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SUBJECT INDEX

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LIST OF CASES COVERED IN THIS ISSUE

Sl. No.	
1.	Abdul Nasar Adam Ismail vs. State of Maharashtra; (2013) 4 SCC 435
2.	Abhay Deo Saxena vs. Rajasthan Housing Board; 2013(3) CPR 378
3.	Afzal v. Union of India; 2013 (4) ALJ 100
4.	Akil v. State (NCT of Delhi); (2013) 3 SCC (Cri) 64
5.	Anand Mohan v. State of Bihar; 2013 Cri.LJ 2644
6.	Anju Chaudhary v. State of U.P.; 2013 (6) SCC 384
7.	Ankush Shivaji Gaikwad v. State of Maharashtra; 2013 (82) ACC 311
8.	Ansal Housing & Cont. Ltd. v. Indian Machinery Co.; 2013(3) CPR 207
9.	Aparna A. Shah vs. Sheth Developers Pvt. Ltd.; 2013 Cr.LJ 3743
10.	Awadha Raj Singh v. ADJ Gorakhpur; 2013 (3) ARC 151
11.	Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465
12.	B.T. Krishnamurthy vs. Sri Basaveswara Education Society with Sri Basaveswara Education Society vs. T.D. Vishwanath; (2013) 4 SCC 490
13.	Bajaj Allianz Gen. Ins. Co. Ltd. vs. Nitin Verma; 2013(30) CPR 445
14.	Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P. Hyderabad; 2013 (4) Supreme 450
15.	Bharat Bhushan v. State of Himanchal Pradesh; 2013 Cri.LJ 2932
16.	Bodige Padam v. Makul Shanker; 2013 ACJ 1844
17.	Branch Manager, National Ins. Co. Ltd. v. Rahmath; 2013 ACJ 1982
18.	Brij Lal v. Piyarey Hassan; 2013 (4) ALJ 349
19.	Budh Singh v. State of Haryana; 2013 Cri.LJ 3061
20.	Commr. of Police, New Delhi v. Mehar Singh; 2013 (4) Supreme 531
21.	Darshan Singh v. State of U.P.; 2013(82) ACC 796
22.	Deepak Gulati v. State of Haryana; 2013 Cri.LJ 2990
23.	Deepak vs. State of Haryana; 2013 (4) SLR 191
24.	Delhi Transport Corpn. Vs. Sarjeevan Kumar; 2013 (138) FLR 956
25.	Devender Pal Singh Bhullar v. State (NCT of Delhi); (2013) 6 SCC 195 = 2013 Cri.LJ 2888
26.	Dharam Pal vs. State of Haryana; 2013 AIR SCW 4491
27.	Dharmendra Kirthal vs. State of U.P.; AIR 2013 SC 2569
28.	Dinesh Chandra (Dr.) Vs. Krishna Kumar Goel; 2013 (2) ARC 710
29.	Dr. Jagmittar Sain Bhagat vs. Director Health Services, Haryana; 2013 AIR SCW 4387

30. Dr. Lokesh Chandra vs. Municipal Board, Bisalpur; 2013(5) ALJ 371
31. FCI vs. Harbhajan Dass; 2013 (4) SLR 414
32. Fulchand vs. Central Coalfield Ltd.; 2013 (3) SLR 341
33. Gaurav v. State of U.P.; 2013(82) ACC 725
34. Gopal Singh vs. State of Uttarakhand; 2013(5) ALJ 379
35. Gulzar Khan v. Smt. Vijay Laxmi; 2013 (4) ALJ 417
36. Gurmala vs. Mohd. Ishaq; 2013(2) ARC 752
37. Gurnaib Singh v. State of Punjab; (2013) 3 SCC (Cri) 49=2013 Cri.LJ 3212
38. Gyan Swaroop v. Additional District Judge; 2013 (4) ALJ 12
39. Harivadan Babubhai Patel v. State of Gujrat; (2013) 3 SCC (Cri) 27
40. HDFC Ergo Gen. Ins. Co. Ltd. Vs. Virendra Gaur; 2013 (138) FLR 788
41. Himmat Singh vs. Saktu Ram Bhatnagar; 2013(5) ALJ 346
42. India Waster Energy Development Ltd. v. Greater Noida Industrial Development Authority; 2013 (4) ALJ 01
43. Irshad Alam vs. Isma Alam; 2013(5) ALJ 248
44. Jagadevappa v. State of Karnataka; 2013 Cri.LJ 2658
45. Jagdish vs. DDC, Jyotaba Phule Nagar; 2013 (5) ALJ 77
46. Jagmittar Sain Bhagat vs. Director Health Services, Haryana; 2013 AIR SCW 4387
47. Jai Ram v. State of UP; 2013 (82) ACC 277
48. Jamil Khan v. Bajaj Allianz General Insurance Co. Ltd.; 2013 ACJ 1640
49. Jarnail Singh v. State of Haryana; 2013 (5) Supreme 39
50. Joseph John Peter Sandy v. Veronica Thomas Rajkumar; AIR 2013 SC 2028 = 2013 (120) RD 548
51. K. Ramana v. K. Thirumala Reddy; 2013 ACJ 1633
52. K. Srinivas Rao vs. D.A. Deepa; (2013) 2 SCC (Cri) 963
53. Kamal Kishore Sharma v. Grish Chopra; 2013 (31) LDC 1506
54. Kamla Prasad Gaur Vs. Shanta Pathak; 2013 (31) LCD 1445
55. Kanhaiya Lal v. State of Rajasthan; 2013 Cri.LJ 2921=AIR 2013 SC 1940
56. Karan Singh v. State of Haryana; 2013 (4) Supreme 501=2013 CriLJ 3227
57. Karthi @ Karthick v. State Rep. by Inspector of Police, Tamil Nadu; 2013 (5) Supreme 52
58. Kashmiri Lal v. State of Haryana; 2013 Cri.LJ 3036=2013 (82) ACC 356
59. Khairuddin v. State of West Bengal; 2013 Cri.LJ 3271
60. Krishan Sharma v. Raj Rani Bhardwaj; AIR 2013 Del 136
61. Krishan v. State of Haryana; (2013) 3 SCC (Cri) 125

62. Kusti Mallaiah vs State of A.P.; 2013 Cri.LJ 3098
63. Lakhan Sing Vs. State of Uttar Pradesh; 2013 (82) ACC 578
64. Lal Bahadur vs. State (NCT of Delhi); (2013) 4 SCC 557
65. Lal Singh v. State of UP; 2013 (82) ACC 771
66. LIC of India Manager v. Smt. Gurvinder Kaur; 2013(3) CPR 29
67. Lily Thomas vs. Union of India; AIR 2013 SC 2662
68. Litta Singh v. State of Rajasthan; 2013 Cri.LJ 3321
69. Lokesh Kumar Jain v. State of Rajasthan; 2013 (4) Supreme 606
70. M/S Laxmi Dyechem v. State of Gujarat; 2013 Cri.LJ 3288
71. M/s Nav Bharat Press (Raipur) Thr. its Partner, Sh. Sameer, M/s Sahara Prime City Ltd. Thr. its Authorised Officer; 2013(3) CPR 465
72. M/s. Kripal Cloth House v. M/s. Harman Singh Kartar Singh; 2013 (31) LCD 1678
73. M/s. Pradip Lamp Works Vs. State of Bihar; 2013 (138) FLR 81)
74. Mahalaxmi Co-operative Housing Society Limited vs. Ashabhai Atmaram Patel (Dead) Thr. LRs.; (2013) 4 SCC 404
75. Manas Goswami v. Girdhari Lal Jaiswal; 2013 (4) ALJ 215
76. Manga alias Man Singh v. State of Uttarakhand; 2013 (4) ALJ 581= 2013 Cri.LJ 3332
77. Mathura Singh v. Addl. Judge, Small Causes-II, Lko.; 2013(120) RD 176
78. Mohan Kushwaha v. Ghanshyam; 2013 ACJ 1496
79. Mohan Lal v. State of Punjab; 2013 Cri.LJ 3265
80. Mohinder Singh v. State of Punjab; (2013) 3 SCC (Cri) 137
81. Mohit alias Sonu v. State of UP; AIR 2013 SC 2248
82. Moti Lal Songara v. Prem Prakash alias Pappu; AIR 2013 SC 2078
83. Nagendra Nath Tiwari v. Bhanu Pratap Sinha (D) through LRs.; 2013 (120) RD 454
84. Natasha Singh v. CBI (State); 2013 Cri.LJ 3346
85. National Insurance Co. Ltd. v. Shiv Shankar; 2013(3) CPR 228
86. National Insurance Co. Ltd. v. Bakhta 2013 ACJ 2155
87. Nem Singh alias Mula v. State of U.P.; 2013 (82) ACC 711
88. New India Assurance Co. Ltd. V. Bhogender Jha; 2013 ACJ 2003
89. New India Assurance Co. Ltd. v. N. Senjilaxmi; 2013 ACJ 2033
90. New India Assurance Co. Ltd. v. Sewa Singh; 2013 ACJ 1573
91. New India Assurance Co. Ltd. Yamuna Nagar Thr. its Manager vs. M/s Uni Ply Industries; 2013(3) CPR 297
92. New India Assurance. Co. Ltd. V. Bhogender Jha; 2013 ACJ 2003

