents-employees have worked on Saturday and there was five working days week declared by the State Government and if, the Respondent-employees have worked on Saturday i.e., 6^{th} day, they are entitled for wages. I do not see any legal impediment or any provision brought to the notice of this Court, which prohibits payment of wages for working on 6^{th} day when there is five working days week declared by the Government. Therefore, in my view, and viewed from any angle, possible view has been taken by the Labour Court. Therefore, no interference is called for. **(General Manager, Government Milk Scheme v. Shivaji Basvant Rao Patil and others; (2011 (130) FLR 116) (Bom. HC).**

Industrial Disputes Act, 1947- Sections 25-F, 15-G and 25-H- Maharastra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971- Sections 28 read with Item 9 of Sch. IV- Retrenchment- Retrenchment of 13 workman while retaining their juniors- Company failed to prove as to why the principle of 'last come first go' not followed- Therefore, the retrenchment was invalid- Question of offering re-employment does not arise- Company had breached the provisions of section 25-H by not permitting the workman to resume work when the work was available- Unfair Labour Practice was committed by company- Industrial Court has not committed any error in directing payment of 50% of back wages.

As the retrenchment itself was invalid, the question of offering re-employment does not arise.

The Company had breached the provisions of section 25-H of the I.D. Act be not permitting the workmen to resume work when the work was available and the Mill restarted. It is apparent that am unfair labour practice as envisaged under Item 9 of Schedule IV of the MRTU & PULP Act was committed by the Company. The Industrial Court, in my opinion, was right in declaring that the Company had committed an unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act.

In my opinion the Industrial Court has not committed any error in directing payment of 50% of the back-wages. However, as I have held that the retrenchment itself was bad the workmen would be entitled to reinstatement with continuity of service and wages. **(Mahavir Steel Industries (P.) Limited, Pune v. Pune Workers Union, Pune and another; (2011(130) FLR 1103) (Bom. HC).**

Industrial Disputes Act, 1947- Natural Justice-

Industrial Disputes Act, 1947- The principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable. Admittedly, the respondent had not appeared for the enquiry on two earlier dates. On the third date too, he was absent and there was no intimation from him before the Enquiry Officer, yet the Tribunal insists that it was the duty of the Enquiry Officer to find out from the concerned department of the bank whether any intimation or application was received from the respondent. Let us take a case where the enquiry is not being held in the bank premises or even in the same town, where the concerned branch of the bank is located. In such a situation, it may take hours or even a day or two to find out whether any letter or intimation from the person facing the enquiry was received in the bank and for all that time, the Enquiry Committee would remain in suspended animation. The tribunal's observation that it was only the third date of hearing and hence, it could not be said that the respondent had adopted dilatory tactics can only be described as unfortunate. We completely reject the notion that three barren dates in an in-house proceeding do not amount to delay. **(S.B.I. Vs. Hemant Kumar; 2011(5) AWC 4560 (SC)**

Insurance Act, 1938

S.64 UM – Appointment of surveyor – There is no prohibition in Insurance Act for appointment of second Surveyor by Insurance co

There is no prohibition in Insurance Act for appointment of second surveyor by Insurance company – But while doing so, insurance company has to give satisfactory reasons for not accepting report of first surveyor and need to appoint second surveyor. (**M/S Nav Bharat International Ltd. National Insurance Co. Ltd.; 2011 (3) CPR 508 (NC)**

Interpretation of Statutes

Provision providing for an exemption has to be construed strictly

As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In Novopan Indian Ltd. (supra), dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows:

> "We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals – and in Union of India v. Wood Papers referred to therein – represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee – assuming that the said principle is good and sound – does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increase the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear

meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

Court further observed that when the language is clear and unambiguous, there is no need to resort to the interpretative process. **(M/s Gammon India Ltd. v. Commissioner of Customs, Mumbai, 2011 (5) Supreme 753)**

Taxing statutes – A taxing statute should be strictly construed

The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be. **(Comm. of Central Excise, Chandigarh v. M/s Doaba Steel Rolling Mills, 2011 (5) Supreme 637)**

When a safeguard or a right is provided which favouring the accused, the compliance thereto should be strictly construed

It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of 'substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. **(State of Delhi v. Ram Avtar @ Rama, 2011(6) Supreme 134)**

Judges Inquiry Act, 1968

S. 3(2)(c) - Natural Justice – Bias – Issue of bias has to be seen from the angle of a reasonable, objective and informed person.

It is not in dispute that respondent No. 3 participated in the seminar organized by the Bar Association of India of which he was Vice-President. He demanded public inquiry into the charges leveled against the petitioner before his elevation as a Judge of this Court. During the seminar, many eminent advocates spoke against the proposed elevation of the petitioner on the ground that there were serious allegations against him. Thereafter, respondent No. 3 drafted a resolution opposing elevation of the petitioner as a Judge of this Court. He along with other eminent lawyers met the then Chief Justice of India. These facts could give rise to reasonable apprehension in the mind of an intelligent person that respondent No. 3 was likely to be biased. A reasonable, objective and informed person may say that respondent No.3 would not have opposed elevation of the petitioner if he was not satisfied that there was some substance in the allegations leveled against him. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and we have no doubt that respondent No. 3 possesses these qualities. We also agree with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality" However, the issue of bias of respondent No. 3 has not to be seen from the view point of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion he would form! It is his apprehension which is of paramount importance. From the facts narrated in the earlier part of judgment it can be said that petitioner's apprehension of likelihood of bias against respondent No. 3 is reasonable and not fanciful, though, in fact, he may not be biased. **(Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee & ors., 2011 (5) Supreme 100)**

Juvenile Justice Care & Protection of Children Act

S. 7 – Juvenile Justice (Care and Protection of Children) Rules, 2007 – R.12 – Grounds of determination of age – Entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence

for determination of age of accused person and school leaving certificate is also valid.

An FIR was registered under Sections 302 and 307 of IPC against appellant and three others in the instant case. An Application was filed by appellant mother stating that appellant was a minor at the time of alleged occurrence. Issue in consideration in present appeal was whether appellant was a juvenile at the time of alleged occurrence.

Evidence on record that appellant had produced mark sheet of High School Examination issued by school authority. Perusal of said certificate showed reference to appellant's Roll No., his name, date of birth, name of the school, details regarding various subject, maximum marks, marks obtained and ultimate result in the examination. Another document relied on by appellant was School Leaving Certificate. Documents furnished clearly showed that date of birth of appellant had been noted as 18.06.1989. Even though Board had correctly accepted entry relating to date of birth in the mark sheet and school certificate, Sessions Judge and High Court committed a grave error in determining age of the appellant ignoring the date of birth mentioned in those documents which was illegal, erroneous and contrary to Rules. Entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. **(Shah Nawaz v. State of U.P. & anr., 2011 (5) Supreme 476)**

Section 12- Bail to Juvenile- Gang Rape of 14 year old girl- Accused being master mind- Plea of parity

The High Court considered the object of the Act and pointed out that merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated

or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile.

Rejecting the Bail application the court held that conspiracy to kidnap a minor girl at gun point in the midst of a marriage procession and then to carry her to an abandoned house and rape her was hatched up by the revisionist who in execution of it acted with criminal intent of arranging for an illegal firearm along with Umed and thereafter executed it with precision. Above sequence of events unerringly indicate criminal proclivities of the revisionist and his depraved sexuality. He, even as a juvenile has a libido psyche and can go to any extent to sooth his lust. His widow mother has no commanding control over him. Record does not indicate any other male relative to keep control of the revisionist for the betterment of his moral and psychological qualities. In such a view, if the revisionist is released on bail, not only it will be miscarriage of justice, but will push the revisionist into further moral and psychological degradation. The ambit and scope of the Act is reformative and not further degradation and therefore a juvenile offender has to be detained at such a place where he can be separated from other criminal and crimes. Legislature in its wisdom has raised the age of juvenile offender from 16 to 18 years but the revisionist being above 16 years of age, was conscious of his illegal criminal activity. It cannot be said that he was unknown of the consequences of his act. Therefore, his case falls in more than one clauses of exception as is provided under Section 12 of the Act. Rule of parity in the case of the revisionist cannot be applied because case of the revisionist stands at a different pedestal from other accused kallo. His role in the crime discussed herein above projects criminality possessed by him. (**Monu vs. State of U.P., 2011(5) ALJ 100: 2011 (74) ACC 353 All HC)**

Land Acquisition Act

(a) Land Acquisition Act, 1894, Sections 4,5-A, 6 and 17- Acquisition of private property, procedure for- Principles laid down by the Apex Court in Civil Appeal No. 3261 of 2011, decided on 18.4.2011- Held, property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4,5-A and 6 of the Act.

(b) Land Acquisition Act, 1894, Sections 4(1), first proviso- Declaration, prescription of time limit- Effect of- Held, notification under Section 4 cannot be utilized after expiry of the period of one year under the first proviso to Section 6(1) for publishing notification under Section 6. (2002) 3 SCC 533 ref.

(c) Land Acquisition- Constitution of India, Article 226- Notification under Section 4(1) applying Section 17(1) and the notification under Section 6 read with Section 17(4) of the Act and all consequential actions taken by the State Government, proposing to acquire land in the village Patwari, Paragana Dadri, District Gautam Budh Nagar set aside, directing the respondents to hand over possession of the land back to the landowners.

Case law referred : JT 2010 (8) SC 15, 2011 (3) AD (SC) 296, (2011 SCC L.Com 189 (Para 20), Civil Appeal No. 3261 of 2011)Para) 21), SLP (Civil No. 16366 of 2011)Para 24),AIR 1971 SC 2355 (Para 31), writ petition No. 48294 of 2009, writ petition No. 20156 of 2009, 2002 (3) SCC 533.

By the eleven writ petitions, under Article 226 of the Constitution of India, the petitioners have challenged the notification dated 13.3.2008 under Section 4 (1), applying Section 17(1) of the Land Acquisition Act, 1894 (in short, the Act) proposing to acquire a total of about 589. 188 hectares of land in the village Patwari, Paragana Dadri, District Gautam Budh Nagar, for public purpose namely for the 'Planned Industrial Development' in Greater Noida Industrial Development Authority (GNIDA), District Gautam Budh Nagar, recording the opinion of the Governor, that the provisions of sub section (1) of Section 17, of the Act are applicable to the said land inasmuch as the land is urgently required for the planned industrial development in District Gautam Budh Nagar through GNIDA,and in order to eliminate the delay likely to be caused by an enquiry under Section 5-A of the Act, the Governor is further pleased to direct under sub section (4) of Section 17 of the Act, that the provisions of Section 5A ofthe Act shall not apply. They have also challenged the notification published in the Official Gazette dated 30.06.2008 under Section 6 read with Section 17 (4) of the Act, declaring the acquisition of land' recording the satisfaction that sub section (1) of Section 17 is applicable and directing the Collector of Gautan Budh Nagar, though no

award under Section 11 has been made, may, on the expiry of 15 days from the date of publication of t he notice under sub section (1) of Section 9, take possession of the land mentioned in the Schedule appended to the notification.

In the result all the writ petitions are allowed. The court is set aside the notification dated 12.03.2008 under Section 4(1), applying Section 17(1) of the Land Acquisition Act 1894, proposing to acquire a total area of about 589.188 hectares of land in the village Patwari, Pargana Dadri, District Gautam Budh Nagar,and the notification dated 30.06.2008 under Section 6 read with Section 17 (4) of the Act, and all consequential actions taken the State Government. The respondents will handover possession of the land back to the landowners.

The court is also issue directions, as it have been issued by the Supreme Court, in Devendra Kumar's case (Supra) that those who have made investment booking flats etc., shall be entitled to get back the amount along with interest at an appropriate rate and if the builders refuse to pay the amount, then they shall be free to avail appropriate legal remedy. **(Har Karan Singh v. State of U.P. and others; (2011 (29) LCD) 1737) (All. HC)**

Section 6 (1), 11, 16, 11A- Land Acquisition-What constitutes taking of possession-

On the basis of the judgments in **Sita Ram Bhandar Society vs. Govt. of NCT, Delhi (2009) 10 SCC 501**, **Omprakash Verma vs. State of Andhra Pradesh (2010) 13 SCC 158, Brij Pal Bhargava vs. State of UP 2011(2) SCALE 692,** the Supreme Court culled out following principles:

i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will,

by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

The Supreme Court held-

> "the action of the concerned State authorities to go to the spot and prepare panchnama showing delivery of possession was sufficient for recording a finding that actual possession of the entire acquired land had been taken and handed over to the BDA. The utilization of the major portion of the acquired land for the public purpose for which it was acquired is clearly indicative of the fact that actual possession of the acquired land had been taken by the BDA.

Taking the view that once possession of the acquired land was handed over to the BDA on 30.6.2001 the view taken by the High Court that the acquisition proceedings had lapsed due to non-compliance of Section 11A cannot be sustained, Supreme Court referred **Satendra**

Prasad Jain vs. State of U.P., **AIR 1993 SC 2517** and quoted the following observation of the Court:

> "Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner."

(Banda Development Authority, Banda vs. Moti Lal Agarwal, 2011 (4) ALJ 150 (SC)

Section 16- Land acquisition - Once Collector made an award, he can take possession of the land- Legal presumption of vesting enshrined in section 16-Cannot be raised in favour of the acquiring authority unless actual possession has been taken. (para 11)

We have given our serious thought to the entire matter and carefully examined the records. Section 161 lays down that once the Collector has made an award under section 11, he can take possession of the acquired land. Simultaneously, the section declares that upon taking possession by the Collector, the acquired land shall vest absolutely in the Government free from all encumbrances. In terms of the plain language of this section, vesting of the acquired land in the Government takes place as soon as possession is taken by the Collector after passing an award under section 11. To put it differently, the vesting of land under section 16 of the Act presupposes actual taking of possession and till that is done legal presumption of vesting enshrined in section 16 cannot be raised in favour of the acquiring authority. **(Prahlad Singh and others v. Union of India and others, 2011 (114) RD 21)**

Ss. 17(1) and 17(4) – Whether acquisition of land for public purpose by itself would be justify exercise of power of eliminating enquiry u/S. 5-A in terms of S. 17(1) and Section 17(4) of above act – Held, "No"

It is well settled that acquisition of the land for public purpose by itself shall not justify the exercise of power of eliminating enquiry under Section 5-A in terms of Section 17(1) and Section 17(4) of the Act. The Court should take judicial notice of the fact that certain public purpose such as development of residential, commercial, industrial or institutional areas by their intrinsic nature and character contemplates planning, execution and implementation of the schemes which generally takes time of few years. Therefore, the land acquisition for said public purpose does not justify the invoking of urgency provisions under the Act. **(Devendra singh & ors. v. State of & ors., 2011 (5) Supreme 466)**

S. 18 – Compensation – Determination of

It is not an absolute rule that when the acquired land is a large tract of land, sale instances relating to smaller pieces of land cannot be considered. There are certain circumstances when sale deeds if small pieces of land can be used to determine the value of acquired land which is comparatively large in area, as can be seen from the judicial pronouncements mentioned hereunder. **(Special Land Acquisition Officer & anr. V. M.K. Rafiq Saheb, 2011 (5) Supreme 397)**

Section 18- Petition seeking compensation from the Government for land encroached-Dismissal by High Court on ground of availability of Remedy u/s 18- Held improper

Relying on its earlier judgments in **ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd., 2004(3) SCC 553** and **Kisan Sahkari Chini Mills Ltd. vs. Vardan Linkers, AIR 2008 SC 2160**, the Supreme Court held-

> "If the person aggrieved and the state are owners of adjoining lands and he claims that the state has encroached over a part of his land, or if there is a simple boundary dispute, the remedy will lie only in a civil suit, as the dispute does not relate to any high handedness, arbitrary or unreasonable action of the officers of the state and there is a need to examine disputed questions relating to title, extent and actual possession. But where the person aggrieved establishes that the state had highhandedly taken over his land without recourse to acquisition or deprived him of his property without authority of law, the landholder may seek his remedy in a writ petition. ----------the High Court would not relegate him to the alternative remedy of civil court, merely because the matter may involve an incidental examination of disputed questions of facts. The question that will ultimately weigh with the High Court is this: whether the person is seeking remedy in a matter which is primarily a civil dispute to be decided by a civil court, or whether the matter relates to a

dispute having a public law element or violation of any fundamental right or to any arbitrary and highhanded action."

(Syed Maqbool Ali vs. State of Uttar Pradesh, 2011 (4) ALJ 455 (SC)

Section 23-Determanation of market value-Non Adoption of belting system-Comparable Sale Instances-Additional Evidence against such sale deed permissible-Deduction towards development charges-Guess work and guesstimate applicability

In the present case the Supreme Court found that there was evidence on record to show that plotting has been done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities. It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction'. It also cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land. The claimants, on whom the onus lies to prove inadequacy of compensation have not even stated that whether under the relevant laws they are expected to leave any part of their land open when they are permitted to raise construction on the land in question. Accordingly the Court found no infirmity in the approach of the High Court in applying the principle of deduction and a deduction of 10% from the market value on account of development charges and other possible expenditures would be justifiable and called for in the facts and circumstances of the present case.

Regarding the element of guess work in calculation, the Supreme Court explained that 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data. 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time 'guess' cannot be treated synonymous to 'conjecture'. 'Guess' by itself may be a statement or result based on unknown factors while 'conjecture' is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se.

The Supreme Court reminded that the concept of 'guesswork' is not unknown to various fields of law. It has been applied in cases relating to insurance, taxation and compensation under the Motor Vehicles Act as well as under the Labour Laws. All that is required from a Court is that such guesswork has to be used with greater element of caution and within the determinants of law declared by the Legislature or by the Courts from time to time. The Court may apply some guesswork before it could arrive at a final determination, which is in consonance with the statutory law as well as the principles stated in the judicial pronouncements. As already noticed, the guesswork has to be used for determination of compensation with greater element of caution and the principle of guesstimation will have no application to the case of 'no evidence'. This principle is only intended to bridge the gap between the calculated compensation and the actual compensation that the claimants may be entitled to receive as per the facts of a given case to meet the ends of justice. The Supreme Court however laid down following principles controlling the application of guesstimate:

(a) Wherever the evidence produced by the parties is not sufficient to determine the compensation with exactitude, this principle can be resorted to.

(b) Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence. Further, this entire exercise has to be within the limitations specified under Sections 23 and 24 of the Act and cannot be made in detriment thereto.

(Trishala Jain & Anr vs. State of Uttaranchal, 2011(4) ALJ 507 (SC)

Concept of Eminent Domain Explained Principles of Land Acquisition laid down

(i) Eminent domains are right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion ever any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.

Dwrkadas Shrinivas vs. Sholapur Spinning and Weaving Co. Ltd., AIR 1954 SC 119, Chiranjit Lal Chowdhuri vs. Union of India, AIR 1951 SC 41 and Jiluhbai Nanbhai Khachar vs. Ste of Gujarat, (1995) Supp (1) SCC 596.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly. D.L.F. Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana (2003) 5 SCC 622: State of Maharashtra vs. D.E. Billimoria (2033) 7 SCC 336 and dev Sharan vs. State of U.P. Civil Appeal No. 2334 of 2011, decided on 7.3.2011.

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/ decision of the state with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/ or its agencies/instrumentalities without complying with mandate of Sections 4, 5A and 6 of the Land Acquisition Act, 1894. A public purpose, however laudable it may be does not entitle the Stat to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the land owner of other interested persons.

(v) Section 17(1) read with Section 17 (4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even few weeks or months. Therefore, before excluding the application of Section 5A, the concerned authority must be fully satisfied that time of few weeks or months likely to

be taken in conduction inquiry under Section 5A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the some can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

(vii) The exercise of power by the government under Section 17(1) does not necessarily result in exclusion of Section 5A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the government to direct that the provisions of Section 5A would not apply to the cases covered under Sub-section 91) or (2) Section 17. In other words, invoking of Section 17 (4) is not a necessar7y concomitant of the exercise of power under Section 17 (1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition of public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17 91) and /or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any cases, exclusion of the rule of audi alteram partem embodied in Section 5A (1) and 92) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17 91) and /or 17(4) with suspicion and carefully scrutinize the relevant record before

adjudication upon the legality of adjudication upon the legality of such acquisitions.

(Radhey Shyam (d) through L.R.s and others Vs. State of U.P. and others; 2011(4) AWC 3280)

Land Acquisition Act- Nagar Nigam raising unauthorized construction on Petitioner's land without his consent and without taking acquisition proceedings- Action deprecated and compensation directed to be paid.

Nagar Nigam is not at liberty to take possession of the land of any portion nor is authorised to take possession of the land or any portion thereof of any person unless the land is acquired or requisitioned under the provisions of the relevant act or is taken by negotiation after obtaining consent in writing. The practice of taking possession and using the land of the individual or a group of persons, without following the prescribed procedure has been very common which cannot be appreciated and we take judicial notice of the same, as cases are coming before the High Court very frequently.

In the instant case, learned counsel for the petitioner, however, submitted that the petitioner would be satisfied in case he is given adequate compensation at the prevalent market rate at the time of taking possession which can be calculated as per the provisions of Land Acquisition Act along with the interest and solacium etc., and would leave his claim for restoration of the possession.

The court is therefore, dispose of this petition with the consent of the parties counsel directing the opposite parties that in case any land of the petitioner has been used by the Nagar Nigam or by any authority for construction of the road or laying down a Kharanja or in any other manner adequate compensation as observed be given to the petitioner expeditiously.

The Sate its functionaries, Lucknow Development Authority, Avas Vikas Parishad, Nagar Nigam etc., should restrain themselves from taking possession of the land of any person without following the procedure of law.

The compensation to the petitioner shall be paid within a maximum period of four months from the date of production of the certified copy of this order before the respondents.

Let copy of this order be sent to the Chief Secretary to the Government of U.P. and the L.R. for necessary follow up. **(Dilip Kumar Gupta and another v. State of U.P. (2011 (29) LCD 1483) (All. HC (Lko. Bench)**

Legal Services Authorities Act, 1987

Permanent Lok Adalt-Jurisdiction of Civil Court –How determined when there is an ouster clause

It is now well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and that only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one of such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. If the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action only courts at Delhi would have jurisdiction, the said clause is invalid in law,

Permanent Lok Adalat when the statement, additional statements, replies, etc. Are filed in an application filed before it, the Permanent Lok Adalat is required to conduct conciliation proceedings between the parties, taking into account, the circumstances of the dispute and assist the parties in their attempt to reach an amicable settlement of the dispute. If the parties fail to reach an agreement the permanent Lok Adalat is required to decide the dispute. The Permanent Lok Adalts are authorised to deal with and decide only disputes relating to service rendered by notified public utility services provided the value does not exceed rupees ten lakhs and the dispute does not relate to a non-compoundable offence.

The nature of proceedings before the Permanent Lok Adalt is initially a conciliation which is non-adjudicatory in nature only if the parties fail to reach an agreement by conciliation, the Permanent Lok Adalat mutates into an adjuratory body, by deciding the dispute. In short,

the procedure adopted by the Permament Lok Adalats is what is popularly known as "CONARB" (that is "conciliation-cum-arbitration") in the United States, where the parties can approach a neutral third party of authority for conciliation and if the conciliation fails, authorise such neutral third party or authority to decide the dispute itself, such decision being final and binding. The concept of "CON-ARB" before a Permanent Lok Adalat is completely different from the concept of judicial adjudication by the courts governed by the Code of Civil Procedure. The Permanent Lok Adalt not being a "court", the provision in the contract relating to exclusivity of jurisdiction of courts at Delhi will not apply.

Section 22-B of the LSA Act provides that permanent Lok Adalats shall be established for exercising jurisdiction in respect of one or more public utility ervices for such areas as may be specified in the notification. It is not disputed that the Permanent Lok Adalt for public Utility Services, Hyderabad was constituted for the area of Hyderabad and transport services by way of carriage of passengers by air is a public utility service. Therefore we hold that the Permanent Lok Adalt at Hyderabad had the jurisdiction to entertain the application against the appellant.

We may also at this juncture refer to the confusion caused on account of the term Permanent Lok Adalat being used to describe two different types of Lok Adalats. The LSA Act refers to two types of Lok Adalats. The first is a Lok Adalat constituted under Section 19 of the Act which has no adjudicatory functions or powers and which discharges purely conciliatory functions. The second is a Permanent Lok Adalat established under 22-B(1) of the LSA Act to exercise jurisdiction in respect of public utility services, having both conciliatory and adjudicatory function. The expression "Permanent Lok Adalat" should refer only to Permanent Lok Adalats established under Section 22-B(1) of the LSA Act and not to the Lok Adalats constituted under Section 19. However in many States, when Lok Adalats are constituted under Section 19 of the LSA Act for regular or continuous sittings (as contrasted from periodical sittings), they are also called as Permanent Lok Adalats even though they do not have adjudicatory function.

In LIC v. Suresh Kumar (2011) 7 SCC 491 this Court observed:

"It is needless to state that Pemanent Lok Adalat has no jurisdiction or authority vested in it to decide any lis, as such, between the parties even where the attempt to arrive at an agreed settlement between the parties has failed."

The said decision refers to such a "Permanent Lok Adalat" organised under Section 19 of the Act and should bot be confused with Permanent Lok Adalats constituted under Section 22-B(1) of the Act. To avoid confusion, the State legal Services Authorities and the High Courts may ensure that Lok Adalats other than the Permanent Lok Adalats established under Section 22-B(1) of the Act in regard to public utility services, are not described as Permanent Lok Adalats. One way of avoiding the confusion is to refer to the Lok Adalats constituted under Section 19 of the Act on a regular or Permanent basis as " Continuous Lok Adalats". **(Interglobe Aviation Limited v. N. Satchidanand; (2011) 7 Supreme Court Cases 463)**

Minimum Wages Act, 1948

Minimum Wages Act, 1948- Section 12- Contract Act, 1872- Sections 23 and 10- Civil Procedure Code, 1908- Section 96- Minimum wages- Respondent claiming the differential amount of minimum wages paid to security guards- Suit for recovery decreed in favour of respondent with *pendent lite* and future interest @ 12% p.a.- Appellant being a Government body cannot take a stand that they are not liable to pay the amount in terms of minimum wages- Appellant being a society under the aegis of Government of NCT of Delhi- Cannot digress from its social and statutory obligation.

The appellant being a Government body cannot take a stand that they are not liable to pay the amount to the respondent in terms of the minimum wages. It is rather the duty of the Government to see that every employer pays wages in consonance and conformity with the Minimum Wages Act. Although the respondent did not place any material on record to show that it has been paying the minimum wages to the said security but considering the fact that the respondent has taken the plea that it was paying the other statutory dues to the security guards deployed by it, therefore, it can be safely assumed that the respondent must have been paying the wages as per the Minimum Wages Act otherwise the

proceedings against the respondents itself could have been initiated for violating the provisions of Minimum Wages Act. The appellant continued to take the services of the respondent till 1999 although the initial agreement was for a period of three months and this it self shows that the appellant was fully satisfied with the services rendered by the respondent. It can also be safely assumed that in the agreement dated 3rd October, 1984 although there is no term which could decipher that the appellant had agreed to pay the wages as per the Minimum Wages Act, but the amount as was agreed between the parties was certainly based on the minimum wages as were then applicable. It is thus quite evident that both the parties were conscious of this fact as to rate of minimum wages in force as on the date of the execution of the agreement and, therefore, the appellant being a Government body ought to have agreed to pay the respondent the revised amount after calculating minimum wages as were raised by the Government through various Gazette Notifications from time-to-time.

The minimum wages are guaranteed irrespective of the capacity of the employer to pay to ensure the worker not only his sustenance and that of his family but also the preservation of his efficiency as a worker. It is the solemn duty of every instrumentality of the State to guarantee minimum wages to its workforce and no such instrumentality can set it off by making a contract to the contrary. It cannot be lost sight of the fact that the guarantee of minimum wages to the workforce is the hall-mark of a progressive nation state and the appellant being a society under the aegis of the Government of NCT of Delhi cannot digress from its social and statutory obligation. **(Tool Room & Training Center v. Delhi Industrial Security Guards (Regd.) (2011 (130) FLR 75) (All. HC)**

Minimum Wages- Benefits of proper wages- Equivalent to minimum wages- State cannot discriminate within its own employees- Cannot deprive them of benefits of proper wages- Equivalent to minimum wages as prescribed under Minimum Wages Act- Application petitioner was appointed as water woman, received consolidated salary as Rs. 285/- p.m.- He was required to discharge duty for six hours a day- On post known as 'part-time water bearer'- Non receiving of adequate wages by employee is evident on record- Notification dated 11.2.2009 prescribed minimum wages- Part-time employees are covered by the notification- Thus part time employees cannot be

denied benefits of minimum wages as prescribed- Appropriate directions issued accordingly to respondent to pay equivalent to full rate of minimum wages plus allowance.

Part-time employees covered by the Notification and working in the dispensary of doctor and consulting room of the doctor working more than four hours are eligible to get full minimum wages with allowance as prescribed under the Notification, would in its own strength be applicable to the part time employees of the State and its establishments. Unfortunately, time and against, as could be seen from hereinabove, the finance department is consulted but the voice of the petitioner even sometime, routed through Court orders, have fallen on deaf ears. The applicant's main prayer is that she is not given the wages, which even as per the State authorities are the prescribed minimum wages to be admissible to those part times working in the Doctor's dispensary or consulting room, as the Notification dated 11.2.2009 contains explanation for the purpose of notification.

The petitioner-applicant, who is admittedly working for six hours a day i.e. for more than four hours in the establishment of the Government, than, she and/or similarly situated other employees cannot be denied the benefits of receiving minimum wages, which Government itself has prescribed for part time employees working in the dispensary and consulting rooms of the doctors.

State, therefore, cannot deny this wages that is equated to minimum wage plus special allowance which are made admissible to the part time employees of doctor's dispensary and consulting rooms, who are putting more than four hours of part time work to its own employees like present petitioner, who are admittedly working for six hours a day, The denial therefore, is in may view squarely hit by Article 14 of the Constitution of India. **(Manjulaben Punja Lal Dabhi v. State of Gujarat and other; (2011 (130) FLR 824) (Guj. HC)**

Payment of Wages Act, 1936- Section 15-Wrongful deduction of wages- Order passed by Prescribed Authority declaring that amount wrongfully deducted by petitioner shall be paid along with compensation- Petitioner could not show any order of punishment of recovery- Amount was wrongfully deducted and prescribed authority

has jurisdictions to pas order under section 15 to entertain the matter- Rest amount is with respect to overtime when they have entertain during holidays but were not paid wages- Petition dismissed with exemplary cost.