93. Nimmagadda Prasad v. CBI; 2013 Cri.LJ 3449

94. Niranjan Hemchandra Sashital vs. State of Maharashtra; (2013) 2 SCC (Cri) 737

95. Nirmala J. Jhala vs. State of Gujarat; 2013(4) SLR 127

96. Om Prakash v. Baijnath Singh; 2013 (4) ALJ 569 = 2013(2) ARC 685

97. Oma v. State of TN; (2013) 3 SCC (Cri) 208

98. PDC Marketing Private Limited v. Axis Bank Ltd.; 2013(3) CPR 164

99. Pramodini Muzawar (Mrs.) vs. Secretary of Tourism; 2013(4) SLR 376

100. Prof. K.V. Rajendran v. Supdt. of Police; CBCID (South Zone, Chennai); 2013(82) ACC 958

101. Punjab vs. Haryana; 2013 AIR SCW 4491

102. Punumacha Ashok Raju v. Indukuri Venkata Gopala Krishnam Raju; AIR 2013 AP 103

103. R.M. Engineering Works Vs. Khushal Bhai Mani Lal Chavda; 2013 (138) FLR 478

104. Raj Gopal Sharma vs. Krishna Gopal Sharma; 2013(5) ALJ 374

105. Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan; 2013 (82) ACC 431

106. Rajaram Prasad Yadav vs. State of Bihar; 2013 AIR SCW 4179

107. Rajasthan SRTC v. Santhosh; (2013) 3 SCC (Cri) 37

108. Rajesh Kumar Singh v. State of U.P.; 2013 (82) ACC 82

109. Rajesh Kumar vs. State of Bihar with Abhishek Kumar vs. State of Bihar; (2013) 4 SCC 690

110. Rajiv Thapar v. Madan Lal Kapoor; (2013) 3 SCC (Cri) 158

111. Ram Kishore v. State of U.P.; 2013(82) ACC 759

112. Ram Milan Alias Chandu Milan v. Addl. City Magistrate (V)/Rent Control & Eviction Officer; 2013 (3) ARC 86

113. Ram Naresh Singh v. Ram Pal Singh; 2013 (4) ALJ 351

114. Ram Swaroop v. State (Govt. NCT) of Delhi; 2013 Cri.LJ 2997

115. Ramchandra vs. RM, United India Ins. Co. Ltd.; AIR 2013 SC 2561

116. Ramesh Chandra v. State of Uttar Pradesh; 2013 (82) ACC 765

117. Ramji Gupta v. Gopi Krishan Agarwal (D); 2013 (4) ALJ 466

118. Ravirala Laxmaiah v. State of A.P.; 2013 (4) Supreme 468

119. Ritesh Sinha vs. State of U.P.; (2013) 2 SCC (Cri) 748

120. Roman Catholic Diocese of Agra Ltd., Datedral House v. Rajendra Singh; 2013 (3) ARC 72

121. Roop Singh v. State of M.P.; (2013) 3 SCC (Cri) 24

122. S. Manickam Vs. Metopolitan Transport Corpn. Ltd.; 2013 (31) LCD 1398 = AIR 2013 SC 2629
123. Sahara India vs. Ashok Kumar Ranchand Gunani; 2013(3) CPR 376
124. Sanjay Dutt v. State of Maharashtra, through CBI (STF); AIR 2013 SC 2687
125. Satgur Dayal v. IV Additional District Judge, Kheri; 2013 (4) ALJ 595
126. Satya Pal v. State of Haryana; 2013 Cri.LJ 2731=2013 Cri.LJ 2734
127. Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 226
128. Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595
129. Shanti Devi v. Additional District Judge, Mainpuri; 2013 (4) ALJ 145
130. Sheo Ram vs. Lachhaman; 2013(5) ALJ 79
131. Sheo Shankar Singh vs. State of U.P.; 2013(5) ALJ 184
132. Sheoraj Singh v. Zahir Ahmad; 2013 (3) ARC 111
133. Shyam Narain v. State (NCT of Delhi); (2013) 3 SCC (Cri) 1 = AIR 2013 SC 2209
134. Shyoraj Singh vs. Zahir Ahmad; 2013 (5) ALJ 336
135. Sondur Gopal v. Sondur Rajini; AIR 2013 SC 2678
136. Sri Prakash v. Shrikant; 2013(3) CPR 31
137. Stanly Hedger v. Florence; AIR 2013 Ker 122
138. State of Haryana v. Janak Singh; 2013 Cri.LJ 3317
139. State of J & K v. Lakhwinder Kumar; 2013 Cri.LJ 3307
140. State of Kerala v. Unni, S/o. Ramachandran; 2013 Cri.LJ 2819
141. State of M.P. v. Babulal; 2013 (82) ACC 1000
142. State of Madhya Pradesh v. Dal Singh; 2013 Cri.LJ 2983
143. State of Maharashtra through CBI v. Mahesh G. Jain; 2013 Cri.LJ 3092
144. State of Rajasthan v. Shiv Charan; 2013(82) ACC 987
145. Subal Ghorai vs. State of West Bengal; (2013) 4 SCC 607
146. Subhash Chand Tyagi vs. Ajay Kumar Mishra; 2013 (2) ARC 731
147. Subodh Nath v. State of Tripura; 2012 (82) ACC 45
148. Suffiya Ahmed Millan Hussen Shah v. Sulochan Vasant Bhavsar; AIR 2013 Bom 104
149. Sujit Biswas vs State of Assam; 2013 Cri.LJ 3140 = 2013 (82) ACC 467
150. Sukhdev Singh vs. Union of India; 2013(4) SLR 440
151. Sunder v. State; (2013) 3 SCC (Cri) 98
152. Surender Kaushik v. State of UP; 2013 (82) ACC 4
153. Suresh Chand Agarwal v. Mahesh Kumar Agarwal; 2013 (4) ALJ 50
154. Suresh Chand Sharma v. Nand Kumar Kamal; 2013 (4) ALJ 795

155. Suresh Kumar Bhikamchand Jain v. State of Maharashtra; 2013 (82) ACC 35

156. Surinder Kumar v. State of Punjab; (2013) 3 SCC (Cri) 246

157. Sushil K. Chakravarty (D) Thr. LRs. Vs. M/s Tej Properties Pvt. Ltd.; 2013 (2) ARC 765

158. Syed Yousuf Hussain v. State of A.P.; 2013 (82) ACC 14

159. Thomson Press (India) Ltd. v. Nanak Builders & Investors P. Ltd; AIR 2013 SC 2389

160. Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66

161. United India Insurance Co. Ltd v. B. Padmavathy; 2013 ACJ 1837

162. United India Insurance Co. Ltd. v. Asha Rani; 2013 ACJ 1679

163. United India Insurance Co. Ltd. v. Janki Devi; 2013 ACJ 1509

164. UP Power Corporation Ltd. vs. Anis Ahmad; AIR 2013 SC 2766

165. Uttaranchal Transport Corporation v. Navneet Jerath; 2013 ACJ 1966

166. Vajresh Venkatray Anvekar v. State of Karnataka; (2013) 3 SCC (Cri) 227

167. Vijay Bahadur Maurya v. 11th ADJ, Varanasi; 2013 (4) ALJ 30

168. Vimal Kanwar v. Kishore Dan; 2013 ACJ 1441

169. Y.S. Jagan Mohan Reddy v. CBI; 2013 Cri.LJ 2734

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Arms Act

S. 17 (3) (b) and (c) – Arms licence - Cancellation of Ground for issue of show cause notice, that licence obtained by giving wrong address and several criminal case pending against him - Well settled law that mere involvement in criminal case is not the ground for cancellation of licence

On perusal of show cause notice dated 17.1.2003 it is apparent that the show cause notice was given only with regard to licence of the petitioner of SBBL gun and it was mentioned therein that while moving an application for grant of licence for SBBL gun, he had to give correct address i.e. his permanent address of village Kondrajeet, Thana Baghrai. There is no allegation with regard to licence of the applicant of revolver. The order passed by the Licensing Authority as well as appellate authority also indicate that so far as licence of revolver is concerned, there is no dispute that the petitioner has got the licence in 1992 by giving his permanent place of residence at village Kondrajeet, Thana Baghrai. In view thereof, a irresistible conclusion is that so far as grant of licence in the year 1992 is concerned, there is no suppression of material fact. The licence of revolver could not have been cancelled by the Licensing Authority on this ground.

In so far as involvement in the criminal cases is concerned, it is well settled that mere involvement in a criminal case is not the ground for cancellation of licence under Section 17 of the Arms Act in view of catena of decision by this Court on this point and there is consistent view in this regard. **(Rajesh Kumar Singh v. State of U.P.; 2013 (82) ACC 82)**

Civil Procedure Code

S. 11 - Res judicata - Two conflicting judgments, effect of - Held, later judgment operates as res judicata

The revision by judgement debtor is directed against order dated 1.5.1999 passed by 8th A.D.J. Faizabad in Misc. Case No. 356 of 1997, M/S Kripal Cloth House v. M/S Harman Singh Kartar Singh, through which application of the applicant under Section 47 C.P.C filed in execution case no. 1 of 1997 was rejected.

Court did not find least error in the impugned order. Whatever objections application was taking could and should have been taken by him before the Delhi Court. Objections under Sections 47 C.P.C. are not in the nature of appeal not even review. The scope of interference under Section 47 C.P.C. is micro scopic vide Dhurandhar Prasad Singh v. Jai Prakash University, AIR 2001 SC 2552.

Supreme Court in Motilala Jain v. Smt. Ramdasi Devi; AIR 2000 SC 1238 has held that if there are two conflicting judgments then later operates as res

judicata. **(M/s. Kripal Cloth House v. M/s. Harman Singh Kartar Singh; (2013 (31) LCD 1678) All HC (LB)**

Ss. 11, 23 – Res Judicata - Finding of Small Cause Court regarding title to property cannot operate as res judicata as it is only collateral or incidental finding recorded while deciding substantial issue

In order to operate as res judicata, the finding must be such, that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case, cannot be made the basis for a plea of res judicata. A question regarding title in a small cause suit, may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Causes Court, res judicata cannot be pleaded as a bar in the subsequent regular suit, for the determination or enforcement of any right or interest in the immovable property. **(Ramji Gupta & Anr. v. Gopi Krishan Agarawal (D) & Ors.; 2013 (4) ALJ 466)**

S. 47 – Execution of decree – Objection as to error in date of decree and description of property in dispute – Rejection of – Rejection on ground that pleadings adjudicated in judgment not to be reagitated during execution of decree was valid

Real trouble of the plaintiff/decree-holder starts after getting the decree. This case amply demonstrates the correctness of this observation. Landlord's respondents instituted suit for eviction against the tenant applicant for his eviction from the tenanted shop in dispute in the form of SCC Suit No.13 of 1998. The suit was decreed by JSCC/ADJ, Varanasi. Revision was dismissed by the Court on 04.09.2009. Meanwhile, execution application had been filed by the landlords in the form of Execution Case No. l of 2006. In the revision, this court had passed conditional stay order, however the condition was not complied with. The suit had been decreed by JSCC/ADJ, Varanasi. In the execution application, tenant applicant filed objections under Section 47, CPC in the form of Misc. Case No. 3 of 2007 taking the pleas that decree passed was without jurisdiction, decree was passed in respect of a shop having two portions (do dari) and the property was not identifiable, and that the decree which was sought to be executed was shown to be dated 19.04.2004, however, the decree was passed on 19.04.2005. It was further argued that the decree of the trial court dated 19.04.2005 had been affirmed by the High Court in Civil Revision No. 222 of 2005, which was dismissed on 04.09.2009, hence execution ought to have been sought of the decree of the High Court.

Executing Court JSCC/ADJ, Court No. 11, Varanasi rejected the objections on 09.06.2010. The said order has been challenged through the

revision.

Regarding error of the date in the decree, the court below held that it was merely typing error. It directed the decree-holder to get the date of the decree corrected. The other objections were extremely trivial, ultra technical and meaningless, hence they were rightly rejected by the court below. It is merely difference of description whether a portion is described as two shops/ rooms or one shop/room having two portions (do dari). The pleas sought to be raised had already been raised in the impugned judgment and decided against the applicant tenant. Those questions could not be reagitated in execution vide "P.V. Jose v. Kanickammal"; AIR 2000 SC 2688. In "Dhurandhar Prasad Singh v. Jai Prakash University"; AIR 2001 SC 2552, it has been held that powers under Section 47, CPC are very narrow and it only provides a microscopic hole. **(Manas Goswami v. Giirdhari Lal Jaiswal; 2013 (4) ALJ 215)**

S. 100 – For admission of second appeal – Substantial question of law has to be framed at time of admission of appeal

In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

S. 151 – Inherent powers – Scope - S. 151 is not substantive provision to get any relief of any kind - It enables court to overcome failure of justice

Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited. The consolidation of suits has not been provided for under any of the provisions of the Code, unless there is a State amendment in this regard. Thus, the same can be done in exercise of the powers under Section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits

being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non-consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law.

In exceptional circumstances, the Court may exercise its inherent powers, apart from Order IX CPC to set aside an ex parte decree.