In the circumstances, it cannot be said that the amount was not wrongfully deducted by employer and, prescribed Authority under section 15 had no jurisdiction to entertain the matter.

The rest of the amount is with respect to overtime claimed by respondents 2 and 3 on the ground that they worked during holidays but were not paid wages at the rate overtime payment is made which has been allowed by Prescribed Authority and this is well within the jurisdiction of Prescribed Authority under section 15 of the Act. Hence there is no jurisdictional error in the order impugned in this writ petition. **(Ramala Sahkari Chini Mills Limited, Meerut v. Authority under Payment of Wages Act and others; (2011 (130) FLR 812 (All. HC)**

Mohammedan Law

Mohammedan Law- Written deed of Gift- Held, is not required to be registered. AIR 1962 AP 199 (FB)- not approved, AIR 1984 Gau. 41- approved

Transfer of Property Act, 1982, Section 123, 129- Registration Act, 1908, Section 17- Mohammedan Law- Written deed of Gift executed by a Mohammedan - Not required to be registered

Mohammedan Law- Oral gift, three essentials of- (1) Declaration of the gift by the donor, (2) acceptance of the gift by the done and (3) delivery of possession- An oral gift fulfilling all the three essentials make the gift complete and irrevocable

The parties are government by Sunni Law. The plaintiffs averred in the plaint that Shaik Dawood died intestate on December 19, 1968 and the plaintiffs and defendants 1 to 3 became entitled to 'A' schedule properties and half share in 'B' schedule properties. The plaintiffs stated that he defendants 4 to 7 are entitled to other half share in 'B' schedule properties.

Mohammed Yakub- defendant 2- contested the suit for partition. He set up the defence that Shaik Dawood executed hiba (gift deed) on February 5, 1968 and gifted his properties to him. Shaik Dawood put in

possession of the hiba properties on that day itself. The hiba became complete and the plaintiffs were fully aware of that fact. The defendant 2 in his written statement also referred to a previous suit for partition filed by some of the parties which was dismissed in default.

Some of the original parties have died during the pendency of the suit. Their legal representatives have been brought on record.

The court os unable to concur with the view of the Full Bench of Andra Pradesh High Court in the case of Tayyaba Begum (supra). We approve the view of the Calcutta High Court Nasib Ali (supra) that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence.

The High Court in the impugned judgement relied upon the Full Bench decision in the case of Tayyaba Begum (supra) but we have already held that the view of the Full Bench in Tayyaba Begum (supra) is not a correct view and does not lay down the correct law.

Consequently, the appeal is allowed and the judgement and order dated September 13, 2004 passed by the High Court of Andhra Pradesh is set aside. The Judgement and decree dated April 27, 1988 passed by the Principal, Subordinate Judge, Vishakapatnam is restored. The parties shall bear their own costs. **(Hafeeza Bibi and others v. Shaikh Farid (Dead) by LRs. And other; (2011 (29) LCD 1407) (SC).**

Motor Vehicles Act

Sections 140, 163-A, 166, 167 and 168- Motor accident claim, choice of the forum for- Held, option is open to the claimant under Section 167 of the Act to choose a forum- Compensation, if award under Section 163-A as a measure of speedy and effective remedy, not open at later stage to invoke the jurisdiction conferred by Section 166 of the Act. (2004) 5 SCC 385 and 2001 ACJ 2059 (SC) ref

(b) Motor Vehicles Act, 1988, Sections 163-A, 166 and 168- Motor accident claim, award of compensation- Claim petition was tried under Section 166- Merely referring of Section 163-A along with Section 166 by the Tribunal- Held, the award not rendered illegal

(c) Motor Vehicles Act, 1988, Sections 165 and 166- Motor accident claim, persons entitled to apply for- Held, driver or owner of the vehicle not differentiated- Any person who has suffered injury in the accident may apply

(d) Moto Vehicles Act, 1988, Sections 166, 168- Motor accident, entitlement to claim compensation for- Held, where a person died while travelling in a vehicle because of accident or some unforeseen event- He/she shall be entitled for compensation under the Act

(e) Accident, concept of- Held, accident is an unplanned event frequently resulting in, bodily injury, property, damage or both

The tribunal has assessed the notional income of the deceased instead of relying upon the pleading with regard to earning of Rs. 5000/-. Grant of compensation on the basis of notional income reveals that the tribunal was conscious with the surrounding facts and circumstances while awarding compensation. Merely because the deceased was the son of the owner shall not make out a case for denial of compensation. Section 165, 166 and 168 of the Act do not contain any rider with regard to payment of compensation on the basis of relationship, caste, creed or religion. The legal heir and successor or dependants of the occupant of the vehicle dying in accident shall be entitled for payment of compensation subject to insurance cover and fulfilment of necessary conditions.

In view of above, the impugned award does not seem to suffer from any impropriety or illegality. The appeal, being devoid of merit, is dismissed. Let the entire amount be deposited before the tribunal along with interest within two months, in case already not deposited and the tribunal shall release the compensation immediately thereafter within a month in terms of the award to the claimants.

Subject to above, the appeal is dismissed. **(The National Insurance Co. LTD., Lucknow v. Smt. Manju Devi and others; (2011 (29) LCD 1783) (All. HC) (Lko. Bench)**

Section 147, 149- Public Transport vehicle loading more passengers than permitted- Liability of Insurance Company to pay and recover from the owner

Referring to its earlier judgments in **National Insurance Co. Ltd. vs. Challa Bharathamma, 2004 AIR SCW 5301, New India Assurance Company vs. Satpal Singh, [(2000) 1 SCC 237], New India Assurance Co. Ltd. Vs. Asha Rani, [(2003) 2 SCC 223], National Insurance Company Ltd. vs. Nicolletta Rohtagi, [(2002) 7 SCC 456], National Insurance Co. Ltd. vs. Swaran Singh, [(2004) 3 SCC 297], National Insurance Co. Ltd. vs. Baljit Kaur, [(2004) 2 SCC 1], National Insurance Co. Ltd. Vs. Anjana Shyam, [(2007) 7 SCC 445],** the Supreme Court held-

> "The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

(United India Insurance Co. Ltd. vs. K.M. Poonam, 2011 (4) ALJ 143 (SC)

S. 147(1) – Death of a person travelling on bonut of a tractor when he fell and came under its wheels – Case of no fault liability – Liability of Insurance Company

It is quite clear that tribunal has not found any rash and negligent driving by the driver of the tractor and has concluded that the claimants would be entitled to compensation under no fault principle, since the death occurred from an accident arising out of the use of motor vehicle. There is no evidence on record to enable this court to interfere with the finding that death occurred due to an accident arising out of the use motor vehicle. In so far making the insurance company liable under S. 140 of the Motor Vehicles Act without giving right to recover the amount of compensation awarded U/s. 140 from the owner is concerned, the same appears to be suffering from an error in law. When a passenger cannot travel on the bonut of the tractor under the insurance policy then the accident which occurred due to negligence of such passenger cannot entitle the claimant to demand compensation from the insurance company, even if the finding is that the driver was not driving the vehicle rashly and negligently, primarily because the provision of the S. 140 relates to liability to pay compensation on the principle of no fault by the owner of the vehicle and not the insurance company and secondly, the deceased was travelling on the bonut of the tractor which was inviolation of policy. Hence, insurance company could not be made liable to pay compensation without a right to recover the amount from the owner. **(United India Insurance Co. Ltd. V. Shivnathi; 2011 ACJ 1644 (All HC)**

S. 147(1) – Death of passenger travelling on roof of Bus when the bus hit a tree – Insurance Co. seeks to avoid its liability on the ground the deceased was travelling on the roof was not a passenger – Held, that deceased was a passenger and Insurance Co. is liable to pay compensation

It does not appear from the written statement of the appellants that they had taken the specific plea that deceased was not a *bona fide* passenger. The deceased could not be said to be a valid passenger merely because he was not sitting inside the bus, therefore, the finding of the Tribunal to the effect that the deceased at least tried to be passenger and as such this was covered by the insurance policy cannot be faulted with.

The factum of travelling of the deceased by the bus is not denied by the insurance company but the claim of the defendants is completely being denied by the appellant insurance company only on the ground that he was travelling on the roof of the bus. The Apex Court in *Amalendu Sahoo v. Oriental Insurance Co. Ltd.; 2010 ACJ 1250 (SC),* has held that insurance company cannot repudiate the claim in toto even if any term of policy is violated. In this view of the law settled by the Apex Court even if the deceased was not travelling in the bus, it cannot be construed that the terms and conditions of the insurance policy have been violated, which has not been placed before the court to establish that travelling on the roof of the vehicle by a passenger is fatal to his claim. **(New India Assurance Co. Ltd. V. Hasina Begum and Others; 2011 ACJ 2156 (All HC)**

S. 147(1) – Corporation took mini bus on hire from its owner for plying on route allotted to it by RTO – Vehicle was given on hire by owner alongwith insurance policy, driver provided by owner supposed to drive under instructions of conductor appointed by corporation – Corporation become owner of vehicle for the specific period and it will be deemed that vehicle transferred alongwith insurance policy – Insurance Company is liable to pay compensation

Appellant and the owner had specifically agreed that the vehicle will be insured and a driver would be provided by owner of the vehicle but overall control, not only on the vehicle but also on the driver, would be that of the Corporation. Thus, the vehicle was given on hire by the owner of the vehicle together with its existing and running insurance policy. In view of the aforesaid terms and conditions, the insurance company cannot escape its liability to pay the amount of compensation. There is no denial of the fact by insurance company that at the relevant point of time the vehicle in question was insured with it and the policy was very much in force and in existence. It is also not the case of the insurance company that the driver of the vehicle was not holding a valid driving licence to drive the vehicle. The Tribunal has also held that the driver had a valid driving licence at the time of accident. It has also not been contended by it that there has been violation of the terms and conditions of the policy or that the driver was not entitled to drive the said vehicle.

In the instant case, the driver was employed by Ajai Vishen, the owner of the bus, but evidently through the agreement driver was supposed

to drive the bus under the instructions of conductor who was appointed by the Corporation. The said driver was also bound by all orders of the Corporation. Thus, it can safely be inferred that effective control and command of the bus was that of the appellant.

Thus, for all practical purposes, for the relevant period, the Corporation had become the owner of the vehicle for the specific period. If the Corporation had become the owner even for the specific period and the vehicle having been insured at the instance of original owner, it will be deemed that the vehicle was transferred along with the insurance policy in existence to the Corporation and thus insurance company would not be able to escape its liability to pay the amount of compensation. **(U.P. State Road Transport Corporation v. Kulsum & Ors.; 2011 ACJ 2145 (SC)**

Section 147(b)-Negligent driving by scooter owner resulting in his death- Liability of insurer if no additional premium paid-No

The High Court referred the judgments in **Oriental Insurance Company Ltd. vs. Smt. Jhuma Saha, AIR 2007 SC 1054** wherein it was observed that 'The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147(b) of the Motor Vehicle Act, which in no uncertain terms covers a risk of a third party only, would be attracted in the present case' and **New India Assurance Company Ltd., vs. Sadanand Mukhi, AIR 2009 SC 1788** where in it was observed that 'Whereas, the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident; in case involving owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property.' The High Court while holding that 'the scooter driver or his heirs are not entitled to any compensation for the injury or on the death of the driver unless premium for covering the risk of injury or death was also paid', made following suggestions:-

1. It is a hard case, where the only bread earner died leaving the family without any support. A policy covering the risk of injury or death of the driver (other than under the EC Act) can always be taken but it is not mandatory.

2. Often, the policy covering the risk due to the accident to the driver (other than under the EC Act) is not taken, as the insured is unable to envisage such a situation. The insurance companies also do not inform the insured as it increases the premium and they stand losing them to the other insurance companies, who might not inform them and cover the third party risk at lesser premium.

3. The position of passengers sitting in a private vehicle is the same.

4. It would be good idea to statutorily require insurance of the driver and the passengers in a private vehicle as is the case for covering the third party risk. The Central government may consider suitability/feasibility of amending Chapter XI of the Motor Vehicles Act 1988.

(New India Assurance Company Limited Gorakhpur vs. Smt. Uma Devi, 2011 (4) ALJ 50 (All.H.C.- DB)

S. 149 – Absence of Driving Licence – Liability of Insurance Company

Insurance company seeks to avoid its liability on ground that the driver of offending motorcycle was a minor and had no licence – Owner contended that key of motorcycle was lying on dining table and motorcyclist took the key without knowledge and consent of owner. Tribunal held that insurance co. is not liable but directed it to pay the amount to the claimants and recover the same from owner. High Court confirmed the order of tribunal. Since, Jatin was a minor and it was the responsibility of the petitioner to ensure that his motorcycle was not misused and that too by a minor who have no licence to drive the same, the MACT quite rightly saddled the liability for payment of compensation on the petitioner and accordingly directed the insurance company to pay the awarded amount to the awardees and thereafter to recover the same from the petitioner. **(Jawahar Singh v. Bala Jain & Ors.; 2011 ACJ 1677 (SC)**

Sections 166 and 168- Fatal accidents, assessment of compensation for- Multiplier to be used- 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years upto 50 years, then reduced by two units for every five years upto 70 years. (2009) 6 SCC 121 ref.

Admittedly, at the time of accident the age of the deceased was 28 years, Therefore, in terms of the ratio of the judgment in Sarla Verma's case, the amount of compensation payable to the appellants is required to be determined by applying the multiplier of 17. By doing so, the appellants would become entitle to get compensation of Rs. 5,30,400/-. If Rs. 15,000/- is added to this amount under other permissible heads, as was done by the High Court, the total amount payable to the appellants would be Rs. 5,45,400/-.

The appeal is accordingly allowed, the impugned judgment is modified and it is declared that the appellants are entitled to total compensation of Rs. 5,45,400/-. Respondent No. 1 shall, within a period of three months from the receipt/production of copy of this judgment to pay to the appellants the total amount of compensation, after deducting the amount already paid in terms of the award of the Tribunal and the judgment of the High Court. Within that period, respondent No. 1 shall also pay interest to the appellants at the rate of 6% per annum on the enhanced amount of Rs. 1,24,800/- from the fate of filing the claim petition. The balance amount shall be paid to the appellants within a period of three months form the date of receipt/production of certified copy of this judgment. **(Urmila and others v. Rashpal Kaur and others; (2011 (29) LCD 1824 SC)**

Section 166- Civil Procedure Code, 1908, order 1, Rule 10 (2)- Motor Accident claim-Impleadment of parties- Appellant, the Special Secretary of the Planning Department of the Government of Uttar Pradesh was travelling in a car provided to him by the State Government, driven by a Government employee when the accident in question took place- Plea of the appellant that he was wrongly impleaded in the claim petition as he was neither the owner of the car, nor its insurer, but was only a traveller in it, was rejected by the High Court and the writ petition claiming deletion of appellant's name from the claim petition was dismissed- Supreme Court disagreed with the above order and held the appellant not to be a necessary party in the dispute involved- 2011 (29) LCD 1920 set aside

(b) Civil Procedure Code, 1908, Order 1, Rule 10(2)- Motor Vehicles Act, 1988, Section 166- Motor Accident claim- Impleadment of parties

This appeal is filed by the Appellant challenging the legality of the judgment and order dated 28.1.2010 passed by the Allahabad High Court Lucknow Bench dismissing the Misc. Petition filed by the Appellant herein. By filing the said petition, the Appellant herein prayed for an order for deleting his name from the proceedings initiated under the Motor Vehicle Act.

Upon hearing the counsel appearing for the parties, we are unable to accept and agree with the aforesaid findings recorded by the High Court. The owner of the vehicle is already on record as a party as also the driver of the vehicle. The appellant was only travelling and an occupant in the car at the time when the accident occurred. It is not necessary to implead an occupant of the car despite the fact that such vehicle in which he was travelling had met with an accident. The court is of the opinion that since the Appellant is neither the owner of the vehicle nor was a driver of the vehicle nor he was an insurer, therefore, he is not a necessary party in the dispute involved in the aforesaid proceedings. The name of the appellant stands deleted from the array of the respondents in the claim petition. **(B.P. Mishra v. Khusbu (Minor) and other; (2011 (29) LCD 1987 SC).**

Ss. 166, 168- Award of Compensation- Consideration of- Section 168 of M.V. Act confers wide discretion on the Tribunal to determine the amount of compensation but this discretion should be exercised rationally and judiciously and not whimsically and arbitrarily

In a Motor Vehicular accident between a car and a Bus owned by Karnataka State Road Transport Corporation, respondent 2, herein in the instant case claimant who was 30 weeks pregnant, suffered a fatal blow on the stomach and her baby died inside uterus. On claim petition, Tribunal awarded a compensation of an amount of ‘ 50,000/- towards loss of unborn child and a further sum of ‘10,000/- towards pain and sufferings to claimant, along with an interest @ 6% per annum. Appeal there against for enhancement of compensation was Allowed by High Court enhancing the compensation to a consolidated amount of ‘1,80,000/- with interest @ 6% per annum. Hence present appeal has been filed against said order of High Court

On receipt of an application for compensation made under Section 166 of the Act, Section 168 of the Act casts an obligation on the Tribunal

to determine the amount of compensation "which appears to it to be just." The expression "which appears to it to be just" gives a wide discretion to the Tribunal to determine the compensation which in the opinion of the Tribunal is "just".

The word "just" connotes something which is equitable, fair and reasonable, conforming to rectitude and justice and not arbitrary. It may be true that Section 168 of the Act confers a wide discretion on the Tribunal to determine the amount of compensation but this discretion is also coupled with a duty to see that this exercise is carried out rationally and judiciously by accepted legal standards and not whimsically and arbitrarily, a concept unknown to public law. The amount of compensation awarded is not expected to be a windfall or bonanza for the victim or his dependent, as the case may be, but at the same time it should not be niggardly or a pittance. Thus, determination of "just' amount of compensation is beset with difficulties, more so when the deceased happens to be an infant/child because the future of a child is full of glorious uncertainties.

Having examined the instant case on the touchstone of the aforestated broad principles, court of the opinion that neither the Tribunal not the High Court applied any principle for determination of the amount of compensation on account of the death of a still born child. It is clear from a bare reading of the orders of the Tribunal and the High Court that no reasons have been indicated by the Tribunal while awarding a lump sum amount of "50,000/- towards the loss of unborn child and '10,000/- towards pain and suffering to the mother and by the High Court enhancing the said amounts to a consolidated amount of '1,80,000/-. Besides, in the impugned judgment, court did not find any discussion on the question of non-pecuniary compensation awarded by the Tribunal to the claimant-mother on account of pain and suffering as a result of death of the child. In the normal course, court would have remanded the matter back to the Tribunal for fresh consideration. However, bearing in mind the quantum of compensation awarded by the courts below and the fact that the accident took place in the year 1995, court is of the opinion that at this juncture it would be to too harsh to direct the claimants to undergo the entire gamut of a fresh exercise under Section 168 of the Act. Therefore, in the facts and circumstances of the case, court refrain form interfering with the

impugned judgment and dismiss the appeal accordingly. **(National Insurance Company Ltd. v. Kusuma & Anr., 2011(6) Supreme 18)**

S. 166 – Award of compensation – consideration of

Appellant was working as a Coolie and earning ‘4500/- per month and was riding as pillion on a motorcycle with one another, when they met with an accident in the instant case. Appellant sustained grievous injuries. He was treated in a private nursing home and his treatment continued for a long time. In the claim petition, it was his case and claim that even after treatment, his right hand is completely disabled and due to which, his work and livelihood completely suffered. Present appeal has been filed against judgment passed by High Court whereby High Court partly allowed appeal and enhanced compensation awarded by Tribunal.

Instantly appellant was working as a Coolie and in and around the date of the accident, wage of the labourer was between ‘100/- to 150/- per day or ‘4500/- per month. Claim being honest and bonafide there was no reason for Tribunal to have reduced monthly earning of appellant from ‘4500/- to ‘3000/- per month. Again, claimant had become permanently disabled and, had lost future earning capacity permanently. Looking to the amount awarded by Tribunal, held that the same was too less and, same held liable to be enhanced. Taking into consideration future economic loss, he would suffer because of permanent partially disability, which would not permit him to work as a Coolie or any other job, medical expenses incurred, pain and sufferings, loss of income during treatment, period of loss of future amenities and discomfort. Hence, it was observed that interest of justice would be served if an additional amount of Rupees Two Lakh was granted to appellant by way of compensation. Appeal allowed to said extent. **(Sri Ramachandrappa v. The Man., Royal Sundaram Alliance Ins. Co. Ltd., 2011 (5) Supreme 536)**

S. 166 – Claim application – Whether multiplier in second schedule can be used as a reference for determining compensation in a claim U/s. 166 – Held, Yes.

The Supreme Court taking into consideration the judgment of United India Insurance Co. Ltd. V. Patricia Jane Mahajan; 2002 ACJ 1441 (SC) & Supe Dei v. National Insurance Co. Ltd; 2002 ACJ 1166 (SC), held in para 10 that “in Arati Bebaruah v. Dy. Director General, Geological

Survey of India; 2003 ACJ 680 SC, the Court has observed that "it is now a well settled principle of law that the payment of compensation on the basis of structured formula as provided for under the second schedule should not ordinarily be deviated from. Section 168 of the M.V. Act lays down the guideline for determination of the amount of compensation in terms of section 166 thereof. Deviation from the structured formula, however, as has been held by the Court, may be resorted to in exceptional cases."

"though the present claim is made under S. 166 the principles for determining compensation as per S. 163-A can be used as a guide. Thus, the second schedule can be used as a reference for determining compensation in a claim under S. 166 of the Act." (**Sant Singh v. Sukhdev Singh & Ors.; 2011 ACJ 1474 (SC)**

S.166 – Whether the Tribunal was justified in awarding compensation towards permanent disablement in addition to the amount allowed under the head "loss of earning capacity" held, Yes

It is true that the compensation for loss of earning power/capacity has to be determined based on various aspects including the permanent injury/disability. At the same time, it cannot be construed that compensation cannot be granted for permanent disability of any nature. For example, take the case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego the other personal comforts and even for normal avocation they have to depend on others.

Taking note of his nature of work, partial loss in the eyesight, loss of middle finger of the right hand, it not only affects his earning capacity but also affects normal avocation and day-to-day work. In such circumstances, the Court is of the view that the Tribunal was fully justified in granting a sum of Rs.150000 towards permanent disability. **(B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.; 2011 ACJ 1971 (SC)**

S. 166 – Fatal accident – Principles of assessment – Choice of multiplier – Deceased bachelor aged 19 claimants parents aged 56 & 55 – Multiplier to be applied by taking average age of the parents

Motor Accident Claim Tribunal deducted 50% of the income of the deceased for personal expenses, as he was a bachelor. Considering the age of parents which was 56 & 55 years the tribunal applied multiplier of 9. High Court relying on the judgment of Apex Court in case Sarla Verma v. Delhi Transport Corpn.; 2009 ACJ 1298 (SC), enhanced the multiplier to 18. The Apex Court taking into consideration the law laid down in General Manager Kerala State Road Transport Corpn.; v. Susamma Thomas; 1994 ACJ 1 (SC), Ramesh Singh v. Satvir Singh; 2008 ACJ 814 (SC) and U.P. State Road Transport Corpn. V. Trilok Chandra; 1996 ACJ 831 (SC), took the view that dictum laid down in above cases is applicable to the present case and accordingly hold that Tribunal had rightfully applied the multiplier of 9 by taking the average of the age of parents of the deceased. **(National Insurance Co. Ltd. V. Shyam Singh & Ors.; 2011 ACJ 1990 (SC)**

S. 166 – Fatal accidents – Principles of assessment – Future prospects – Deceased neither a government servant nor permanent employee of any private company – Working as agent of LIC and Post Office – Whether Tribunal was justified in not taking into consideration prospects of future increase in income of the deceased – Held, Yes.

Undoubtedly, future increase in the income of deceased was not considered by the learned Tribunal in view of various factors, i.e., the deceased was neither a government servant nor permanent employee of any private company and his income could not be deemed to be permanent up to his age of superannuation. The deceased was working as agent in insurance company and post office at the time of accident and his income could be flexible in future and thus prospects of further increase in the income of the deceased was not required to be considered in calculating amount of compensation. **(U.P. State Road Transport Corporation v. Archana Srivastava & Ors.; 2011 ACJ 1873 (All HC) (DB)**

S. 166 – Principles of Assessment – Computation of Income – Deduction for personal expenses

Considering national insurance Co. Ltd. V. Indira Srivastava; 2008 ACJ 614 (SC) & Raghubir Singh Matolia v. Hari Singh Malviya; 2009 ACJ 1580 (SC), Hon'ble Supreme Court held that the deductions made by the Tribunal on account of HRA, CCA and Medical Allowance are done on an incorrect basis and should have been taken into consideration in calculation of the income of the deceased. Further, deductions towards EPF and GIS should also not have been made in calculation of the income of the deceased.

The Tribunal deducted 40% from the income of the deceased by way of personal expenses and the same was upheld by the High Court. The court was of the view that both courts erred in doing the same in the light of the judgment of Sarla Verma v. Delhi Transport Corpn.; 2009 ACJ 1298 (SC). Hence, the Court hold that as the deceased was married a deduction of 1/3rd should be made to her income by way of personal expenses. **(Sunil Sharma & Ors. V. Bachitar Singh & Ors.; 2011 ACJ 1441 (SC)**

S. 166 – Strict principles of proof are not attracted in cases related to road accident claims

One scooterist coming on wrong side of the road, hit right leg of pillion rider of the motorcycle in result thereof she sustained multiple injuries. Accident was witnessed by certain persons and one of them (Umed Singh) took the appellant to Dr. Punia's clinic from where she was referred to Chawla Nursing Home, Hisar. The matter was also reported to SSP, Hissar by injured which was forwarded to SSP, Hanumangarh. Tribunal awarded a compensation of Rs.136547/- alongwith 9% interest. The said award was set aside by the High Court inter alia on the ground that even though complaint was forwarded to SSP. Hissar and was further forwarded to SSP, Hanumangarh but none from the office of SSP, Hanumangarh came to prove the complaint. Filing of the complaint by the appellant is not disputed as assistant complaint clerk of SSP office Hissar proved it. If the filing of the complaint is not disputed the decision of the tribunal cannot be reversed on the ground that nobody came from the office of the SSP, Hanumangarh to prove the complaint. The general apathy of the administration in dealing with complaints lodged by ordinary citizens is far to well known to be overlooked by High Court. In this regard, the perception of the High Court in disbelieving the complaint betrays a lack of sensitized approach to the plight of a victim.

The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted (Vimla Devi v. Himachal Road Transport Corpn.; 2009 ACJ 1725 SC Referred). **(Parmeshwari v. Amir Chand & Ors.; 2011 ACJ 1613 (SC)**

S. 170 – Tribunal dispose of claim but no order was passed on application of insurance company U/s. 170 – Whether there was implied permission U/s. 170 – Held, Yes.

Virtually the Civil Court is converting itself to a Tribunal while hearing the Motor Accidents Claim petition. If the principle of Civil Procedure Code is followed then it will be seen after final disposal of the suit or the proceeding, none of the applications can be said to be pending but treated to be disposed of alongwith the suit. In such circumstances, higher court is only require to see what would be the fate of non disposal of the application at the time of the disposal of the suit or proceeding. It will come out from the facts and circumstances of each case whether such non disposal is treated to be implied permission or implied rejection. But how the entire proceeding is treated to be nullity is unknown to the Court (Para 18).

Tribunal categorically held that the owner did not appear when the Insurance Company was allowed to contest the claim and on such contest several issues were framed and ultimately award was passed. Therefore, it is case of implied permission and the appeal of the appellant cannot be held to be unsustainable. (Para 19) **(New India Assurance Co. Ltd. V. Maharunisha and Ors.; 2011 ACJ 1453 (All HC, DB)**

Municipal Election

U.P. Municipalities Act, 1916 & U.P. Municipal Corporation Act,1959 Constitutional validity of Rule 4(2) of U.P. Municipalities (Election of members, Corporators, Chairman and Mayors) Rules 2010 providing that election for these posts shall not be contested on basis of political parties-held unconstitutional

Held-

Thus, the Constitution itself has recognized the role of political parties in the political process and functioning in our Parliamentary System. Municipal law has made provisions in terms of the mandate of the Constitution whereby, the elected members belonging to political parties, from the area constituting the Municipality or the Municipal Corporation are represented in the local body. Thus, when the Constitution itself has recognized the role of political parties, and they are represented as members of the political parties in the local body, to prevent candidates from contesting on the Symbol of a party and representing that party to which they belong, to our mind, would be against this mandate and spirit of our constitutional philosophy. The allotment of a Symbol to a party has been held to be a bond created between recognized political party and its Symbol. (**See Subramanian Swamy vs. Election Commission of India, (2008) 14 SCC 318**). No explanation has been given as to why if the political parties are already represented in the local body as ex officio members by the fact of they being members of State Assembly/State Council and or Lok Sabha/Rajya Sabha, the need to exclude, an individual eligible to contest, from contesting as a member of a political party on the election Symbol of that party, which is to be allotted by the State Election Commission. The conduct of elections commences from the issuance of the notification for holding elections. Every step in the process till the results are declared and orders issued is solely within the jurisdiction of the Election Commission, in terms of law including any order, that it may issue. The law has been explained in **A.C. Jose vs. Sivan Pillai, AIR 1984 SC 921**. The allotment or reservation of a Symbol is within the exclusive jurisdiction of the Election Commission and falling within the expression 'superintendence, direction, control and conduct of elections'. See **Kanhiya Lal Omer vs. R.K. Trivedi, AIR 1986 SC 111**. **(People's Union For Civil Liberties vs. State Of U.P., 2011 (4) ALJ 256 (All.H.C.- DB)**

Narcotic Drugs & Psychotropic Substances Act

Ss. 21(b), 21(c) – Where quantity of heroin recovered from appellant was less than the commercial quantity as prescribed by the Act – accused would be liable to convicted u/s 21 (b) not U/s 21(c).

Court observed that the notification specifying small quantity and commercial quantity under Sec. 2 of the Act wherein at serial No. 56, the commercial quality of heroin is prescribed as 250 grams. Therefore, it is clear that the quantity of heroin which was recovered from the appellant was less than the commercial quantity as prescribed under the Act.