An ex-parte decree passed due to the non appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the Court. An application under Section 151 CPC will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of Order IX CPC may not be attracted, and in such a case the Court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers.

There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a Court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of Court, the injustice so done must be remedied, in accordance with the principle of *actus curia neminem gravabit* - an act of the Court shall prejudice no person. **(Ramji Gupta & Anr. v. Gopi Krishan Agarawal (D) & Ors.; 2013 (4) ALJ 466)**

S. 151 – Inherent power of court - Judiciary also possesses inherent power to recall its judgment or order if it is obtained by fraud on court

In A.V. Papayya Sastry and others v. Govt. of A.P. and others; (2007) 4 SCC 221, the Supreme Court explained the consequences, where any judgment or order is obtained by the party by playing fraud on the Court. The Supreme Court observed in paragraphs 21 and 22, as follows:-

> "21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;"
>
> "Fraud avoids all judicial acts, ecclesiastical or temporal".

It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in

collateral proceedings. (**Ramesh Chandra v. State of Uttar Pradesh; 2013 (82) ACC 765)**

S. 151 – Arbitration and Conciliation Act, Ss. 12, 13, 15, 16 - Inherent powers – Invocation of powers for substitution of arbitrator is not permissible

The respondents who are seeking replacement/substitution of an Arbitrator for any reason have the following two options:

1. to challenge the jurisdiction of the Arbitrator as provided under Ss. 12 and 13 of the Act; or
2. to get his mandate terminated in accordance with Ss. 14 and 15 of the Act. The Act does not, however, contemplate any direct intervention of the Chief Justice or the person designate by him who has referred the matter to the Arbitrator for any of the above purpose, as with the appointment of the Arbitrator High Court becomes functus officio and ceases to have any power either to entertain challenge to the jurisdiction of the Arbitrator or to terminate his mandate on any ground.

A substitute arbitrator can only be appointed after termination of the mandate of the earlier arbitrator. Thus, in view of the specific provision of Ss. 12 to 15 of the Act which provides for procedure for challenging the jurisdiction of the Arbitrator and for termination of his mandate, the respondents cannot invoke the inherent jurisdiction of High Court under S. 151, CPC. **(Suresh Chand Agarwal v. Mahesh Kumar Agarwal; 2013 (4) ALJ 50)**

Ss. 151 and 10 – Scope of inherent powers of court regarding consolidation of suits – Such power has to be exercised only U/s. 151

The court not much impressed by the argument of the learned Senior Counsel appearing for the respondent that the trial court has committed an error in not consolidating the various suits including Civil Suits Nos. 292 of 1993 and 681 of 1992 to be tried together as ordered by the District Court in its order dated 29-8-2006 in Civil Misc. Application No. 16 of 2005. Section 24 CPC only provides for transfer of any suit from one court to another. The court has not passed an order of consolidating all the suits. There is no specific provision in CPC for consolidation of suits. Such a power has to be exercised only under Section 151 CPC. The purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses and the parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. (**Mahalaxmi Cooperative Housing Society Limited vs. Ashabhai Atmaram**

Patel (Dead) Through LRs.; (2013) 4 SCC 404)

O. 1, R. 10 and O. 22, R. 10 – Impleadment of Lis pendens transfers – Permissibility – Transferee would not subsequent purchaser be impleaded

In this case, the question of appellants' impleadment has already attained finality, so far as the Court is concerned, in view of the judgment in Second Appeal No. 1325 of 1998, decided on 24.11.1999.

Sri Singh has also relied on decision in Government of Orissa vs. Ashok Transport Agency and others; 2005 ACJ 753 (SC) wherein referring Order 22, Rule 10 the Court said that it is for the assignee or transferee to come on record if it so chooses and to defend the suit. It also said that it is equally open to assignee to trust its assignor to defend the suit property but with the consequence that any decree against the assignor will be binding on it and would be enforceable against it. This issue has already attained finality after dismissal of appellants' Second Appeal No. 1325 of 1998 in the earlier suit proceedings and, therefore, with great respect, in my view, even this authority shall not help appellants in the present case.

Here the argument being advanced by appellants is not in an appropriate proceeding, inasmuch as the Court cannot sit in appeal over a decision by coordinate Bench passed in another Second Appeal No. 1325 of 1998. The judgment has attained finality. The appellants before this Court having chosen not to assail aforesaid decision of the Court has surrendered to the same and now in the present appeal which has arisen from another suit, cannot wriggle out of the legal consequences flowing from the above judgment dated 24.11.1999 passed in Second Appeal No. 1325 of 1998, whereby the application seeking impleadment in earlier suit stood finally rejected and that has attained finality. So far as this Court is concerned, The Court have to proceed by treating that issue regarding impleadment of appellants in earlier suit as already had attained and cannot be reconsidered here at for any purposes whatsoever. It is in these facts and circumstances, the Court find Court unable to give any credence to appellants on the basis of Apex Court's decision in Amit Kumar Shaw; AIR 2005 SC 2209. **(Shyoraj Singh vs. Zahir Ahmad; 2013 (5) ALJ 336)**

O. 3, R. 4 – Change of counsel – Refusal – Validity

In this case, petitioner's application for change of counsel objected on ground that fees, etc. of petitioner's counsel had not been fully paid. Said objection stated that it was agreed between petitioner and his counsel that expenses of claim petition would be borne by advocate himself and whatever shall be amount of decree, 15% thereof shall be paid to counsel.

Despite repeated query, respondents No. 2 and 3 could not show as to how the objection filed by respondent No. 3 in present case before respondent No. 2 opposing petitioner's application for change of counsel was referable to either Section 49C of Advocates Act or Rule 39 of Rules, 1975 or Order 3 Rule 4 C.P.C. Even the judgment of Hon'ble Himachal Pradesh High Court in Oriental Insurance Company (AIR 2006 HP 94) is not attracted at all to the facts and circumstances of this case.

The conduct of respondent No. 2 in this case has not been befitting to a Presiding Officer of a Court. No plausible and valid justification has been shown by respondent No. 2 in passing the order impugned in this writ petition. It has also not shown any reason as to what special interest respondent No. 2 had in ensuring payment of fee to the respondent No. 3 from petitioner. Apparently whatever is apparent is not the entire thing and there are reasons to justify an inference of lack of bona fide on the part of respondent No. 2. The matter requires more investigation and inquiry. If a judicial officer has acted in a manner which is not fair and partial and apparently for the reasons lacking bona fide, such an action of a judicial officer comes within the ambit of misconduct justifying an appropriate disciplinary action and adequate punishment. **(Gyan Swaroop v. Additional District Judge; 2013 (4) ALJ 12)**

O. 6 R. 17 - Revisionist failed to pay costs imposed on his restoration application - Proposed amendment in written statement to delay the proceedings – Held, amendment application moved with mala fide intention, liable to be dismissed

The revision under Section 25 Provincial Small Cause Court Act read with Section 115 C.P.C. has been preferred by the revisionist against the order dated 15.5.2012 passed by Judge small cause Court, Faizabad in SCC Suit No. 17 of 2007, Shanta Pathak V. Kamla Prasad Gaur, whereby amendment application 99-A moved by the revisionist for amendment in his written statement has been rejected.

As a general rule it is a settled principle of law that the courts should be liberal in allowing the amendment applications but in case an amendment application is being moved with a malafide intention only to delay the proceeding that would fall under the exception to the above general rule and such an application for amendment would then be liable to be dismissed.

Considering the entire facts and circumstances of the present case the court is of the view that no illegality or infirmity has been committed by the court below in dismissing the amendment application of the revisionist by passing the impugned order. **(Kamla Prasad Gaur Vs. Shanta Pathak; (2013 (31) LCD 1445)**

O. 6, R. 17 – Amendment of plaint – Permissibility

The suit has been filed by the landlord respondent against tenant applicant for his eviction and for recovery of arrears of rent. The amendment was to the effect that during pendency of the suit defendant had substantially damaged the tenanted shop in dispute and had made structural changes therein and the said acts were done by the defendant on 14/15 May, 2010 and thereafter the tenant had put a slab in front of the door and had elevated the floor. Under Section 20(2)(b) and (c) of U.P. Act No. 13 of 1972 tenant is liable to eviction on the ground of structural changes material alteration in and substantially damage to the tenanted building.

Court below is directed to decide the suit very expeditiously. Before the court below as well as this court it was vehemently argued on behalf of the defendant that no structural alteration etc. as alleged by the landlord had been done by the tenant. As far as this aspect is concerned it will have to be seen after the evidence has been adduced. Merely because amendment application has been allowed it does not mean that the court has recorded any finding regarding correctness of the allegation added through that. **(Himmat Singh vs. Saktu Ram Bhatnagar; 2013(5) ALJ 346)**

O. 6, R. 18 – Amendment of pleadings – Time limit for extension of – Procedure contained in O. 6, R. 18, is directory and not mandatory amendment allowed after payment of cost

In Rule 18 of Order 6 of the Code of Civil Procedure on grant of permission to amend the pleadings, two conditions have been laid down; one amendment has to be made within the time limit granted by the court or in case no limit is fixed, within 14 days from the date of order and in the case of failure, it cannot be amended, unless time granted by the court. The putting of the conditions for carrying out an amendment pursuant to the court's order appears to be directory in character as the rule has been framed to carry out the amendment in a particular manner. The amendment in always made to improve the pleadings and improvement of pleadings clears the way of decision making process.

Procedural laws are enacted to facilitate the process of getting justice from the court, therefore, in my considered opinion, the procedure contained under Rule, 18, Order 7 are directory in character and not mandatory. Otherwise also, in this case, the court has allowed the amendment after payment of cost, meaning thereby, the court has extended the time limit for amendment. **(Jagdish**

vs. Deputy Director of Consolidation, Jyotaba Phule Nagar; 2013 (5) ALJ 77)

O. 7, R. 7 – Moulding relief – If equity and justice so require, Court can mould relief in a given case so as to do complete justice between parties - But while doing so, Court shall not travel beyond pleadings, issues and evidences

While answering the substantial questions of law, as formulated, the Court finds, if equity and just so requires, the Court can mould relief in a given situation so as to do complete justice between the parties. Order 7, Rule 7 of the Code permits Court to grant general or other relief which it may deem fit provided finds it just and to the same extent as it has been asked for. It, however, cannot be doubted that while doing so, Court shall not travel beyond pleadings, issues and evidences; and, the relief, which is totally different, not asked by either of the parties, shall not be granted. In U.P. State Brassware Corporation Ltd. v. Udai Narain Pandey; 2006 (108) FLR 201 (SC)= AIR 2006 SC 586, the Court held that under Order 7, Rule 7 of the Code, power has been conferred upon the Court to mould relief in a given situation. **(Nagendra Nath Tiwari v. Bhanu Pratap Sinha (D) through LRs.; 2013 (120) RD 454)**

O. 7, R. 10 – Jurisdiction – Issue of – Can be raised at any stage and in such cases doctrine of waver does not apply

Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/inexcutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. **(Jagmittar Sain Bhagat vs. Director Health Services, Haryana; 2013 AIR SCW 4387 (B)**

O. 9, R. 13 – Suit for recovery – Ex-parte decree – Restoration of suit against ex-parte decree by principal debtor – Validity of

In the present case, there is no dispute between the parties that the petitioner was a surety for M/s. Ravi Brick Works and, therefore, even if the suit had been decreed ex parte when an application for restoration under Order 9, Rule 13 of the Code on behalf of M/s. Ravi Brick Works was moved and the suit was restored by the court by its order dated 1.8.1994, the court ought to have restored the suit so far as the petitioner was concerned also but the court committed not only an error of fact but also a grave error of law in confining its order only to M/s. Ravi Brick Works and impliedly declined the claim of the

petitioner for setting aside the ex parte decree.