In that view, the law laid in E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau, 2008 (5) SCC 161 shall apply to the present case. We, therefore, hold that the accused is liable to be convicted under Section 21(b) and not under section 21(c) of the Act as, on the relevant date, he was found in possession of 125 grams of heroin which is less than the commercial quantity as prescribed under the Act. The maximum punishment prescribed for the offence under Section 21(b) of the Act is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees. **(Nikku Khan @ Mohammadeen v. State of Haryana, 2011 (5) Supreme 84)**

S. 42 - mandatory - information in writing to Senior Officer about search and seizure

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S. 42 – Search and seizure – Requirement to forward information in writing to senior officer before search, Secret information that accused was dealing in contraband received by Police Officer while he was on patrol duty, Officer immediately proceeding to conduct search and making seizure. Information as to seizure forward only after search, requirement under S. 42 stands substantially complied with – Search not vitiated. **(Kuldeep Singh Vs. State of Punjab, 2011 Cri.L.J. 2672 (SC)**

S. 42(2) – Non compliance of – Effect of – Non compliance with provisions of Sec. 42(2) of above said act vitiates prosecution case

Appellant was convicted in the instant case under section 18 of Narcotic Drugs and Psychotropic Substances Act, 1985 as 3.500 kilograms of opium was recovered from his residence. Appeal there against was dismissed by High Court.

Hence, the present appeal has been filed against said order of High Court.

It is clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation of the delay can however, be countenanced. Court have gone through the evidence of PW-6 Kuldip sing. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the junior officer Inspector Kuldip Singh. It is, therefore clear that there has been complete non-compliance with the provisions of section 42(2) of the Act which vitiates the conviction. **(Rajender Singh v. State of Haryana, 2011 (5) Supreme 603)**

S. 42(2), 41(1) and 50 – Section 42(2) is mandatory while search u/s 41(1) would not attract compliance with Sec. 50

In the case of Union of India v. Satrohan, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. **(State of Delhi v. Ram Avtar @ Rama, 2011(6) Supreme 134)**

S.50 - Term Magistrate is discussed

Hon'ble Patna High Court held - On perusal of the above construction of the term 'Magistrate', read with Section 2(XXIX) of the N.D.P.S. Act, what appears is that wherever the term 'Magistrate' has appeared in the N.D.P.S. Act, we have always to construe that word to mean 'Judicial Magistrate'. If this could be the meaning as has been pointed out by the Cr.P.C. under Section 3 (1), then the word 'Magistrate', which appears anywhere in the N.D.P.S. Act, especially in Section 50 has always to be referred to as the Judicial Magistrate. The Land Reforms Deputy Collector (LRDC), without being said much about it, could never be said to be a Judicial Magistrate. Even accepting the evidence put forward by the witnesses in their statement, though the same has not been supported by them in their evidence. The L.R.D.C could never mean or cold never be acknowledged as judicial Magistrate and on looking at things from that angle what I find is that there was complete non-compliance of

Section 50 of the N.D.P.S. Act. **(Bigau Gond Vs. State of Bihar, 2011 Cri.L.J. 3836 (Patna High Court)**

S. 50 – Compliance should be strictly construed – Theory of substantial compliance not applicable

As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat; (2011) 1 SCC 609, the theory of 'substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right.

While discharging the onus of section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of section 50 of the Act. Non-compliance of the provisions of section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. To secure a conviction under section 21 of the Act, the possession of the illicit article is a *sine qua non*. Such contraband article should be recovered in accordance with the provisions of section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. **(State of Delhi v. Ram Avtar @ Rama; 2011(74) ACC 634 (SC)**

S. 52 & 52A seized property should be deposited in Malkhana

Narcotic Drugs and Psychotropic Substance Act, 1985 – Ss.51, 52, 52-A and 8 & 21(b) –Recovery of smack powder, Link evidence as to seized narcotic substance missing in this case 175 gm smack recovered from possession of appellant 100 gm and 35 gm smack powder also recovered from personal search of his two employees. Trial court held all three accused guilty. High Court dismissed appeals there against. Neither of the two independent witnesses of seizure supported prosecution case. From time of seizure, till deposit of recovered narcotics in FSL, it was not clear where samples were laid or were handled by how many people and in what ways. FSL report came on 21-3-2005, charge-sheet submitted on 31-

3-2005, but alleged narcotic substance was deposited in malkhana about two months later on 28-5-2005. No explanation where seized substance was kept in the meanwhile. Alleged narcotic powder seized from possession of accused persons was never produced before trial court as a material exhibit, and no explanation for its non-production was tendered. There is, thus, no evidence to connect forensic report with substance that was seized from possession of appellant or the other accused. Non-production of such material evidence was not a mere procedural irregularity, and caused prejudice to accused. **(Ashok Alias Dangra Jaiswal v. State of Madhya Pradesh, (2011)2 SCC (Cri) 547)**

Obligation of authorities under Section 50 NDPS Act

The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before this Court in several cases and recently, the constitution Bench of this Court in Vijaysinh Chandubha Jdeja Vs. State of Gujarat (2011) SCC 609 ☹2011) 1 SCC (Cri) 497 has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed.

The Court on the basis of finding in Vijaysinh Chandubha Jdeja Vs. State of Gujarat (2011) SCC 609 ☹2011) 1 SCC (Cri) 497, held it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the magistrate and in para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecution agency to produce the suspect before the nearest Magistrate.

That being the law laid down by the Constitution Bench of this Court on interpretation of "Section 50 of the NDPS Act, we do not think that the obligation under Section 50 of the Act has been discharged statutorily by the appellant in this case. **(Narcotics Control Bureau Vs. Sukh Dev Raj sodhi; (2011) 6 SCC 392)**

Negotiable Instruments Act

S. 138 – Notice – Demanded not only the amount of cheque but also interest and cost – Notice valid

Considering the law propounded by Hon'ble Supreme Court in Suman Sethi v. Ajay Churiwal & Ors.; AIR 2000 SC 828, and K.R. Indira v. Dr. G. Adinarayana; 2004 (48) ACC 30 (SC), the court held that if the cheque amount has been specifically mentioned in the notice and in addition to that amount certain other amount such as interest, costs etc., has also been demanded by way of notice, the notice cannot be held to be invalid. **(Indu Singh v. State of U.P. & Another; 2011(74) ACC 410 (All HC)**

S. 138

Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones. The learned Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the Appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the Appellant/complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of the learned Magistrate, as confirmed by the High Court, with an increased fine. After an interval of 14 years, we are not inclined to interfere with the order of the High Court impugned in the appeal, except to the extent of increasing the amount of compensation payable by a further sum of Rs. 2 lakhs. The said amount of Rs. 2 lakhs in addition to the sum of Rs. 6 lakhs already directed to be paid by the Respondent to the Appellant, shall be deposited in the Trial Court within two weeks from date and upon such deposit being made, the Appellant will be at liberty to withdraw the same by way of compensation, together with the amounts already deposited, if not already withdrawn. In default of such deposit, the Appellant shall undergo one month's simple imprisonment. **(Kaushalya Devi Massand Vs. Roopkishore, 2011 Cri.L.J. 2593 (SC)**

Ss. 138, 139 – Complaint alleging dishonour of cheques – Acquittal by Trial court – Appeal dismissed by High Court – Hence, present appeals had filed against said orders of courts below.

Respondent No.4 – Munish Jain, a Director of M/s A.T. Overseas Ltd. had given in all four cheques for different amounts to Anil Sachar, partner of M/s Rati Woolen Mills who are appellant Nos.1 and 2 respectively. According to the case of the complainants, the said cheques were given to M/s Rati Woolen Mills, of which appellant no. 1 is a partner, in consideration of supply of goods to M/s Shree Nath Spinners Pvt. Ltd.

The aforestated cheques, which had been given by Munish Jain as Director of M/s A.T. Overseas Ltd., had not been honoured and due to dishonour of the said cheques, the complainant, namely, Anil Sachar, as a partner of M/s. Rati Woolen Mills had issued notice as required under the provisions of Section 138 of the Negotiable Instruments Act. In spite of the said notice, the complainant was not paid the amount covered under the aforestated cheques and, therefore, complaints had been filed against the present respondents.

After considering the evidence adduced and the arguments made before the trial court, the trial court acquitted the accused for the reason that the gods had been supplied by the complainants to M/s. Shree Nath Spinners Pvt. Ltd. and the cheques had not been given by M/s Shree Nath Spinners Pvt. Ltd.but they had been given by M/s. A.T. Overseas Ltd. As M/s Shree Nath Spinners Pvt. Ltd. and M/s A.T. Oversease Ltd. are two different legal entities and as there was nothing on record to show that the cheques were given by M/s. A.T. Overseas Ltd. in consideration of goods supplied by the complainants to M/s. Shree Nath Spinners Pvt. Ltd., the conclusion was that there was no liability of M/s Shree Nath Spinners Pvt. Ltd. and, therefore, dishonour of the aforestated cheques would not make signatory of the cheques from the account of M/s Overseas Ltd. liable under the provisions of the Act.

Being aggrieved by the orders passed by the learned Judicial Magistrate, First Class, Ludhiana, dated 4th May, 2007, criminal appeals were filed before the High Court of Punjab and Haryana at Chandigarh, but the said appeals have been dismissed and, therefore, the original complainants have approached this Court by way of these appeals.

The court held that Perusal of record showed that there was an understanding among complainants and accused that in consideration supply of goods to M/s Shree Nath Spinners Pvt. Ltd., M/s A.T. Overseas Ltd. was to make the payment. Said understanding was on account of the fact that directors in both companies were common and said companies were sister concerns. In the circumstances, it was held to be proved that in consideration of supply of goods to M/s Shri Nath Spinners Pvt. Ltd. and M/s A.T. Overseas Ltd. had made the payment. Instantly, M/s A.T. Overseas Ltd. paid the cheque which had been duly signed by one of its Directors, Respondent 4. Respondent 4 was also a Director in M/s Shree Nath Spinners Pvt. Ltd. Both were sister concerns having common Director. Evidence on record that both the companies were having several transactions and the companies used to pay on behalf of each other to other parties or their creditors. Said fact strengthened the presumption to the effect that M/s A.T. Overseas Ltd. had paid the cheques to the complainant, which had been signed by Respondent 4, in consideration of goods supplies to M/s Shree Nath Spinners Pvt. Ltd. Even though presumption under section 139 is rebuttable. However, no effort was made by Respondent 4 or any of the Directors of M/s. A.T. Overseas Ltd. for rebuttal of said presumption. Trial court wrongly acquitted the accused. Said incorrect view was wrongly confirmed by High Court. Impugned acquittal order passed by courts below was held liable to be set aside. **(Anil Sachar & anr. v. M/s Shree Nath Spinners P. Ltd., 2011 (5) Supreme 221)**

Payment of Gratuity Act

Gratuity- Withholding of part of amount of- Final fixation of salary made on basis of revised pay scales during service tenure of petitioner- No fraud or misrepresentation committed by petitioner- Hence, no recovery could be made from gratuity of petitioner after retirement- On ground of wrong fixation of salary

In the above, court is of the opinion that the respondents are not entitled to make any recovery from the gratuity of the petitioner after the petitioner retired on 30th June, 2000 on the ground of wrong fixation of salary of the petitioner in the revised pay-scales while the petitioner was in service. The respondents were, therefore, not justified in withholding the amount of Rs. 30,000/- from the gratuity payable to the petitioner.

It is evident that in case, fixation of salary/pay was finally done during the service tenure of an employee, and payments of salary/pay were made to him accordingly, and there was no fault or fraud or misrepresentation on the part of the employee in such fixation, then no recovery can be made from the employee after his retirement on the ground that erroneous fixation of salary was done in his case. **(Krishna Kumar v. State of U.P. and others; (2011(130) FLR 14, All. HC)**

Retiral Benefits- Liability of interest- In case of belated payments of pension and gratuity by respondent-Nagar Panchayat- Respondent is directed to pay simple interest @ 8% on such delayed payment of pension and gratuity

For undue delayed payment of retiral dues to an employee, the Apex Court has held that suitable interest must be awarded so as to compensate the employee concerned. It has repeatedly been held in most of the cases where lawful dues of an employee are not paid within a reasonable time and that too without any lawful cause, a suitable interest must be awarded on the delayed payment to such employees.

Hon'ble Supreme Court in a catena of judgments has held if payment of retiral benefits are delayed without any justification, the employer must be asked to pay interest on such amount vide *State of Kerala v. M.P. Nair, Charan Singh v. M/s. Birla Tesile andanothe, R.S. Dhull v. State of Haryana, Vijai L. Mehrotra v. State of U.P. and others, and H.G. Gowada v. Karnataka Agro Industries Corpn. Ltd., Indrajeet Singh v. State of U.P., and S.K. Dua v. State of Haryana and another.* This to mind would apply with full force in present case also.

This petition is disposed of directing respondent No. 3 to pay simple interest on delayed amount of pension and gratuity@ 8%. **(Munuwa V. State of U.P. and others; (2011 (130) FLR 69) (All HC)**

Leave- Encashment- Payment of interest- Leave encashment is a benefit granted under leave rules- Not a pensionary benefit-As such no interest cold be awarded to petitioner in regard to same.

As regards the claim for interest in respect of payment of leave encashment, the Tribunal has held that encashment of leave is a benefit under the leave rules, and the same is not a pensionary benefit as such, no

interest could be awarded to the petitioner in regard to the same. **(Ram Chandra Gupta v. Union India and others; (2011(130) 656 (All HC)**

Gratuity- Allahabad Bank Employees (Pension) Regulations, 1979- Regulations 46(1) and 45- Constitution of India, 1950- Article 14- Petitioner, was appointed as clerk in Nainital Branch of Allhabad Bank and continued as such till 23.4.1983- Promoted to JMG-Scale I Officer Cadre w.e.f. 2.5.1983 and confirmed on said post- After promotion, the terms and conditions of service of petitioner were governed by Regulations on 1979- Retirees were offered option of Gratuity under Regulation 46 or pension in lieu of-In view of Regulation 46 every officer of Bank shall be eligible for gratuity on retirement-Claim of petitioner is governed by Regulation 46(2)- He is only entitled to get amount of gratuity under section 46(2)- Accordingly the respondents are directed to pay gratuity to petitioner

From a perusal of Regulation 45, it is crystal clear that every officer of the Bank shall be eligible for gratuity on retirement including voluntary retirement as provided under Regulation 46(2) of 1979 Regulation.

We are of the considered view that the claim of the petitioner is governed by sub-clause (2) of Regulation 46 and he is only entitled to get the amount of gratuity as envisaged by sub-clause (2) of Regulation 46 of 1979 Regulation, which has been reproduced hereinabove, i.e. one month;s pay for every completed year of service, subject to maximum of 15 months' pay. To this extent, the writ petition deserves to be partly allowed and rest of the reliefs sought for by the petitioner are not tenable. **(Sudhir Kumar v. Allahabad Bank; (2011 (130) FLR 778 (Utt.HC)**

Payment of Gratuity Act, 1972-Section 7 (3-A)- Claim of interest- For delay in payment of amount of gratuity- Pendency of charge-sheet against the petitioner claimant- Cannot constitute a sufficient cause for non payment of interest on delayed payment of gratuity- Interest does not entail any penal consequences for either party- Simple interest @ 9% p.a. would be proper

The provisions of sub-section (3-A) of section 7 only7 talks of delay in payment due to the fault of the employee and even for such fault of employee, unless the employer concerned has obtained prior written permission of the controlling authority under this Act, the interest would

accrue to the petitioner employee and would be liable to be paid by the respondent-Employer. There is no question of any fault of the petitioner if the charge sheet against him wrongly issued on 31.10.2001 was admittedly dropped by the competent authority of the respondent on 3.6.2002. **(Vishal Singh Shekhawat v. Rajasthan State Ganga Nagar Sugar Mills Ltd.; (2011 (130) FLR 314 Raj. High Court- Jaipur Bench)**

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

After change of approach to physically handicapped persons, under PWD Act, it is no longer open for Bank to contend that a person with one normal eye is medically unfit to officer's job in bank.

In the present case, we are unable to appreciate the approach of the Central Government and the Bank. The State Bank of India has treated the petitioner to be medically unfit, and placed him in the category of physically handicapped, not entitled to be appointed as an officer in the bank. He has been accused of failing to give the information of loss of one eye in the application form, and has been treated to be medically unfit for the job whereas he was not required to give any such information and his one eye is normal and healthy. There is nothing which he cannot do, which a person with two healthy eyes can do.

The State Bank of India has not pleaded or placed on record any material to justify the Circulars dated 25.10.1983, and 16.1.2001, and its revision by circular dated 17.2.2007, providing that one eyed candidates would be barred from all further recruitment in clerical or official's cadre. There is absolutely nothing to show that a person with one healthy eye with normal vision cannot perform clerical or officers work in bank. There is no medical opinion supporting the decision of the bank. The decision is apparently full of prejudice to the handicapped persons. There enactment of PWD Act to provide social justice to disabled, and the shift in the approach to disabled persons by the Supreme Court negatives the argument in favour of the decision of the bank. When a totally blind person can claim to be appointed as an officer in the bank, the declaration that one eyed persons is medically unfit, is a contradiction in terms. The Circulars of the Bank denying opportunity of employment of one eyed persons as clerks and officers, is violative of Article 14 of the Constitution of India. The

issue raised in the present case is more a human right issue, than a disability issue. **(Yogesh Dutt v. Union of India and others, 2011(3) E.S.C. 2192 (All)**

Prevention of Corruption Act

Ss. 19 and 13(1)(e) & (2)

It may be that the appellants in this case held more than one officer during the check period which they are alleged to have abused; however, there will be no requirement of sanction if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or is holding a different office than the one which is alleged to have been abused, still there will be no question of sanction. In case of the present appellants, there was no question of the appellants' getting any protection by a sanction. The High Court was absolutely right in relying on the decision in Parkash Singh Badal case to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19, PC Act. **(Abhya Singh Chautala Vs. Central Bureau of Investigation, (2011) 2 SCC (Cri) SC 1)**

Prevention of Food Adulteration Act, 1954

Sec. 17—Liability of Directors -- When liable for prosecution

It is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegation had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company. (**Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector; 2011 FAJ 1 SC)**

Rule 44-I of the 1955 Rules regarding compulsory iodisation of Salt-Object of PFA Act.

The petitioners challenged the validity of Rule 44-I of the Prevention of Food Adulterations Rules, 1955, which bans the use of non-iodised common salt for human consumption. The petitioners submitted that international experience, particularly in western countries, was to move form compulsory iodisation regime to voluntary need-based iodisation regime, so that only those persons having iodine deficiency could use iodised salt. The petitioners submitted that when the entire populace does not need iodised salt, it is unfair and unjust to deny them right to choose between iodised and non-iodised salt. It was therefore contended that Rule 44-I violates Articles 14 and 21 of the Constitution, which entitle every person to have free choice in regard to consumption of food. The Supreme Court however noted that the opinion of medical experts on compulsory iodisation of salt was divided.

The object of the PFA Act is to prevent supply of adulterated foodstuff as a part of business activity in the interests of health of the community. The PFA Act seeks to eliminate the danger to human life from the sale of adulterated food and to ensure that what is sold is wholesome food. If an item of food in adulterated, or is itself an adulterant (used for adulteration, or unwholesome or injurious to health, a rule to prevent or prohibit the manufacture for sale, storage, sale or distribution of such objectionable food item will be within the scope of the Act. Such prohibition will be valid even in regard to incidental items such as misbranded food items and unlicensed food items (where licence is required). But where an item of food (used in the composition or preparation of human food and used as a flavouring) is in its natural form and is unadulterated and is not injurious to health, a rule cannot be made under the provisions of the Act to ban the manufacture for sale, storage or sale of such food item on the ground that such ban will ensure that the populace will use a medicated form of such food, which will benefit a section of the populace.

Making available medicines or medicinal preparations to improve public health is not the object of the 1954 Act. If the object sought to be achieved is to persuade the people to use iodised salt or to ensure that people use iodised salt, recourse cannot be by making a rule banning sale

of common salt for human consumption under the Act. The Act cannot be used to make a rule intended to achieve an object wholly unrelated to the Act. The good intention of the rule-making authority is not therefore sufficient to save the rule. Rule 44-I is wholly outside the scope of the Act. Rule 44-I is not a rule made or required to be made to carry out the provisions of the Act, having regard to its object and scheme, it has nothing to do with cubing of food adulteration or to suppress any social or economic mischief. **(Academy of Nutrition Improvement and others Vs. Union of India; (2011) 8 SCC 274)**

Protection of Women from Domestic Violence Act

Ss.2(f) - Domestic relationship – Live in relationship discussed

Court held- In absence of legal and valid marriage, a mere fact that the parties lived together as husband and wife to the knowledge of the people or otherwise could not confer on such a woman a status of a wife. Petitioner had admitted in her evidence in the proceeding that person she was living with was the friend of her first husband but she was not married to him. The concept of 'Live-in' relationship in the background of Indian culture and society, sanction of such relationship is yet to be interpreted by the larger Bench of the Apex Court. In view of that matter, the statutory provision, by which the "wife" has been defined in terms of Section 125 of the Code, cannot be liberalized. The statute sanctions that an illegitimate child from the father is entitled for maintenance but such sanction of maintenance has not been provided under law in respect to a woman not lawfully married with a person. AIR 2005 SC 1809, Rel. on (Para 11) **(Vineeta Devi Vs. Bablu Thakur & Anr., 2011 Cri.L.J. 3633 (Jharkhand High Court)**

Ss.2(f), 17 – Shared household

The words "has been" and the words "have lived" have been used for the purpose of showing the past relationship or experience between the concerned parties. To interpret the said provisions so as to mean that only subsisting domestic relationship are covered would result in turning the provisions of the said Act otiose. As is well settled by the judgments of the Apex Court in cases of beneficent Legislations, an interpretation which furthers it purpose must be preferred to the once which obstructs the object and paralyses the purpose of the Act. Reference could be made to the

judgment of the Apex Court reported in (2009) 14 SC 546: (AIR 2010 SC 125:2010 Lab IC 1104) the matter of Union o India v. Devendra Kumar Pant and others. Apart from that a literal construction of the provisions would show that even if the woman was in the past in a relationship she would be entitled to invoke the provisions of the said Act. The words "has been" or "have lived" appearing in the definitions are plain and clear and therefore effect would have to be given to them,. In the instant case, the Petitioner who is the aggrieved person and the Respondent No. 1 had lived together in the shared household when they were related by marriage. The Petitioner though divorced continued to stay in the shard household till she was allegedly forcefully evicted by the Respondent No. 1, she would therefore be entitled to invoke the provisions of the said Act, as the Petitioner and the Respondent No. 1 are squarely covered by the provisions of the said Act. **(Smt. Bharati Naik Vs. Ravi Ramnath Halarnkar & Anr., 2011 Crl.L.J. 3572 (Bombay High Court) (Goa Bench)**

Right to Information Act, 2005

Section 8(1)(e)- Examining bodies like C.B.S.E. not exempted from disclosure of such information under Section 8(1)(e) of the Act- The examining bodies were bound to provide inspection of evaluated answer books to examinees.

The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of Section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information, (that is information other than those enumerated in Section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties. (**Central Board of Secondary Education v. Aditya Bandopadhyay, 2011(4) E.S.C. 600 (SC)**

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act

S. 3(1) Clause (x) insult within public view

Court held - A reading of Section 3(1) shows that two kinds of insults against the member of a Scheduled Castes or Scheduled Tribes are made punishable – one as defined under clause (ii) and the other as defined under clause (x) of the said section. A combined reading of the two clauses shows that under clause (ii) insult can be caused to a member of the Scheduled Castes or Scheduled Tribes by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood, and to cause such insult, the dumping of excreta, etc. need not necessarily be done in the presence of the person insulted and whereas under clause (x) insult can be caused to the person insulted only if he is present in view of the expression 'in any place within public view'. The words 'within public view', in my opinion, are referable only to the person insulted and not to the person who insulted him as the said expression is conspicuously absent in clause (ii) of Section 3(1) of Act 3 of 1989. By avoiding to use the expression 'within public view" in clause (ii), the legislature, I feel, has created two different kinds of offences, an insult caused to a member of the Scheduled Castes or Scheduled Tribes, even in his absence, by dumping excreta, etc. in his premises or neighbourhood and an insult by words caused to a member of the Scheduled Castes or Scheduled Tribes 'within public view' which means at the time of the alleged insult the person insulted must be present the expression 'within pubic view' indicates or otherwise the legislature would have avoided the use of the said expression which it avoided in clause (ii) or would have used the expression 'in any public place'. **(Asmathunnisa Vs. State of Andhra Pradesh, Represented by the Public Prosecutor, High Court of Andhra Pradesh, Hyderabad & another, (2011) 2 SCC (Cri) SC 159)**

Using words Serval and Pallan in insulting manner is discussed

The accused belong to the "Serval" caste which is a Backward Caste, whereas he complainants belong to the "Pallan" caste which is a Scheduled Caste in Tamil Nadu. The word "Pallan" no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word "Chamar" denotes a specific

caste, but it is also used in a derogatory sense to insult someone). Scheduled Caste is, in our opinion, an offence under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the SC/ST Act"). To call a person as a "pallapayal" in Tamil Nadu is even more insulting, and hence is even more an offence.

Similarly, in Tamil Nadu there is a caste called "Parayan" but the word "Parayan" is also used in a derogatory sense. The word "paraparayan" is even more derogatory.

In our opinion use of the words "Pallan", "pallapayal", "Parayan" or "paraparayan" with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modem age.

In the modern age nobody's feelings should be hurt. In particular in a country like India with so much diversity [see in this connection the decision of this Court in Kailas V. State of Maharashtra, (2011) 2 SCC 793, we must take care not to insult anyone's feelings on account of his caste, religion, tribe, language, etc. Only then can we keep our country united and strong. **(Arumugam Servai Vs. State of Tamil Nadu, (2011) 2 SCC (Cri) SC 993)**

Service Laws

Cancellation of Candidature of appellant to post of constable for suppression and failure to disclose in the application about his involvement in a criminal case - validity of

Candidature of appellant to post of Constable was terminated in the instant case for suppression and failure to disclose in the application bout his involvement in an incident resulting in a criminal case under Sections 324/323/504 IPC. Writ Petition and Appeal there against was dismissed. Hence, Present appeal has been filed against said order of High Court. The Court has observed that though Criminal Case under Sections 324/323/504 IPC had been registered against the appellant, admittedly appellant had been acquitted. On these facts, it was not at all possible for appointing authority to take a view that appellant was not suitable for appointment to the post of a police constable. It was the duty of appointing authority, to satisfy himself on the point as to whether appellant was suitable for

appointment to post of a constable, with reference to nature of suppression and nature of criminal case. Instead of considering whether appellant was suitable for appointment to the post of male constable, appointing authority mechanically held that his selection was irregular and illegal because appellant hand furnished and affidavit stating the fact incorrectly at the time of recruitment. Impugned orders of Single judge and Division Bench was set aside. So appeal was allowed. **(Ram Kumar v. State of U.P. & Ors., 2011(6) Supreme 23)**

Punishment-Quantum- Interference of Courts- Courts should rarely interfere with the quantum of punishment

It is well settled that punishment is primarily a function of the Management. Court rarely interfere with the quantum of punishment. (**State Bank of Mysore & Others etc. v. M.C. Krishnappa; 2011(6) Supreme 128)**

Specific Relief Act

Section 16 (c)- Readiness and Willingness- Meaning-Burden of Proof

In **N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao, (1995) 5 SCC 115,** Supreme Court held:

> "....Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration

> which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and to perform his part of the contract."

Regarding discharge of onus, the Supreme Court in **P.D. Souza vs. Shondrilo Naidu, (2004) 6 SCC 649** observed:

> "It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf.... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

Held-

After referring above two observations, the Supreme Court pointed out that section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It has been rightly considered by this Court in **R.C. Chandiok vs. Chuni Lal Sabharwal, (1970) 3 SCC 140** that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct

of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties.

Considering the fact of part payment of sale consideration, having sufficient cash and financial capacity to execute the sale deed, bank statements as to the moneys in fixed deposits and saving accounts, it was concluded that the plaintiff had his "readiness" and "willingness" to perform his part of obligation under the contract. The Supreme Court remarked:

> "The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contact. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness."

(J.B. Builders vs. A. Ramadas Rao, 2011(2) ARC 716 (SC)

Section 16 (c)- Readiness and Willingness- Meaning-Permission to sell not obtained-Article 54 Limitation Act

The High Court found that an agreement was executed in the year 1995. According to Clause IV of the said agreement, permission from ceiling authority was to be taken by defendant and it was specifically mentioned by registered letter that he will inform regarding the fact of permission. Admittedly, after execution of agreement, defendant has not discharged his burden and never intimated this fact. When in 2003, plaintiff came to know regarding repeal of the Ceiling Act, then immediately he sent a registered notice but defendant has not executed the sale deed, then he filed a suit. The Court held that before sending registered letter, there was no necessity on behalf of plaintiff-respondent to prove regarding compliance of Section 16-C because a condition was there that

as soon as defendant will inform regarding permission, plaintiff will get sale deed executed. If defendant would have intimated the fact regarding permission and plaintiff would not have executed the sale deed, in that circumstances, it can be held that plaintiff was not ready and willing to perform his part of the contract. Conduct of plaintiff clearly shows that as soon as he came to knowledge regarding repeal of the Act, he filed suit meaning thereby he was ready to perform his part of the contract. As regards limitation, the court approved the finding recorded by Appellate Court that limitation will run from the date of intimation by defendant and held that from the date of intimation, period of three years will run for the purposes of filing suit. **(Mitthoo Yadav vs. Durjan Yadav, 2011(4) ALJ 427 (All.H.C. Single Judge)**

Section-39- Suit by Joint owner against other restraining defendants by permanent order or injunction dealing with any of the properties or business of the plaintiff, etc.- Whether interlocutory injunction of a mandatory character as against the prohibitory injunction could be granted?

Relying on **Films Rover International Ltd. vs. Cannon Film Sales Ltd. [(1986) 3 All ER 87)] and Kishore Kumar Khaitan and another vs. Praveen Kumar Singh (2006) 3 SCC 312**, the Supreme Court reiterated the test for issuing temporary mandatory injunction as follows:-

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
(3) The balance of convenience is in favour of the one seeking such relief.

Being essentially an equitably relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

The Supreme Court further remarked,

> "An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction."