Learned counsel for the petitioner has also referred to a judgment of this Court reported in 1999 (36) ALR 808 Punjab National Bank v. IVth Additional District Judge, Pilibhit and others wherein also the Court interpreting the Order 9 Rule 13 of the Code of Civil Procedure read with Section 128 of the Indian Contract Act has held that where the interest and Liability of the surety is co-extensive with that of the principal debtor, when the suit is restored on an application of the principal debtor and the ex parte decree is set aside, it would automatically imply that the suit has been restored so far as the other defendants whose rights and Liabilities were co-extensive of the principal debtor also.

In view of the aforesaid facts and the law laid down by the Court, the impugned orders dated 10.8.1998, 14.7.1999 and 20.2.2000 are absolutely illegal and based on a misinterpretation of law and, therefore, deserves to be quashed. **(Shanti Devi v. Additional District Judge, Mainpuri; 2013 (4) ALJ 145)**

O. 11, Rr. 14 and 15 – Withholding of document/evidence – Considerations for drawing adverse inference – Pleadings of party, whether such withholding has relevance at all or non-production establishes case of other party – Are relevant considerations

Order 11 CPC contains certain provisions with the object to save expense by obtaining information as to material facts and to obtain admission of any fact which he has to prove on any issue. Therefore, a party has a right to submit interrogatories relating to the same matter in issue. The object of introducing such provision is to secure all material documents and to put an end to protracted enquiry with respect to document/material in possession of the other party. In such a fact-situation, no adverse inference can be drawn against a party for non-production of a document unless notice is served and procedure is followed. Under Rule 14 Order 11, the Court is competent to direct any party to produce the document asked by the other party which is in his possession or power and relating to any material in question in such suit. Rule 15 Order 11 provides for inspection of documents referred to in pleadings or affidavits. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the Court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The Court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The Court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order 11, CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non production of evidence is always optional and a relevant factor to be considered

in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the Court to direct the other side to produce the document and other side failed to comply with the Court's order, the Court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

O. 12, Rr.1, 2, 2A – Admission – Failure of party to prove its defence does not amount to admission nor it can reverse or discharge the burden of proof of the plaintiff

It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff. To an admission made without following procedure under O. 12 or admission having not made during the course of trial S. 58 of Evidence Act does not get attracted. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

O. 21, R. 58(2), S. 47 - Powers of Executing Court - Objection against attachment of property - Agreement for sell of suit property produced by relative of judgment-debtor, was not genuine, but collusive in nature and brought into existence to defeat fruits of decree obtained by decree-holder Executing Court would have power to determine validity of such agreement

In the instant case, property was attached before judgment in suit for recovery. When execution proceedings were initiated, suit for specific performance of agreement to sell subject property was filed by judgment-debtor's relative.

A shadow was cast upon genuinity of agreement of sale and it was under a cloud. Unless and until the agreement of sale was held to be a genuine one, question of attaching any value to sale deed did not arise, and as such no importance could be attached either to agreement of sale or sale deed. If there is sufficient proof that agreement of sale was executed in ordinary course prior to date of attachment and in pursuance of such genuine transaction if sale deed is executed subsequent to date of attachment, then only attachment does not prevail over pre-existing contract of sale.

Since the agreement of sale was not genuine, but collusive in nature and it was brought into existence to defeat fruits of decree obtained by decree-holder, it was held that ownership of property and/or right, title or interest therein may necessarily involve determination of validity or otherwise of agreement of sale,

as done by executing Court. Executing Court had power to determine validity of agreement of sale**. (Punumacha Ashok Raju v. Indukuri Venkata Gopala Krishnam Raju & Ors.; AIR 2013 AP 103)**

O. 21, Rr. 98, 102 – Objection to Execution of decree - Purchaser of property of judgment debtor pendent lite cannot invoke provisions of O. 21 Rr. 97 to 102

In the instant case, principal contention of the learned counsel appearing for the petitioner was that the executing court was obligated to consider the objections in the same manner as in a suit. In my view, the contentions cannot be countenanced in view of the well settled position in law that the purchaser form the judgment debtor during the pendency of the suit cannot avail of the Rules 97 to 102 of Order 21.

The objections of the judgment debtor i.e. the petitioner herein have been exhaustively dealt with in the order passed on by the learned lower court. Though the Application was rejected on ground that same was premature, the said reasons were reiterated in the impugned order as the objections were in the same manner and to the same extent as in original application before the court below. In that view of the matter, no case for interference was made out. **(Suffiya Ahmed Millan Hussen Shah v. Sulochan Vasant Bhavsar & Ors.; AIR 2013 Bom 104)**

O. 22, R.4 (4) - Death of sole defendant - Without impleading legal heirs/representatives proceedings in present case continued - Validity of - Conscious decision taken by Single Judge as proceeded with matter ex-parte against appellant is permissible O. 22 R. 4(4)

In this case, Court has have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant. The real issue which needs to be determined with reference to the contention advanced at the hands of the learned counsel for the appellant under Order XXII Rule 4(4) of the Code of Civil Procedure is whether the learned Single Judge while proceeding with the trial of CS (OS) no.2501 of 1997 was aware of the death of the plaintiff Sushil K.C. (the appellant herein). And further, whether the learned Single Judge of the High Court had thereafter, taken a conscious decision to proceed with the suit without insisting on the impleadment of the legal representatives of the deceased defendant Sushil K.C. It is possible for us, in the facts of this case, to record an answer to the question posed above. We shall now endeavour to do so. It is not a matter of dispute that Sushil K.C. had died on 3.6.2003. It is also not a matter of dispute, that on 29.8.2003 the plaintiff Tej Properties (the respondent herein) had filed an interlocutory application, being IA no.9676 of 2003 under Order XXII Rule 4(4) of the Code of Civil Procedure, for proceeding with CS (OS) no. 2501 of 1997 ex-parte, by bringing to the notice of the learned Single Judge, that Sushil K.C. had died on 3.6.2003. That being the

acknowledged position, when the learned Single Judge allowed the proceedings in CS(OS) no. 2501 of 1997 to progress further, it is imperative to infer, that the court had taken a conscious decision under Order XXII Rule 4(4) of the Code of Civil Procedure, to proceed with the matter ex-parte as against interests of Sushil K.C., (the defendant therein), without first requiring Tej Properties (the plaintiff therein) to be impleaded the legal representatives of the deceased defendant. It is therefore, that evidence was recorded on behalf of the plaintiff therein, i.e., Tej Properties (the respondent herein) on 28.1.2005. In the aforesaid view of the matter, there is certainly no doubt in our mind, that being mindful of the death of Sushil K.C., which came to his knowledge through IA no.7696 of 2006, a conscious decision was taken by the learned Single Judge, to proceed with the matter ex-parte as against the interests of Sushil K.C. This position adopted by the learned Single Judge in CS (OS) no.2501 of 1997 was clearly permissible under Order XXII Rule 4(4) of the Code of Civil Procedure. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. (**Sushil K. Chakravarty (D) Thr. LRs. Vs. M/s Tej Properties Pvt. Ltd.; 2013 (2) ARC 765) (SC)**

O. 23, R. 3. Pt. I or Pt. II – Determination of applicability

Order 23 Rule 3 CPC speaks of compromise of a suit. Order 23 Rule 3 refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is under the 1976 Amendment of CPC required to be in writing and signed by the parties. The second part of Order 23 Rule 3 deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from the first part of Order 23 Rule 3. The expression "agreement" or "compromise" refers to the first part and not the second part of Order 23 Rule 3. The second part gives emphasis to the expression "satisfaction". The word "satisfaction" in Order 23 Rule 3 has been used in contradiction to the word "adjustment" by agreement or compromise by the parties. The requirement of "in writing and signed by the parties" does not apply to the second part of Order 23 Rule 3 where the defendant satisfies the plaintiff in respect of whole or part of the subject-matter of the suit. The proviso to Order 23 Rule 3 as inserted by the Amendment Act, 1976 enjoins the court to decide the question where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation. The court is, therefore, called upon to decide the lis one way or the other. The proviso to Order 23 Rule 3 expressly and specifically states that the court shall not grant such adjournment for deciding the question unless it thinks fit to grant such adjournment by recording reasons. **(Mahalaxmi**

Co-operative Housing Society Limited vs. Ashabhai Atmaram Patel (Dead) Thr. LRs.; (2013) 4 SCC 404)

O. 26, R. 9 – Advocate Commissioner - Appointment of – Validity

An application 76 (Ga) was filed by the plaintiff for appointment of Advocate commissioner. By the order dated 2010.1995, the trial court appointed as Advocate commissioner. Being aggrieved by the said order, the defendant's respondents 2 to 6 herein, filed revision No. 455 of 1995. The revisional court by the impugned order dated 20.4.1996 set aside the order dated 20.10.1995 aggrieved by which this petition has been filed. It is pointed out by the learned counsel for the petitioners that earlier an application 52 (Ga), under Order XXVI, Rule 9 CPC had been filed by the respondents on 16.3.1990, for appointment of Advocate Commissioner and the said application was allowed and Advocate Commissioner was appointed. The plaintiffs-petitioners, however, filed a recall application and detailed objections on 10.4.1990, further requesting that some senior counsel may be appointed to measure the entire plot No. 828 and the land of the plaintiffs-petitioners be separated and a report be called for in respect of the six feet wide pathway. The trial court modified its earlier order and ordered accordingly. On 10.7.1990, the Commissioner's report was filed against which objections were filed and thereafter issues were framed. Ultimately on 27.5.1993, the Commissioner's report was rejected. On 13.7.1994, the plaintiff-petitioners filed a fresh application for appointment of a second Advocate Commissioner for inspection of the entire area of plot No. 828 and to prepare a survey map. In civil revision No. 455 of 1995, the revisional court by the impugned order dated 20.4.1996 has set aside the order dated 20.10.1995 and has held that since in the plaint, there were no averments relating to the disputed six feet wide passage and no relief was also sought in respect of this plot, therefore, there was no good ground for appointment of Advocate Commissioner.

In the opinion of the Court, it was not appropriate for the revisional court to interfere with the order dated 20.1 0.1995 appointing Advocate Commissioner to submit a Second Commission Report as the order to appoint Advocate Commissioner did not in any manner determine the rights of the parties, which was a question yet to be decided by the trial court and, therefore, the revisional court has clearly exceeded its jurisdiction in interfering with the order of the trial court dated 20.10.1995 and further proceeded to record findings that there were no averments or relief claimed in respect of the six feet wide passage in the plaint. **(Vijay Bahadur Maurya v. 11th ADJ, Varanasi; 2013 (4) ALJ 30)**

O. 26, R. 10 (2) – Survey Commissioner's report – Evidentiary value – Commissioner's report u/O 26, R. 10(2) is only a piece of evidence and it is always open to trial court to believe it or not

Commissioner's report constitutes only evidence and has to be considered by Court like any other evidence while deciding the suit. It cannot be

said that the view expressed by Commissioner in his report will be deemed to be a finding on the concerned issue as soon as the Commissioner's report is accepted by Court to form a part of record as evidence and the Court, if takes any other view, than what has been stated by Commissioner in his report: that would amount to be recording a contradictory finding over a finding of judicial nature already recorded so as to attract the principle of res judicata. Thus, Commissioner's report under Order 26, Rule 10(2) is only a piece of evidence and it is always open to Trial Court to believe it or not. Mere fact hat Commissioner's report was admitted as part of evidence does not deprive a Court of Fact to reject or disbelieve the report while assessing the evidence and deciding issues in suit. **(Ram Naresh Singh v. Ram Pal Singh; 2013 (4) ALJ 351)**

O. 41, R. 17 – Additional evidence – State of consideration - Stage of consideration is when appeal is considered on merits

Order 12, CPC deals with admission of the case, admission of the documents and judgment on admissions. Rule 1 therefore provides that a party to a suit may give notice by his pleadings or otherwise in writing that he admits the truth of the whole or any part of the case of any other party. Rule 2 deals with notice to admit documents-it provides that each party may call upon the other party to admit within 7 days from the date of service of the notice of any document saving all such exceptions. Rule 2A provides that a document could be deemed to have been admitted if not denied after service of notice to admit documents. Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff. To an admission made without following procedure under O. 12 or admission having not made during the course of trial S. 58 of Evidence Act does not get attracted. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

O. 41, R. 17 – Additional evidence – Permission to adduce – It is given only if appellate court finds it necessary for passing judgment

Under Order XLI, Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it

necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even with- out such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial Court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower Court is not entitled to the indulgence of being allowed to give further evidence under this rule. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

O. 47, R. 1 – Review petition – Maintainability – Petitioner attempted to postulate rehearing of dispute by highlighting all aspects of case and in simulating that judgment passed earlier was erroneous – Rehearing not permissible U/o 47, R.1, hence, petition not maintainable

Relying upon the judgments in the cases of Alibam's and Smt. Meera Bhanja (AIR 1995 SC 455) it was observed as under:

> "Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

In view of the law as discussed above, a review petition cannot be treated to be a revision or an appeal in disguise. Rehearing at all is not permissible under Order 47, Rule 1 of Code of Civil Procedure. By the petition, the petitioner has attempted to postulate rehearing of the dispute between the parties and has highlighted all the aspects of the case and attempted to impress upon the Court that the judgment passed by this Court earlier, on merits, with detailed discussions was an erroneous decision and deserves to be reheard and corrected. Even if it is presumed that two opinions can be found the Court cannot review a

judgment or order even on this ground. Crux of the matter is that an error apparent on the record and can be established by lengthy and complicated argument cannot be cured under Order 47, Rule 1of the Code of Civil Procedure. **(Brij Lal & ors. v. Piyarey Hassan & Ors.; 2013 (4) ALJ 349)**

Code of Criminal Procedure

S. 3 – Circumstantial Evidence – Five Golden Principles (Panchsheel) relating to Law – Enunciated

The 5 golden principles (the panchsheel) relating to the law on circumstantial evidence have been aptly enunciated in paragraph 152 in Sharad Birdichand Sarda v. State of Maharashtra; AIR 1984 SC 1622, as follows:

> "152….(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973)2 SCC 793= AIR 1973 SC 2622, where the following observations were made:
>
> > "certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) the circumstances should be of a conclusive nature and tendency.
>
> (4) they shoud exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

(Nem Singh alias Mula v. State of U.P.; 2013(82) ACC 711)

Ss. 28, 432, 433, 433A and 428 – Case falling short of rarest of rare case - Imposition of sentence - Powers of session court - Sessions Judges have no power to impose harsher variety of life sentence i.e. imprisonment for rest of accused's life or imprisonment exceeding 14 years without remission or

commutation – Only constitutional Courts i.e. Supreme Court and High Court can exercise said power of imposing harsher variety of life sentence

There may be cases wherein a particular case falls short of the rarest of rare category deserving exclusion of imposition of death sentence, but, at the same time, looking at the nature of the crime, the Court may feel sentence of life imprisonment, which is subject to remission or commutation working out to a minimum term of 14 years of imprisonment would be grossly inadequate and disproportionate. Characterizing circumstances with reference to the crime and criminal, the Supreme Court in AIR 2008 SC 3040 considered possibility of expanding the options so as to cover the vast hiatus between 14 years imprisonment of life and death. In the context, death sentence awarded by the trial Court and confirmed by High Court come to be substituted with imprisonment for life with a direction that accused shall not be released till rest of his life.

Subsequent judgments of the Supreme Court while referring to AIR 2008 SC 3040 though exercised such option, did not confirm the fact that the exercise undertaken by the Supreme Court while commuting the death sentence to harsher imprisonment for life could be undertaken by the Sessions Court as well. As a matter of fact, in AIR 2008 SC 3040 though specifically no reference is made to Article 142 of the Constitution, reading of the judgment and the analysis leading to the conclusion in that case definitely confirm the fact that the Supreme Court imposed a sentence of imprisonment for life without remission or commutation as provided under the Code of Criminal Procedure drawing its power under Article 142 of the Constitution. Their Lordships said, in appropriate cases such exercise could be made not only by the Apex Court, but also by the High Court being Superior Court in their respective States. There is no specific reference to Sessions Court.

When the provisions of the Code including S. 28 does not clothe the Sessions Courts with the power to labour such exercise as undertaken in AIR 2008 SC 3040 giving such powers to Sessions Court without any uniform policy or standardized guidelines is not warranted. In respect of offences where death penalty or imprisonment for life is the sentence that could be passed, it is open to the Sessions Court to look into the facts and circumstances in the light of gamut of decisions and decide whether it would fall under the category of rarest of rare case warranting capital punishment of death. Once it opines that the case on hand has to be excluded from the category of rarest to rare case, the only option open to them is to impose sentence of imprisonment for life, which would mean, for the rest of the life of the accused. Beyond that, the Session Courts cannot take the exercise of finding alternative sentence. The area of remission, commutation etc. is not within the purview of the Sessions Court. The Executive can exercise such power so far as giving remission or commutation as stated under S. 432 to 433A, however, depending upon the prison manual or any other

law in that regard one cannot bring down imprisonment for life below 14 years with all remission and other best possible benefits which could be extended to the accused **(State of Kerala v. Unni, S/o. Ramachandran & Ors.; 2013 Cri.LJ 2819)**

S. 125 – Maintenance – Determination of – Magistrate can award maintenance from date of application

Relying on the case of Shai Kumari Devi and another v. Krishan Bhagwan Pathak @ Kishun B. Pathak; 2009 (67) ACC 560, The Hon'ble Supreme Court observed as:

Maintenance is a right which accrues to a wife against her husband the minute the former gets married to the latter. It is not only a moral obligation but is also a legal duty cast upon the husband to maintain his wife. Hence, whenever a wife does not stay with her husband and claims maintenance, the only question which the Court is called upon to consider whether she was justified to live separately from her husband and still claim maintenance from him? If the reply is in the affirmative, she is entitled to claim maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application and there is nothing which requires recording of 'special reasons' though he must record reasons as envisaged by sub-section (6) of section 354 of the Code in support of the order passed by him.

The Court, therefore, hold that while deciding an application under section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however; are required to be recorded by the Court. In judgment by the Court, no such requirement can be read in sub-section (1) of section 125 of the Code in absence of express provision to that effect**. (Lal Singh v. State of UP; 2013 (82) ACC 771)**

S. 154 – FIR – Registration of FIR cannot be faulty due to non-mentioning of time of dispatch

The learned counsel appearing for the State brought to our notice that as far as the dispatch is concerned, even as per the column found in the FIR, only the date of dispatch is required to be noted and not the time, as compared to the date and time to be recorded as regards the reporting of the crime. Therefore, due to non-mentioning of the time of dispatch, no fault can be found as regards the registration of the FIR. **(Sheo Shankar Singh vs. State of UP; 2013 (5) ALJ 184)**

S. 154 – FIR – Ante-dating, ante-timing of - Does not lead to rejection of entire prosecution case

In this case, the main contention on behalf of the defence that the High Court should have totally discarded the prosecution story once it held that the evidence creates a reasonable suspicion about the FIR being ante-dated and ante-timed. In none of the cases cited by the defence, the Court find that the Court has discarded the entire prosecution story only on the ground that the FIR was ante dated and ante timed. The Court has, on the other hand, held in State of M.P. v. Mansingh and others; (2003) 10 SCC 414 that if the date and time of the FIR is suspicious, the prosecution version is not rendered vulnerable but the court is required to make a careful analysis of the evidence in support of the prosecution case. **(Anand Mohan v. State of Bihar; 2013 Cri.LJ 2644)**

S. 154 – FIR – Need not contain minute details

When a man loses his daughter due to cyanide poisoning, he is bound to break down. He would take time to recover from the shock. Six hours' delay in lodging the FIR cannot make his case untrue. It is also not proper to expect him to give all minute details at that stage. The FIR contains sufficient details. It is not expected to be a treatise. The comments on alleged delay in lodging the FIR and its contents are totally unwarranted. For the same reasons, it is also not possible to accept the submission of the appellant husband of the deceased that because the deceased's father (PW I) did not tell the police officers who were present at the scene of offence that the appellant was responsible for the suicide, his FIR lodged after six hours is suspect. **(VajreshVenkatray Anvekar v. State of Karnataka; (2013) 3 SCC (Cri) 227)**

S. 154 – FIR – Lodging of two FIRs in respect of one and same incident - Not permissible

It is quite luminous that the lodgement of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in Upkar Singh (supra), the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible. **(Surender Kaushik and others v. State of UP and others; 2013 (82) ACC 4)**

S. 154 – FIR – Omission of important facts by a person claiming to know all facts is relevant factor to judge credibility of prosecution case

Undoubtedly, the FIR lodged has disclosed the previous statement of the informant which can only be used to other corroborate or contradict the maker of such statement. However, in the event that the informant is a person who claims to know the facts, and is also closely related to the victim, it is expected that he would have certainly mentioned in the FIR, all such relevant facts. The omission of important facts affecting the probability of the case, is a relevant factor under Section 11 of the Evidence Act to judge the veracity of the case of the prosecution. **(Sujit Biswas vs State of Assam; 2013 Cri.LJ 3140 (SC)**

S. 154 – FIR – Object and importance – The object of registering an FIR is to set the machinery of criminal investigation into motion, which culminates into filing of the police report in terms of 173 (2) Cr.PC

On the plain construction of the language and scheme of Sections 154, 15 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced into writing by the officer-in-charge of a police station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the investigating agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of

investigating powers by the police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, reinvestigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. **(Anju Chaudhary v. State of U.P.; (2013 (6) SCC 384)**

S. 156 – Investigation – Defects in – Not fatal to prosecution

Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused.

Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation. **(Karan Singh v. State of Haryana & Anr.; 2013 Cri.LJ 3227 (SC)**

Ss. 156(3) – Registering FIR and investigation - Directions issued

The Court cautions the Magistrate of the Courts below in the State of U.P. that in cases of crime against the women, they should carefully examine the application under section 156(3) Cr.P.C. of the victim/ aggrieved persons and exercise their jurisdictional discretion in a proper manner taking into account the rapid increase of crime against women but at the same time the Magistrate shall also take care that no innocent persons should be harassed by misuse of process of law. **(Ram Kishore v. State of U.P.; 2013(82) ACC 759)**

Ss. 156(3), 202 – Magistrate's power u/s 156 (3) and S. 202 – Relative scope

Section 156 primarily deals with the powers of a police officer to investigate a cognizable case: While dealing with the application or passing an order under Section 156(3), the Magistrate does not take cognizance of an offence. When the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the said purpose, he is not said to have taken cognizance. It is an order in the nature of a pre-emptory reminder or intimation to the police to exercise its primary duty and power of investigation in terms of Section 151 of the Code. Such an investigation Court embraces the continuity of the process which begins with collection of evidence under Section 156 and ends with the final report either under Section 159 or submission of charge-sheet under Section 173 of the Code.

Still another situation that can possibly arise is that the Magistrate is competent to treat even a complaint termed as an application and pass orders under Section 156(3), but where it takes cognizance, there it would have to be treated as a regular complaint to be tried in accordance with the provisions of Section 200 onwards falling under Chapter XV of the Code. There also the Magistrate is vested with the power to direct investigation to be made by a police officer or by such other person as he thinks fit for the purposes of deciding whether or not there is sufficient ground for proceeding. This power is restricted and is not as wide as the power vested under Section 156(3) of the Code. The power of the Magistrate under Section 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before the cognizance is taken. In other words, Section 202 would apply only to cases where Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency. But there may be circumstances where the Magistrate, before taking cognizance of the case himself, chooses to order a pure and simple investigation under Section 156(3) of the Code. These cases would fall in different class. This view was also taken by a Bench of this Court in Rameshbhai Pandurao Hedau v. State of Gujarat; (2010) 4 SCC 185: (1010) 2 SCC (Cri) 801). The distinction between these two powers had also been finally stated in the judgment of this Court in Srinivas Gundluri v. SEPCO Electric Power Construction Corpn.; (2010) 8 SCC

206: (2010) 3 SCC (Cri) 652) wherein the Court stated that:

"23 .... to proceed under Section 156(3) of the Code, what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation."

But where it takes cognizance and decides as to whether or not there exists a ground for proceeding any further, then it is a case squarely falling under Chapter XV of the Code.

Thus, the Magistrate exercises a very limited power under Section 156(3) and so is its discretion. It does not travel into the arena of merit of the case if such case was fit to proceed further. This distinction has to be kept in mind by the court in different kinds of cases. In the present case, the learned Magistrate while passing the order dated 29-7-2008, had not dealt with the case on merits, but on a legal assumption that it was not a case to direct investigation because investigation was already going on under FIR No. 45 of 2007. Once it is held as done by us above, there were two different and distinct offences committed by different persons and there was no commonality of transaction between the two. Court does not found any error of jurisdiction in the order of the High Court requiring the learned Magistrate to deal with the cases afresh and pass an order under Section 156(3) of the Code. Once that view is taken, the direction passed by the learned Magistrate directing further investigation under Section 156(3) can also not be complied with though there is no specific challenge to that order before Court. **(Anju Chaudhary v. State of U.P.; (2013 (6) SCC 384)**

S. 157 - Delay in sending FIR to Magistrate – Whether vitiates prosecution case - Delay in sending FIR to Magistrate does not vitiate prosecution case

In this case, nothing was put to PW-13 (Investigating Officer) as regards the alleged delay in sending the FIR to the Magistrate and or to any prejudice was caused to the appellants on that account. It would have enabled the Investigating Officer to explain the reason for the delay. In any event nothing has been shown as to any prejudice caused to the appellants on the ground of alleged delay in sending a copy of FIR to the Magistrate

When Court apply the above principle laid down in the said decision for the reasons to be adduced for the other questions to be dealt with in this judgment, court hold that there was no dearth in the process of investigation based on the factum of the alleged occurrence on 21.11.2001, as reported by the complainant PW- 2 and the mere delay in forwarding of the express report to the Magistrate has not caused any dent in the case of the prosecution. In other words, court has no difficulty in stating that the FIR was factually recorded without delay and the investigation started on the basis of the FIR and in the absence of any other infirmity in that respect, the delay in forwarding the report to the

Magistrate does not in any way vitiate the case of the prosecution. **(Manga alias Man Singh v. State of Uttarakhand; 2013 (4) ALJ 581)**

S. 157 – Delay in sending FIR to Magistrate does not vitiate prosecution

In this case, nothing was put to PW-13(Investigating Officer) as regards the alleged delay in sending the FIR to the Magistrate and or to any prejudice was caused to the appellants on that account. It would have enabled the Investigating Officer to explain the reason for the delay. In any event nothing has been shown as to any prejudice caused to the appellants on the ground of alleged delay in sending a copy of FIR to the Magistrate.

When Court apply the above principle laid down in the said decision for the reasons to be adduced for the other questions to be dealt with in this judgment, we hold that there was no dearth in the process of investigation based on the factum of the alleged occurrence on 21.11.2001, as reported by the complainant PW-2 and the mere delay in forwarding of the express report to the Magistrate has not caused any dent in the case of the prosecution. In other words, we have no difficulty in stating that the FIR was factually recorded without delay and the investigation started on the basis of the FIR and in the absence of any other infirmity in that respect, the delay in forwarding the report to the Magistrate does not in any way vitiate the case of the prosecution. **(Manga alias Man Singh v. State of Uttarakhand; 2013 Cri.LJ 3332 (SC)**

S. 161 – Examination by police - Omission to mention fact in statement made to police - Whether amount to contradiction

The explanation to Section 161 Cr.PC states that an omission to state a fact or circumstance in the statement made to the police may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. It was, therefore, for the Court to decide whether the omission in the statement of PW 2 about the beatings given to the deceased before the police was significant enough for the Court to disbelieve that the deceased was beaten in connection with the demand for dowry. Considering the evidence of PW 1 and PW 2 in its entirety, Court think that the High Court is right in coming to the finding that the deceased was not only subjected to a subsequent demand of dowry but also subjected to cruelty and harassment in connection with such demand for dowry soon before her death and that the trial court had not taken a correct view on the evidence of PW 1 and PW 2. **(Satya Pal v. State of Haryana & Anr.; 2013 Cri.LJ 2734)**

Ss. 167, 437 – Statutory bail - Consideration of

Learned senior counsel appearing for the appellant pointed out that after the order dated 05.10.2012, the CBI is not justified in prolonging the same just to

continue the custody of the appellant. It was also highlighted that even according to the CBI, several Ministers and IAS officers are involved, but no one has been arrested so far. As far as those allegations are concerned, it is the claim of the CBI that considering the huge magnitude of transactions, various beneficiaries, companies/persons involved with A-1 and his associates, the CBI is taking effective steps for early completion of the same. Though learned senior counsel for the appellant submitted that in view of non-compliance of Section 167 of the Code the appellant is entitled to statutory bail, in view of enormous materials placed in respect of distinct entities, various transactions etc. and in the light of the permission granted by this Court in the order dated 05.10.2012, we are unable to accept the argument of learned senior counsel for the appellant.

On going into all the details furnished by the CBI in the form of Status Report and the counter affidavit dated 06.05.2013 sworn by the Deputy Inspector General of Police and Chief Investigating Officer, Hyderabad, without expressing any opinion on the merits, Court feel that at this stage, the release of the appellant (A-1) would hamper the investigation as it may influence the witnesses and tamper with the material evidence. Though it is pointed out by learned senior counsel for the appellant that since the appellant is in no way connected with the persons in power, we are of the view that the apprehension raised by the CBI cannot be lightly ignored considering the claim that the appellant is the ultimate beneficiary and the prime conspirator in huge monetary transactions.

While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

Taking note of all these facts and the huge magnitude of the case and also the request of the CBI asking for further time for completion of the investigation in filing the charge sheet(s), without expressing any opinion on the merits, we are of the opinion that the release of the appellant at this stage may hamper the investigation. However, Court direct the CBI to complete the investigation and file the charge sheet(s) within a period of 4 months from today. Thereafter, as observed in the earlier order dated 05.10.2012, the appellant is free to renew his prayer for bail before the trial Court and if any such petition is filed, the trial Court is free to consider the prayer for bail independently on its own merits without being influenced by dismissal of the present appeal. **(Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation; 2013 Cri.LJ 2734)**

S. 167(2)(a)(ii) – Default bail/statutory bail - Entitlement to - Accused has enjoyed indefeasible right to grant of bail if an application was made before the filing of the Charge sheet

It would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the Petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to noncompliance of the provisions of Section 167(2) Cr.PC is the question with which we are confronted. In view of the Court, grant of sanction is nowhere contemplated under Section 167 Cr.PC What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail.

Both the decisions in Natabar Parida's case(supra) and in Sanjay Dutt's case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.PC and an application having been made for grant of bail prior to the filing of charge-sheet, the Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.PC is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.PC, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.PC The scheme of the Cr.PC is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial.

Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) Cr.P.C. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. **(Suresh Kumar Bhikamchand Jain v. State of Maharashtra & another; 2013 (82) ACC 35)**

S. 176 – Reliance on statement made in inquest proceedings – Impropriety – Reliance on said statement would be permissible only after the same is recorded by court on oath, whereupon, doctor concerned has to be subject to cross-examination

Court has observed that even though the statement of Dr Pritu Dhalaria has been relied upon by the SDM, Delhi in the inquest report, which completely knocks out all the pleas advanced by Madan Lal Kapoor (the respondent complainant), Court is of the view that it would be improper to make any reference thereto in deciding the present controversy. Reliance on the statement of Dr Pritu Dhalaria would be permissible only after the same is recorded by a court on oath, whereupon, he has to be subjected to cross-examination. Only then his statement would acquire credibility for reliance. Any fact situation based on the oral testimony, by one or the other party cannot be the basis of a determination, akin to the one in hand. **(Rajiv Thaper v. Madan Lal Kapoor; (2013) 3 SCC (Cri) 158)**

S. 190 - Cognizance – Power of Magistrate – Magistrate is not bound to accept final report – Taking of cognizance and issue of process against person, though exonerated by investigating agency

In view of the conflicting views, the controversy relating to the power of the Magistrate under Section 190 of the Code has been referred to the larger Bench and, hence, the order of taking cognizance is invulnerable. To appreciate the said submission, Court thinks it seemly to refer to certain pronouncements pertaining to the said issue. In Ranjit Singh v. State of Punjab; AIR 1998 SC 3148, a three-Judge Bench was dealing with the issue whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. The three-Judge Bench was dealing with the said issue as reservations were expressed by a two- Judge Bench in Raj Kishore Prasad v. State of Bihar; AIR 1996 SC 1931 with regard to the ratio laid down in Kishun Singh v. State of Bihar; 1993 AIR SCW 771. The conclusion that has been recorded in Ranjit Singh's case is as follows: -

> "19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code that court can deal with only the accused referred to in Section 209 of the Code. There is no

intermediary stage till then for the Sessions Court to add any other person to the array of the accused.