(Purshottam Vishandas Raheja vs. Shrichand Vishandas Raheja (D) through LRs., 2011 (2) ARC 552 (SC)

Stamp Act

Section 33, 2(14) and Schedule 1-B Article 35- Rent agreement- With renewal clause for another 11 months period subject to express written consent of lessor –Renewal is not automatic –No right or liability created for future- Not a lease in perpetuity.

In view of above condition the renewal of the lease is subject to express written consent of the lesser. Therefore, unless the aforesaid condition is fulfilled by giving a written consent by the lesser the lease cannot be renewed. In other words, the renewal of the lease is not automatic. Thus, the rights allegedly created or sought to be transferred by the rent agreement in future by virtue of the renewal clause is dependent upon the written consent of the lesser which may or may not be given.

In view of above the lease cannot be treated to be renewed for another term. Accordingly, I am of the view that the aforesaid rent agreement does not create any right or liability in respect of the property in question for future without the express written consent of the lesser. In the absence of such a written consent the lease cannot be recognized for more than 11 months. **(Manish Jain v. State of U.P., 2011 (113) RD 626)**

Section 33 read with 47-A and 56(1-A)-Lease or licence-A document has to be read as a whole and every part of the document has to be considered for arriving at a conclusion. (Para 7)

It is settled law that a document has to be read as a whole and every part of the document has to be considered for arriving at a conclusion as to whether the same answers the description of a lease or a licence when the matter qua chargeability of the stamp duty on such a document is involved. **(M/s. Old World Hospitality (P) Ltd. v. State of U.P., 2011 (113) RD 628)**

Authority is not powerless to correct a mistake in its own order if mistake is bonafide and is of clerical nature- Order impugned set aside-Direction issued to correct the certificates.

The Act contains no specific provision conferring power of review or for the amendment/correction of such a certificate issued under section 10-A of the Act with regard to the payment of stamp duty in cash. However, it is well settled that where an authority is empowered to issue a certificate or pass order it always has an inherent power to correct or rectify the mistake which may accidentally occur in issuing such a certificate or passing an order. The inherent power is one which is not expressly provided but nevertheless is deemed to exist in the authority or the Court concerned. It is altogether distinct from the power of review which is normally a creation of statute.

Undoubtedly, the statute may not have conferred any power of review in this regard upon the authority concerned but such an statutory power of review, which is substantive in nature is to be distinguished from a procedural review which is inherent in every Court, Tribunal or Authority.

The Supreme Court in the case of **Grindlays Bank Ltd. v. The Central Government Industrial Tribunal and others, 1981 (42) FLR 88=AIR 1981 SC 606**, observed as under:

> "We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

The procedural review or the inherent power to correct or rectify an order or certificate is based on the maxim "actus curiae neminem gravabit" which means an act of Court shall prejudice no man as has been laid down in State of Gujrat v. Jagan Bhai, AIR 1966 SC 1631. **(M/s. Raj Hans Infratech (P) Ltd. Through its Director and another v. State of U.P., Through Principal Secretary, Stamp and Registration, Civil Secretariat, Lucknow and others, 2011 (113) RD 806)**

Stamp Duty-Deficiency of- No power to review under Stamp Act- But every authority has inherent power to correct its own mistake.

It is no doubt true that under the Indian Stamp Act no power has been conferred upon the Commissioner Stamp to review his earlier order but at the same time this Court cannot loose sight of the fact that every authority has inherent right to correct its own mistake. From the records it is established beyond doubt that before the order dated 31st March, 2010 could be passed in the proceedings initiated, an spot inspection report of the District Magistrate himself had intervened qua which a categorical direction was issued by the Collector himself that the pending matter be decided only after taking into consideration the subsequent report. In order to avoid the action in terms of the report of the District Magistrate, the

petitioners in the matter agreed to pay the deficiency of stamp duty as per the first notice issued. The Additional Commissioner Stamp, without taking note of the subsequent notice and subsequent report of the Collector, closed the proceedings on the undertaking given by the petitioners to deposit the entire deficiency. I am of the opinion that the subsequent report of the Collector could not have been ignored while passing the order dated 31st March, 2010. **(Smt. Satyawati and others v. State of U.P. Through Secretary, Finance & Revenue, U.P., Lucknow and others, 2011 (113) RD 825)**

Section 56- Revision- Revisional authority dismissed the revision for non-filing of written arguments- Committed error in law.

The concept of filing or submission of written arguments was totally alien to the judicial procedure. The parties were supposed to state the facts of their case, grounds of challenge and the relief claimed by way of pleadings and to substantiate the same by oral arguments. Thus, parties had the opportunity to plead in writing and to substantiate the pleadings by oral arguments. In other words, things which may not be explained in writing were permitted to be explained by oral submissions. Thus, pleadings and oral arguments were complimentary to one another and there was no concept of submission of written arguments.

It was lately that a trend of submitting written arguments in additions to pleadings and oral submissions came to be developed which also came to be recognized by the Civil Procedure Code.

It may be relevant to refer to Rule 2 of Order XVIII CPC wherein by Act No. 22 of 2002 sub-Rule 3(A), 3(B), 3(C) and 3(D) have been added w.e.f. 1.7.2002 permitting the parties before conclusion of the oral arguments to submit written arguments, if the Court so permits. Therefore, it is only with the permission of the Court that written arguments can be submitted before conclusion of the oral arguments or within time allowed by the Court.

The submission of written arguments is in addition to the oral arguments at the discretion of the Court but are not mandatory in nature. No penalty or any consequence for non –filiing the written statement within time allowed has been prescribed.

In view of the above, the submission of written arguments is only for the sake of convenience and probably to avoid long drawn arguments and delay but it can not be regarded as a thumb rule so as to authorize the Court or the authority to dismiss the case for non-filing of the written statement. **(Dharmendra Pal Singh v. State of U.P. and others, 2011 (113) RD 864)**

Authorities under-Vested with inherent power to recall any order which may have been passed in violation of the principles of natural justice. (para 9 and 10)

In view of above, every Court or authority is vested with inherent power to recall, modify or to correct its own order in certain contingencies. Inherent power means a power which though not conferred by the Act but is otherwise vested in the Court or the authority concerned. The exercise of the said power is based on the maxim "actus curiae neminem gravabit" which means no one should be prejudiced by the action of the Court or the authority as has been laid down in State of Gujrat v. Jagan Bhai, AIR 1966 SC 1631.

In view of above legal position, I am of the opinion that the authorities under the Indian Stamp Act, 1899 are also vested with the inherent power to recall any order which may have been passed in violation of the principles of natural justice where it is established that the notice was not issued or duly served upon the party concerned. **(Saurabh Agarwal v. Additional Commissioner (Judicial) Agra Mandal, Agra and others, 2011 (114) RD 217)**

Transfer of Property Act

Lease and Licence Distinguished- Section 105 Transfer of Property Act and Section 52 of Indian Easements Act

Held-

Whether a particular document will constitute "lease" or "licence" would inter alia depend upon certain factors which can be summarized as follows:-

(a) Whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(b) The real test is the intention of the parties-- whether they intended to create a lease or a licence;
(c) If the document creates an interest in the property, it is a lease; but if it only permits another to take use of the property, of which the legal possession continues with the owner, it is a license, and
(d) If under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

(Pradeep Oil Corporation vs. Municipal Corporation of Delhi, 2011 (2) ARC 617 (SC)

Stage of –Transfer of title to property involving immoveable Property

The Hon'ble Court considering the question as to whether title to the property passed to the appellants on execution of the sale deed, by reference to its earlier judgments in Bishundeo Narain Rai Vs. Anmol Devi ((1998) 7 SCC 498) and Kaliaperumal Vs. Rajagopal (2009) 14 SCC 193 held

(When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply.)

"It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of the Transfer of Property Act, 1882 ('the Act', for short) defines 'sale' as ' transfer of ownership in exchange for a price paid of promised or part-paid and part-promised'. If the intention of parties was that title should pass on execution and registration, title would pas to the purchases even if the sale price or part thereof is not paid. In the event of no-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55 (4) (b) of the Act.

Normally, ownership and title to the property will pass to the

purchaser on registration of the sale deed with effect form the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima-facie proof of an intention to transfer the property it is not proof of operative transfer if payment of consideration (price) is a conditions precedent for passing of the property.

The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstance and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of the Evidence Act.

Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of the entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him), title in the property would not pass to the purchaser. **(Janak Dulari Devi v. Kapildeo Rai; (2011)6 SCC 555)**

U.P. Excise Manual

R. 633 – Applicability of

It is manifest that the said Rule, made in exercise of the rule-making power of the State under the Act, would apply only in relation to manufacture, import, export and transport of potable liquor, i.e. the liquor which is capable of being consumed by human beings. Precisely for the aforesaid reason, in order to bring appellant's case within the scope of Rule 633, High Court went on to observe that it could be presumed that rectified spirit in the missing tank wagon was diverted for conversion into potable alcohol. Rule 633 is of regulatory character meant to ensure that the liquor

being exported under a bond reaches its destination and is not misused or misutilized in transit.

This court has further held that exercise of power u/r 633(7), Uttar Pradesh Excise Manual in violation of principles of natural justice is null and void. **(Kesar Enterprises Ltd. v. State of U.P. & ors., 2011 (5) Supreme 386)**

U.P. Municipalities Act, 1916

Although Court cannot go into question of sufficiency of materials, but can always see, whether there is relevant material on record for arriving at such objective satisfaction. (para 78)

The Court cannot go into the question of sufficiency of the material but it can always see:

Whether there is any material or not; and

Whether it is relevant for arriving at the objective satisfaction

This may not be possible unless the material on which this objective satisfaction is based is also indicated in the notice/order. **(Hafiz Ataullah Ansari v. State of U.P. and others, 2011(3) E.S.C. 1779 (All)(FB)**

U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974

Rule 2(c), brother does not come within definition of family of deceased. (para 9)

It is well settled position that compassionate appointment is not a constitutional right and is in pursuance to an exception carved out in the shape of scheme and, therefore, it has to be strictly complied with in its letter and spirit. The inclusion of any other relation in the definition of family of the scheme of compassionate appointment would amount of enlarge the scope of the scheme. Needless to say that the object of the scheme to enable the family to get over the financial crisis which it faces at the time of death of sole bread-earner by giving employment to the dependents of the deceased Government employee defined under the scheme within a reasonable time as prescribed and the scheme cannot be used as devices to ensure appointment as a matter of right.

As a result of forgoing discussions, the Court is of the considered view that the scheme providing compassionate appointment to the dependent of the deceased though includes the dependent unmarried brother if the deceased employee unmarried but it does not include any person who will marry to the widow of the deceased Government servant.

On the basis of the aforesaid analysis, this Court comes to the conclusion that the petitioner who is unmarried younger brother of the deceased employee, in no manner was dependent of the deceased employee and on that pretext that he will marry with the widow of deceased brother, cannot be given appointment on compassionate ground under Rules, 1974. However, it is always open for the widow of the deceased who is aged about 27 years, can approach the authority concerned for her appointment. (**Manish Kumar Musaddi v. State of U.P., 2011(3) E.S.C. 1763 (All) (L.B.)**

Rule 5- Compassionate appointment- Entitlement to- Deceased-husband was Dy. S.P. in U.P. Police- Petitioner sought appointment on compassionate appointment grounds on post of Officer on Special Duty- Right as such thereto- State Government has defended its decision to give compassionate appointment on Class III post- Under 1974 Rules, compassionate appointment is given as the post except the post which is within the purview of U.P. Public Service Commission- Rule of compassionate appointment should not be treated as rule to give alternate employment or an employment commensurate with the post held by deceased Government servant.

The rule of compassionate appointment has an object to give relief against destitution. It should not be treated as rule to give alternate employment or an employment commensurate with the post held by the deceased Government servant. It is not by way of giving similarly placed life to the dependents of the deceased by creating a supernumerary or ex-cadre post. The object of giving compassionate appointment should not be lost while relaxing the rules. (**Smt. Madhulika Pathak v. State of U.P. and others, 2011(3) E.S.C. 1887 (All)(DB)**

U.P. State Electricity Board Dying in Harness Rules, 1975

On appointment of widowed daughter-in-law under Dying-in-Harness Rules on compassionate ground after death of her father-in-law- It

was found by High Court that omission to include widowed daughter-in-law in definition of family. (para 8)

We must, however, note one feature of the word 'family' as generally contained in most Rules. The definition of 'family' includes wife or husband; sons; unmarried and widowed daughters; and if the deceased was an unmarried Government servant, the brother, unmarried sister and widowed mother dependant on the deceased 'Government servant. It is therefore, clear that a widowed daughter in the house of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law on the death of her husband does not cease to be a part of the family. The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, in our opinion, arbitrariness, as presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, prima facie, would be irrational and arbitrary. The State, therefore, to consider this aspect and take appropriate steps so that a widowed daughter-in-law like a widowed daughter, is also entitled for consideration by way of compassionate appointment, if other criteria is satisfied. **(U.P. Power Corporation Ltd. v. Smt. Urmila Devi, 2011(3) E.S.C. 1585 (All)(FB))**

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

Section 20(4) and 20(2)(f)-Tenant denying title of land lord- Provincial Small Cause Courts Act, 1887 - Section 23-Title Dispute-Whether Small Cause Court to invariably return plaint-Held-Question of title can be gone in to incidentally

Referring to the judgment of the **Supreme Court in Shamim Akhter vs. Iqbal Ahmad Khan, AIR 2001 SC 1,** High Court Held- Section 23 of the Act does not make it obligatory on the Court of Small Causes to invariably return the plaint instituted by the landlord against the tenant on the basis of contract of tenancy once the question of title is raised by the tenant in a suit for eviction. The question of title could also incidentally be gone into. The argument of the applicant that the plaint should have been returned back to the competent court does not have any merit. **(Ram Sevak vs. Pramod Kumar, 2011 (4) ALJ 616 (All. H.C. Single Judge)**

Section 21 (1) (a) and Rule 18 (2) – Maintainability of subsequent release application-applicability of res-judicata.

Referring **Janki Prasad vs. VI Additional District Judge, 1978 ARC 137,** it was held that the principles of res-judicata apply only to the situations which are static and not to changing situation. The bonafide need of the landlady must be considered with reference to the time when a suit for eviction was filed and it cannot be assumed that one the question of necessity is decided against the plaintiff, it has to be assumed that he will not have a bonafide and genuine necessity even in future.