20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

In Kishori Singh and others v. State of Bihar and another, the learned Judges have opined thus: -

"10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

In M/s. India Carat Pvt. Ltd. v. State of Karnataka and another; AIR 1989 SC 885, a three-Judge Bench, after analyzing the provisions of the Code, referred to the decisions in Abhinandan Jha v. Dinesh Mishra; AIR 1968 SC 117 and H.S. Bains v. State; AIR 1980 SC 1883 and, eventually, ruled thus: -

"The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers

under Section 190(1)(b) and direct the issue of process to the accused."

In Dharam Pal and others v. State of Haryana and another; 2004 13 SCC 9, a three-Judge Bench was dealing with a reference to resolve the conflict of opinions in Kishori Singh (supra), Rajinder Prasad v. Bashir; AIR 2001 SC 3524] and SWIL Ltd. v. State of Delhi; AIR 2001SC 2747. At that juncture, the pronouncements in Kishun Singh (supra) and Ranjit Singh (supra) were brought to the notice of the Court. After referring to various provisions of the Code, the Bench of three learned Judges expressed as follows: -

> "Prima facie, we do not think that the interpretation reached in Ranjit Singh case is correct. In our view, the law was correctly enunciated in Kishun Singh case. Since the decision in Ranjit Singh case is of three-Judge Bench, we direct that the matter may be placed before the Hon'ble the Chief Justice for placing the same before a larger Bench."

There is no dispute that the reference is still pending. In Uma Shankar Singh v. State of Bihar and another, a two-Judge Bench was dealing with the issue pertaining to the power of the Magistrate under Section 190(1)(b) of the Code. After taking note of the decisions and the reference order in Dharam Pal (supra), the Court accepted the submission that the law is well settled that the Magistrate is not bound to accept the final report filed by the investigating agencies under Section 173(2) of the Code and is entitled to issue process against an accused even though exonerated by the said authorities without holding any separate enquiry on the basis of the police report itself.

Court have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Anyone who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand. **(Moti Lal Songara v. Prem Prakash alias Pappu and Anr.; AIR 2013 SC 2078)**

Ss. 190, 123—Cognizance of offence—Role of Magistrate

The Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3), Cr.PC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that they may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out proceed against the persons named in column No. 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Sessions, he may commit the case to the Court of Session to proceed further in the matter. The plea that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate had no other function, but to commit the case for trial to the Court of Session, which could only report to Section319 of the Code to array any other person as accused in the trial cannot be accepted. In other words, according to plea of appellant there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Session Judge, till the Section 319 stage was reached in the trial, Furthermore, in the event, the Session Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same. **(Dharam Pal vs. State of Haryana; 2013 AIR SCW 4491(A)**

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

The Sessions Judge is entitled to issue summons under S. 193 Cr.PC upon the case being committed to him by the learned Magistrate. The key words in the Section are that- "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The plea that the cognizance indicated in S. 193 deals not with cognizance of an offence, but of the commitment order passed by the Magistrate cannot be accepted in view of the clear wordings of S. 193 that the Court of Session may take cognizance of the offences under the said Section. **(Punjab vs. Haryana; 2013 AIR SCW 4491 (C)**

S. 204(1) – For the entertaining the second complaint on same allegation – Exceptional circumstances should exist

There is no dispute regarding maintainability of second complaint as laid down in various pronouncements. Hon'ble Supreme Court in the case of

Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar; AIR 1962 SC 876 has laid down thus:

> "There is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under Section 203 of the Code of Criminal Procedure. As however, a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under Section 204(1) of the Code of Criminal Procedure, exceptional circumstances must exist for the entertainment of the second complaint on the same allegations; in other words, there must be good reasons, why the Magistrate thinks that there is "sufficient ground for the proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under s. 203 of the Code of Criminal Procedure.
>
> The question now is, what should be those exceptional circumstances? In Queen Empress v. Dolagobind Dass (1), Maclean, CJ said: "I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of coordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice."

In the same decision, the Apex Court also has laid down the test to determine the exceptional circumstances which are.--(1) manifest error; (2) manifest miscarriage of justice; and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings**. (Jai Ram and others v. State of UP & another; 2013 (82) ACC 277)**

Ss. 302, 354 – Death sentence - Awarding of – Balancing test – Not proper for deciding capital sentences - Court has to apply crime test, criminal test and rarest of rare test for deciding death sentence

The tests that court has to apply, while awarding death sentence, are "crime test," "Criminal test" and rarest of rare test (RR test) not "balancing test." To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0% that is no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still the Court has to apply finally the Rarest of Rare case Test (RR Test), RR Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types

of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Courts award death sentence since situation demands so, due to constitution compulsion, reflected by the Will of the people and not the Will of the Judge. **(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)**

Ss. 309, 230, 231, Chapter XVIII – Adjournments – Exercise of power of trial court to adjourn proceedings

There is a dire need for the courts dealing with cases involving serious offences to proceed with the trial on day-to-day basis in de die in diem until the trial is concluded. The trial court dealing with sessions cases must ensure that the well-settled procedures laid down under CrPC as regards the manner in which the trial should be conducted in sessions cases are strictly complied with, in order to ensure dispensation of justice without providing any scope for unscrupulous elements to meddle with the course of justice to achieve some unlawful advantage, as has happened in the present case. **(Akil v. State (NCT of Delhi); (2013) 3 SCC (Cri) 64)**

S. 311 – Powers of Court to summon recall, or re-examination any person – Exercise of – Governing principles

While dealing with an application under Section 311 Cr.PC read along with Section 138 of the Evidence Act, following principles have to be borne in mind by the Courts:

(a) Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

(b) The exercise of the widest discretionary power under Section 311 Cr.PC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

(d) The exercise of power under Section 311 Cr.P.C. should be restored to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filing in a lacuna in a prosecution case, unless the facts and circumstances of the case made it

apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The Court must satisfy itself that it was in every respect essential to examine such a wintess or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of Section 311, Cr.PC simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(j) Exigency of the situation, fair play and good sense should be safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

(k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

(l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure than an opportunity of rebuttal is given to the other party.

(n) The power U/s. 311 Cr.PC must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as human right.

(Rajaram Prasad Yadav vs. State of Bihar; 2013 AIR SCW 4179 (B)

S. 313 - Statement of accused under – Not guilty – Not lead any evidence, in

his defence

In order to bring home the charges levelled against the accused-appellant, the prosecution examined 9 witnesses. Thereafter, the prosecution evidence was closed. The statement of the accused-appellant Jarnail Singh, was then recorded under s. 313 of Cr.PC. He denied the allegations levelled against him, and pleaded false implication. Despite opportunity having been afforded to him, the accused-appellant did not lead any evidence, in his defence. **(Jarnail Singh v. State of Haryana; 2013 (5) Supreme 39)**

S. 313 - Examination of accused – Accused has right to remain silent and cannot be forced to become witness against him but has duty to furnish explanation in his statement under s. 313, Cr.PC in respect of the incriminating material put to him - If he fails to do so, Court would draw inference against including adverse inference against him

In a Criminal trial, the purpose of examining the accused person under section 313, Cr. PC, is to meet the requirement of the principle of natural justice i.e., audi alterum partem. This means that the accused may be asked to furnish some explanation as regard the incriminating circumstances associated with him and the Court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under s. 313, Cr.PC, cannot be used against him and have to be excluded from consideration. (**Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan; (2013 (82) ACC 431 (SC)**

S. 313 – Statement of accused U/s. 311 can be used as evidence against him when it supports prosecution case

It is a settled principal of law that the statement of an accused under section 313 of Cr.P.C can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under section 313 of Cr.P.C simpliciter normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 Cr.P.C is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced. **(Khairuddin & ors. vs State of West Bengal; 2013 Cri.LJ 3271 (SC)**

S. 313 - Accused not asking any question to witness produced stating incriminating circumstances - Simply denying them as incorrect – Not sufficient

Consistent versions have been provided by the material witnesses regarding the non-payment of the sum of Rs.47,000/- as sale consideration for the sale of a buffalo, by the appellant. This version of events also fully stands established by the evidence provided by Maya Devi (PW.3) and Birma (PW.4). In his statement under Section 313 Cr.P.C., the defence did not ask any question to test the veracity of the said statement, either to Maya Devi (PW.3) or to Birma (PW.4). Mere denial stating that the same is incorrect by the appellant, is not sufficient and there is no reason to disbelieve the said portion of the case of the prosecution. It also stands established from the material on record, that there had been an altercation between the appellant and the deceased 2-3 days before the incident, and the appellant had threatened the deceased with dire consequences. Such version of events stands further fortified, by the evidence of Omkar Singh (PW 8). **(Karan Singh v. State of Haryana & Anr.; 2013 (4) Supreme 501)**

S. 354—Penalty—Principle of just punishment is bedrock of sentencing in respect of criminal offence

Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. **(Gopal Singh vs. State of Uttarakhand; 2013(5) ALJ 379 (SC)**

S. 354 – Sentence – Aggravating circumstances - Pendency of criminal cases against accused – Not aggravating circumstances

Mere pendency of few criminal cases against accused as such is not an aggravating circumstance to be taken not of while awarding death sentence unless the accused is found guilty and convicted in those cases. **(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)**

S. 354 – Sentencing has a social goal - Awarding just sentence is complex exercise – Court has to strike balance between reformative theory and principle of proportionality

Sentencing for any offence has a social goal. Sentence is to be imposed, regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crime. It serves as a deterrent. True it is, on certain occasions, opportunities may

be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim. **(Shyam Narian v. State (NCT of Delhi); AIR 2013 SC 2209)**

Ss. 357 and 357A - IPC, 1860 – Section 304 part II – Award of compensation - Question of compensation is considered only when accused is convicted

While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Cr.PC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family. **(Ankush Shivaji Gaikwad v. State of Maharashtra; 2013 (82) ACC 311)**

S. 360 – Probation of Offenders Act, 1958, Ss. 12, 4 - Release on probation – Probation Officer has no role under Cr.PC but to assist the Court under Probation of Offenders Act - While 1958 Act exonerates convict of disqualification - That is not so under Code

Section 360 of the Code of Criminal Procedure does not provide for any role for probation officers in assisting the courts in relation to supervision and other matters while the Probation of Offenders Act does make such a provision. While Section 12 of the Probation of Offenders Act states that a person found guilty of an offence and dealt with under Section 3 or 4 of the Probation of Offenders Act, shall not suffer disqualification, if any, attached to the conviction of an offence under any law. The Code of Criminal Procedure does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anamolous results. The intention to retain the provisions of Section 360 of the Code and the Probation of Offenders Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other

provisions of the Code. **(Sanjay Dutt v. State of Maharashtra, through CBI (STF); AIR 2013 SC 2687)**

S. 378 – Appeal against acquittal - Interference with - Only in exceptional cases and where compelling circumstances exist, power should be exercised

The court has time and again laid down parameters for interference by a superior court against the order of acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. **(Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P., Hyderabad; 2013 (4) Supreme 450)**

S. 378 – Appeal against acquittal – Is substantially different form appeal against conviction Court however would not interfere with acquittal if view adopted is reasonable and has its grounds well set out in materials on record

In State of Rajasthan v. Shera Ram alias Vishnu Dutta; (2012) 1SCC 602: AIR 2012 SC 1, after survey of the earlier pronouncements, it has been observed that there is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other. The preponderance of judicial opinion of Apex Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal, the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience. **(Kanhaiya Lal & Ors. v. State of Rajasthan; AIR 2013 SC 1940)**

Ss. 397, 401, 482, 319 - Bar to exercise of revisional powers - Against interlocutory order - Order rejecting application to summon additional accused - Not interlocutory order - May be assailed by filing revision - Not by filing petition under S. 482

When the complainant's application Under Section 319 of Cr.PC was rejected for the second time, he moved the High Court challenging the said order under Section 482 of Cr.PC on the ground that the Sessions Court had not correctly appreciated the facts of the case and the evidence brought on record.