In a case where no new facts have come into existence and there have been no intervening change or circumstances the second application may not be maintainable on the principles or res-judicata but where the landlord establishes a change of situation since the first application, the said case would require the court trying second application to re-investigate not only the question of bonafide requirement but also of the great hardship. **(Mehesh Chandra Agarwal vs. Additional District Judge, Faizabad, 2011 (2) ARC 600 (All. H.C., Lucknow Bench-Single)**

Section 21(1)(a)- Bonafide need and comparative hardship- Duty of tenant to search alternative accommodation- Effect of failure

High Court found that in the instant case on the basis of material on record, it was established that the tenant did not make any effort to search an alternative accommodation immediately, the filing of the release application and even thereafter, so the said facts are sufficient to tilt the balance of comparative hardship against the tenant. For reaching this conclusion, the High Court referred **Bhutada vs. G.R. Mundada 2003**

Supreme Court 2713; 2005(2) ARC 899 and quoted the observation made in **Salim Khan vs. IVth Additional District Judge, Jhanshi, 2006(1) ARC 588** which was as follows:

> " in respect of comparative hardship , tenant did not show what efforts they made to search alternative accommodation after filing of release application . This case sufficient to tilt the balance of hardship against them **Vide Bhutada vs. G.R. Mundada 2003 Supreme Court 2713; 2005(2) ARC 899**. Moreover, rent of Rs. 6/- per month which the tenants are paying is virtually as well as actually no rent. By paying such insignificant rent they must have saved a lot of money. Money saved is money earned. They must, therefore, be in a position to take another house on good rent. Further, they did not file any allotment application for allotment of another house. Under Rule 10(3) of the Rules framed under the Act, a tenant, against whom release application has been filed, is entitled to apply for allotment of another house immediately. Naturally such person is to be given preference in the matter of allotment. Respondents did not file any such allotment application. Thus, the question of comparative hardship has also to be decided against the tenants."

The High Court after surveying the case law on the subject came to the conclusion that the said view was further reiterated by High Court in the following cases:-

(1) Jai Raj Agarwal vs. Bhola Nath kapoor, 2005(3) ARC 417.
(2) Rulemuddin vs. Abdul Nadeem, 2007(2) ARC 62.
(3) Mohabbey Ali vs. Taj Bahadur, 2009 (2) ARC 715.
(4) Raj Kumar vs. Lal Khan, 2009 (2) ARC 740
(5) Ashis Sonar vs. Prescribed Authority 2009 (3) ARC 269.

On facts of the present case, the High Court found that petitioners/tenants were enjoying comforts of a rented shop while the landlord/respondent was doing his business from another rented shop. After filing of release application tenant had not made any sincere effort to

find out alternate accommodation. It was held that when a release application is filed before the prescribed authority, tenant must find out suitable accommodation, he cannot force landlord to allow him to run his business from a shop rented to him. **(Mohd. Zafar Khan vs. District Judge, Hardoi, 2011 (2) ARC 629 (All. H.C.- Lucknow Bench- Single Judge)**

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

Lease- Cancellation of- Provisions of section 198 of the U.P.Z.A. & L.R. Act to be availed- Lease cannot be cancelled through an administrative order- Rules of natural justice to be followed- Procedure prescribed under law cannot be avoided- Petition disposed of with observations.

Suffice it to say, if the orders have been passed by the Authorities conferring a lease on the petitioner then the respondent administration has to move an application for recall or for setting aside such orders. In the instant case, the petitioner relies on a lease conferred by the competent authority. The procedure for cancellation of a lease which can be said to be invalid is provided for under sub-section (4) of section 198 of the U.P.Z.A. & L.R. Act, 1951. This provision can be availed of in the event the lease is invalid. It cannot be cancelled through an administrative order. The rules of natural justice have to be complied with and the procedure prescribed by law has to be followed. It is well settled that even an order criticised as being void requires setting aside. Reference be had to the observations of the Apex Court in the Constitution Bench decision of Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217, (Paragraphs 25 and 26) extracted hereinunder:

> ..... "Evidently, the Appellate Court in a case which properly comes before it on appeal is fully competent to decide whether the trial was with or without jurisdiction, and it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction and thereby decides wrongly. If it affirms the conviction and thereby decides wrongly that the trial Court had the jurisdiction to try and convict it cannot be said to have acted without jurisdiction and its order cannot be treated as a nullity.
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It is well settled that if a Court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the Court to which it would lie if its order was with jurisdiction." **(Ram Awadh v. Collector/ District Deputy Director of Consolidation, Jaunpur and others. 2011 (113) RD 712)**

Suit-For declaration and partition of agricultural land-No limitation provided- If part of land is pond then parties cannot seek any declaration and partition among them.

However, it is directed that in case the land in dispute or part thereof is entered in the revenue records as pond then area mentioned as pond in the revenue records should at once be got vacated and handed over to the State and the Gaon Sabha which are also defendants in the suit by the S.D.O. in the suit in question itself. Supreme Court in Hinch Lal Tiwari v. Kamala Devi, 2001 (92) RD 689 has held that if some plot of land was pond at the time of Zamindari abolition in U.P. then it continues to be pond and the fact that it has become plain land or has been converted in to plain land does not rob it of its character of being pond and it cannot be allotted to any one and the State authorities must convert the same into the shape of a pond. The said authority has recently been followed by the Supreme Court in Civil Appeal No.1132 of 2011 Jagpal Singh v. State of Punjab decided on 28.1.2011. In the latter authority it has also been held that public utility land like pond etc. should be got vacated at once Relevant sentence in para 20 of the said authority is quoted below:

> "The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices."

It has been held in Kunti v. Commissioner, 2009 (107) RD 405 (SC) and Dinanath v. State of U.P., 2009 (108) RD 321 that Collector of each district should get the public utility land in possession of unauthorised persons vacated even if earlier some consolidation or revenue authority or Court had passed the order in favour of unauthorised occupant. The authority of Dinanath has been approved by the Supreme Court through its judgment dated 29.3.2010 given in S.L.P. (Civil) C.C. 4398 of 2010. After

quoting extensively from the judgment of the High Courts, the Supreme Court observed as follows:

"In a matter like the present one, the Court cannot be a silent spectator and is bound to perform its constitutional duty for ensuring that the public property is not frittered by unscrupulous elements in the power corridors and acts of grabbing public land are properly enquired into and appropriate remedial action taken." **(Janki Devi v. State of U.P., 2011 (113) RD 642)**

U.P. Z.A. & L.R. Rules, 1952-

Rule 285-I- Proceedings under- Section 5 of the Limitation Act, 1963 is applicable for condonation of delay.

However, as far as question of delay is concerned first of all Full Bench authority of this Court in Ram Swaroop v. Board of Revenue and others, 1990 RD 291, has held that provision for condonation of delay under section 5, Limitation Act is applicable to the proceeding under Rule 285-I of U.P.Z.A.L.R. Rule (cancellation of auction sale). **(Raksha Pal Singh and others v. Pokhi Singh and others, 2011 (113) RD 778)**

Entries based on the orders passed by the Consolidation Authorities- Proper to move an application for recall or for setting aside or to file appeal against- Order passed by adjudicatory forum cannot be set aside through administrative orders.

The Apex Court while further explaining the above in the context of the case before it went on to hold in Para 7 as under:

> "..... In our opinion, even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter parties until it is successfully avoided or challenged in a higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise....."

Any order passed by the Consolidation Officer, if ex-parte, is subject to recall or restoration proceedings as the case may be. It is also subject to appeal under section 11 of the UPCH Act or section 21(2) thereof, depending upon the nature of the orders to be assailed. Thus the Act itself is a complete Code where this opportunity can be availed of. The benefits and the rigours of the Limitation Act are also available as per section 53-B thereof. Apart from this correction of entries can be made under the U.P. Land Revenue Act, 1901 as applicable read with the provisions of the U.P.Z.A. & L.R.Act 1951. The rules of natural justice have to be complied with in all cases. Nonetheless orders passed by an

adjudicatory forum cannot be set aside through administrative orders. **(Abdul Mannon v. Collector/District Deputy Director of Consolidation, Jaunpur, 2011 (113) RD 789)**

Transfer of Land by a member of schedule caste

Uttar Pradesh Zamindari Abolition & Land reform Act 1950- From a perusal of Section 157 A UPZALR Act 1950, it would be clear that nowhere does the (Section 157A) restricts itself to agricultural land. On the contrary, the language used is that no bhumidhar or asami belonging to a Scheduled Caste Category shall have the right to transfer any land without the approval of the collect.

In our opinion, once an act has to be done by a specific method, it is not possible to accept the contention of the petitioner that because at the time of execution of the lease deed, the said lease deed was registered and that amounts to a transfer granting approval by the Collector under Section 157A of the Act. **(Suman Chauhan Vs. Union of India and others; 2011 (4) AWC 3544)**

Class-III Lessee-Statute itself determines the period of lease-No fresh determination is required- Mere continuance of entry would not confer any title beyond the period for which the lease existed. (para 8)

Where the Statute itself has determined the period of lease then in the opinion of the Court, no fresh determination is required. If the person has unauthorizedly held over the land, he can be ejected by either taking recourse to summary proceedings or to any other mode after putting him to notice. The ratio of the case of Hari Ram, Therefore, has to be understood in the aforesaid context. **(Ashok Kumar v. State of U.P. Through Secretary (Revenue), Government of U.P., Lucknow and others, 2011 (113) RD 823)**

Section 117- Notification under- Power with the Government to rescind the notification-Not in the Director of Panchayat Raj.

The reference to the Panchayat Raj Act in the said provision will not amount to conferring a power either on the Director or on any other authority under the Panchayat Raj Act to rescind a notification under section 117 of the U.P.Z.A. & L.R. Act. It is settled principle of law that a power to do in a particular authority empowers the same authority to undo

the notifications. The State Government has the power under the provisions of section 117 of the U.P.Z.A. & L.R. Act and not the Director of Panchayat Raj to rescind the notification of section 117. The powers under the Panchayat Raj Act, 1947, operate in a different field and so is the case under the U.P. Municipalities Act, 1916. There the limits of boundaries are defined that does not deal with any such power of divesting the management of Gaon Sabha Land which is within the exclusive domain of the U.P.Z.A. & L.R. Act, 1950. **(Yatindra Kumar Singh @ Raju and others v. State of U.P. Through Secretary, Urban Development, U.P., Lucknow and others, 2011 (114) RD 50)**

Wakf Act, 1995

(a) Wakf Act, 1995, Section 83- Constitution of India, Article 226- Alternative remedy, bar of- Question whether the property in dispute is waqf property or not- Held, has to be decided by the Board or by the Tribunal-Cannot be adjudicated in writ jurisdiction.

(b) Constitution of India 226-Wakf Act, 1995, Section 83- Dispute regarding the Waqf property- Writ relating to- See: Head note (a).

By The Court- Learned counsel for the petitioner says that the property falling on Khasra No. 1135 could not have been recorded as Waqf property as the properties falling under Waqf were duly registered.

Shri M.Sayeed appearing for the Waqf Board says that some ofthe properties which formed the waqf property since were not recorded as such, therefore such correction has been made. He further submits that dispute of like mature can be decided by the Tribunal under Section 83 of the Act and it is not amenable to writ jurisdiction.

In support of his contention, he relies upon a decision of a Division Bench passed by us in the case of Mohammad Ashraf Khan v. U.P. Sunni Central Waqf Board, Lucknow and other in writ petition no. 1739 (M/B) of 2011 wherein it has been held that the question regarding a particular property being the waqf property or not, has to be considered by the Board or by the Tribunal.

Considering the pleas raised, the court os of the opinion that the question whether the property in dispute is waqf property or not, ha to be decided by the Board or by the Tribunal and such matter cannot be

adjudicated upon in writ jurisdiction under Article 226 of the Constitution as it requires evidence to be led.

However, learned counsel for the petitioner states that with regard to the property in question, "y" a civil suit is also maintainable.

The courts do not intend to address ourselves on the said issue and if a civil suit is filed and is maintainable, the present order would not come in the way.

Therefore, the writ petition is dismissed with the liberty to the petitioner to pursue his remedy, as be provided under the Act itself and as may be permissible under law. **(Ram Kumar v. State of U.P. and others; (2011 (29) LCD 1913 Lko Bench Allahabad High Court)**

Words and Phrases

Concept of sustainable development

Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering environment. As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. This aspect is recognized by the concept of "sustainable development". **(Lafarge Umiam Mining Pvt. Ltd. v. Union of India & ors., 2011 (5) Supreme 417)**

Direction – meaning of

According to the Words and Phrases, Permanent Edition, Vol. 12A, the term 'Direction' means a guiding or authoritative instruction, prescription, order, command.

To sum up, the direction issued by the Court is in the nature of a command or authoritative instruction which contemplates the performance of certain duty or act by a person upon whom it has been issued. The direction should be specific, simple, clear and just and proper depending upon the facts and circumstances of the case but it should not be vague or sweeping. **(Arun Kumar Aggarwal v. State of M. P. & ors., 2011 (6) Supreme 163)**

Encumbrance – Meaning of

An ‘encumbrance’ is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See National Textile Corporation v. State of Maharashtra, AIR 1977 SC 1566 and State of H.P. v. Tarseem Singh, 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property does not amount to encumbering property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MOUs are not even agreements of sale. In these circumstances, it is not possible to hold that the respondents have created any encumbrances or violated the order dated 11.11.2002. **(Mrs. Sardamani Kandappan v. Mrs. S Rajalakshmi & ors., 2011 (5) Supreme 1)**

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STATUTE:

English translation of Nyaya Anubhag-2 (Adhinasth Nyayalaya), Noti. No. 387/VII-Nyaya-2-2011-201G-95 T.C.-4, dated May 10,2011,published in the U.P. Gazette, Extra., Part-4 ,section (Kha),dated 10th May,2011,p.2.

In the exercise of the powers under Section 13 of the **Code of Criminal Procedure, 1973** (Act No.2 of 1974) the Governor, on the recommendation of the High Court of Judicature at Allahabad, is pleased to make the following amendment in Government Notification No.1063/VII-Nyaya-2-2010-201G/1995, dated July 26, 2010

AMENDMENT

In the Schedule to the aforesaid notification the entry appearing at Serial No.3 shall be *omitted.*

Ministry of Finance (Deptt. of Revenue), Noti. No G.S.R. 470(E), dated June 21, 2011, published in the Gazette of India , Extra., Part II, Section 3(I), dated 21st June, 2011, p.2, No. 330.

In the exercise of the powers conferred by Section 9 read with Sections 4 and 76 of the **Narcotic Drugs and Psychotropic Substances Act, 1985** (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Rules,1985, namely---

1. (1) These rules may be called the **Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2011.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as the "said rules"), in Rule 54, in the proviso, for the words "during financial year for analytical purposes by any importer notified by the Government" the words "during a calendar year for analytical purposes by an importer" shall be *substituted* .

3. In Form No. 4-A of the said rules, in the 'Conditions of import certificate', after the condition (*ii*), the following condition shall be *inserted,* namely-

"(*iii*) If the import is for analytical purposes, the importer shall,--

(a) ensure that no part of the drug imported under this certificate shall be used for any purpose other than for analytical purpose;

(b) inform the Narcotics Commissioner about the complete utilisation of the Narcotic Drug imported; and

(c) follow the procedures specified in Rules 42, 45, 46 and 47."

Ministry of Finance (Deptt. of Revenue), Noti. No. S.O. 739 (E), dated April 11, 2011, published in the Gazette of India, Extra., Part II, Section 3 (ii) dated 11th April, 2011, pp. 1-2, No. 624

In exercise of the powers conferred by Section 9 read with Sections 4 and 76 of the **Narcotic Drugs and Psychotropic Substances Act, 1985** (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Rules, 1985, namely—

1- (1) These rules may be called the **Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2011.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2- In the Narcotic Drugs and Psychotropic Substances Rules, 1985, in 49, --

(i) in sub-rule (1), in clause (ii), for the word "Board" the "Secretary, Government of India, Ministry of Finance, Department of Revenue or any other officer, not below the rank of Additional Secretary to the Government of India, authorized by him in this behalf" shall be substituted;

(ii) in sub-rule (3), for the word "Board" the words "Central Government" shall be substituted.

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