The complainant wanted the High Court to set aside the order after holding that the evidence brought on record is sufficient for coming to the conc1usion that the appellants were also involved in the commission of the offence. The order assailed not being an interlocutory order the complainant ought to have challenged the order before the High Court in revision under Section 397 of Cr.PC and not by invoking inherent jurisdiction of the High Court under Section 482 of Cr.PC **(Mohit alias Sonu and Anr. v. State of UP and Anr.; AIR 2013 SC 2248)**

S. 437 – Bail - In case of economic offences - Require different approach

Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. **(Satya Pal v. State of Haryana & Anr.; 2013 Cri.LJ 2731)**

Ss. 406, 407, 362 and 173(8) – Transfer of Investigation to CBI – Consideration of – Power of Court to transfer investigation must be exercised in rare and exceptional cases

The Court in the case of Sakiri Vasu v. State of U.P.; 2008 (62) AIC 236 (SC) = AIR 2008 SC 907= 2008(60) ACC 689(SC) held:

> "This Court or the High Court has power under Article 136 or Article 226 to order investigation by the C.B.I. That, however should be done only in some rare and exceptional case, otherwise, the C.B.I. would be flooded with a large number of cases and would find it impossible to properly investigate all of them." (Emphasis added)

In view of the above, the law can be summarised to the effect that the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like C.B.I. only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency I thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instill confidence in the investigation or where the investigation is prima facie found to be tainted /biased.

In sum And substance, firstly, the facts and circumstances, of the instant

case do not present special features warranting transfer of investigation to C.B.I., and that too, at such a belated stage where the final report under section 173(2), Cr.P.C. has already been submitted before the competent Criminal Court. The allegations are only against the then R.D.O. who might have been transferred to various districts during these past 15 years. Similarly various other police officials might have investigated the case and it is difficult to assume that every police official was under his influence and all of them acted with mala fide intention. In view of the earlier order of this Court dated 2.9.2008, no subsequent development has been brought to the notice of the Court which could warrant interference by superior Courts and transfer the investigation to CBI. (**Prof. K.V. Rajendran v. Superintendent of Police; CBCID (South Zone, Chennai); 2013(82) ACC 958)**

S. 439 – Grant of bail – Consideration of

While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt. **(Nimmagadda Prasad v. CBI; 2013 Cri.LJ 3449 (SC)**

Ss. 482, 227 – Quashing of proceedings – Stepwise enquiry devised for High Court to follow in exercise power of quashment U/s. 482

The complaint made by the respondent complainant in the instant case proceeded on the assumption that his daughter was administered poison. The said assumption was based on the fact that the body of the deceased had turned blue. The motive for commission of the crime was stated to be non-cordiality of relations between the two families on account of non-fulfilment of dowry demand. However, the evidence produced by the appellants viz. the post-mortem examination report dated 28-9-1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent complainant; the chemical analysis findings contained in the Central Forensic Science Laboratory's report dated 9-2-1993 which has not been disputed by the respondent complainant; the inquest report of the SDM, Delhi dated 6-7-1993, findings whereof have been painstakingly recorded by involving the respondent

complainant; the letter of the brother of the deceased dated 22-9-1992 addressed to the deceased just four days before her death, the contents and authenticity whereof are not the subject-matter of challenge at the hands of the respondent complainant; and finally, the telephone bills produced by the appellant-accused substantiating consistent and regular contact between the rival families, which have not been questioned, can lead only to the conclusion that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellant-accused. As far as the allegedly strained relations between the deceased and her in-laws is concerned, the telephone bills demonstrate that phone calls were regularly made by the deceased from her husband's residence to her parents. The relationship was subsisting even during the time of the deceased's illness. In a letter written by the brother of the deceased just four days before the deceased's death, he had showered praise on the appellants. Thus, it had been established that the relationship between the two families was cordial and affectionate. This is clearly contrary to what has been alleged in the complaint. Merely because the body of the deceased had turned blue, is not sufficient basis to infer that she had been poisoned to death. In fact, material relied upon by the appellants is sufficient to condemn the factual basis of the accusation as false.

The discretion vested in the High Court under Section 482 Cr.P.C. can be exercised suo motu to prevent the abuse of court, and/or to secure the ends of justice. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution / complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same.

The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. (Para 29)

The following steps should be followed by the High Court to determine the veracity of a prayer for quashing of proceedings raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

1. *Step one*: whether the material relied upon by the accused is

sound,
reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

2. *Step two*: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

3. *Step three*: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

4. *Step four*: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused. **(Rajiv Thaper v. Madan Lal Kapoor; (2013) 3 SCC (Cri) 158)**

S. 482 – Quashing of FIR against appellant U/s. 409 IPC

Rejected by High Court-appeal-though, delay had been alleged on the part of appellant, nothing on the record to suggest that appellant caused delay in the matter of investigation on contrary, silence on the part of respondent regarding availability of the original record or other evidence before the Investigating Agency showed that delay caused due to inaction on the part of the respondent keeping investigation pending for further period would be futile as respondent was not sure whether original records could be procured for investigation Delay in the present case being caused by respondent, constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution held to be violated - As the appellant had already been exonerated in the departmental proceedings for identical charges, keeping the case pending against the appellant for investigation, held to be unwarranted-FIR lodged against appellant quashed-Appeal allowed **(Lokesh Kumar Jain v. State of Rajasthan; 2013 (4) Supreme 606)**

Constitution of India

Art. 5 - Domicile of choice - The Person who claims to have acquired domicile of choice - Has to prove it

The right to change the domicile of birth is available to any person not legally dependant and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality. **(Sondur Gopal v. Sondur Rajini; AIR 2013 SC 2678)**

Art. 14 – Does not envisage negative equality – Any illegality once committed cannot be allowed to be perpetuated – Instances of appointment of persons involved in serious crimes cannot be made precedence

The Screening Committee's proceedings have been assailed as being arbitrary, unguided and unfettered. But, in the present cases, court sees no evidence of this. However, certain instances have been pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality (Fuljit Kaur). It is not meant to perpetuate illegality or fraud because it embodies a positive concept. If the Screening Committee which is constituted to carry out the object of the comprehensive policy to ensure that people with doubtful background do not enter the police force, deviates from the policy, makes exception and allows entry of undesirable persons, it is undoubtedly guilty of committing an act of grave disservice to the police force but court cannot allow that illegality to be perpetuated by allowing the respondents to rely on such cases. It is for the Commissioner of Police, Delhi to examine whether the Screening Committee has compromised the interest of the police force in any case and to take remedial action if he finds that it has done so. Public interest demands an in-depth examination of this allegation at the highest level. Perhaps, such deviations from the policy are responsible for the spurt in police excesses. Court expect the Commissioner of Police, Delhi to look into the matter and if there is substance in the allegations to take necessary steps forthwith so that policy incorporated in the Standing Order is strictly implemented. **(Commissioner of Police, New Delhi & Anr. v. Mehar Singh; 2013 (4) Supreme 531)**

Art. 14 – Reasoned order is requirement of natural justice and reason is heart beats of every conclusion

It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding

an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice-delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

Arts. 14, 16 and 226 – Compassionate appointment – Claim for higher post – Validity of

In this case, upon the death of the father of the present petitioner, his mother had submitted a claim for consideration of the case of her son, namely, Deepak on a Class—IV post. Thereafter, upon attaining the age of majority and after the decision of this Court in Civil Writ Petition No. 1515 of 2002, the petitioner himself had also submitted a request for being considered for appointment to a Class—IV post on compassionate ground. Such appointment has been given to him in terms of issuance of appointment letter dated 12.6.2009 on the post of Peon. The petitioner has accepted such appointment without any reservation. It would not be open for him now to seek appointment to a Class—III post on compassionate basis. **(Deepak vs. State of Haryana; 2013 (4) SLR 191 (P&H)**

Art. 21—Personal liberty—Is not absolute—Controlled by concept of rational liberty

Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty". In essence, liberty of an individual should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose h is own. The cry of liberty is not to be confused with or misunderstood as unconcerned senile shout for freedom. The protection of the collective is the bone marrow and that is why liberty in a civilized society cannot be absolute. It is the duty of the courts to uphold the dignity of personal liberty. It is also the duty of the Court to see whether the individual crosses the "Lakshman Rekha" that is carved out by law is dealt with appropriately. **(Dharmendra Kirthal vs. State of U.P.; AIR 2013 SC 2569 (E)**

Arts. 21 & 14 – Right to dignity – Wife beating leading to suicide – View that one or two beatings not sufficient in ordinary course for women to commit suicide is not acceptable—Court should be sensitive to women's problems

In this case, the view taken by the Sessions Judge in this case that one or two beatings are not sufficient in the ordinary course for a woman to commit suicide suggests that wife beating is a normal facet of married life. It cannot mean that giving one or two slaps to a wife by a husband just does not matter. It is one thing to say that every wear and tear of married life need not lead to suicide and it is another thing to put it so crudely and suggest that one or two assaults on woman is an accepted social norm. Judges have to be sensitive to women's problems. Assault on a woman offends her dignity. What effect it will have on a woman depends on the facts and circumstances of each case. There cannot be any generalisation on this issue. This, however, must not be understood to mean that in all cases of assault suicide must follow and that where there is no evidence the court should go out of its way, ferret out evidence and convict the accused in such cases. It is of course the duty of the court to see that an innocent person is not convicted. But it is equally the duty of the court to see that perpetrators of heinous crimes are brought to book. The views taken by the Sessions Judge can be characterised as perverse. They show a mindset which needs to change. Perhaps the Sessions Judge wanted to convey that the circumstances on record were not strong enough to drive the deceased to commit suicide. But to make light of slaps given to the deceased wife which resulted in loss of her right eyesight in this case is to show extreme insensitivity. There is a phenomenal rise in crimes against women, and the protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitised towards the women's problems. **(Vajresh Venkatray Anvekar v. State of Karnataka; (2013) 3 SCC (Cri) 227)**

Art. 21 – Fair trial – What does it constitutes - Denial of adducing evidence in support of defence is valuable right and constitutes to denial of fair trial

Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. **(Natasha Singh v. CBI (State); 2013 Cri.LJ 3346 (SC)**

Art. 21 – Right to speedy trial – Scope

Unless there is a speedy trial, the concept of fair trial is totally crucified. Recently, in Mohd. Hussain vs. State (Govt. of NCT of Delhi); 2012(9) SCC 408, a three-Judge Bench, after referring to the pronouncements in P. Ramachandra Rao case vs. State of Karnataka; (2002) 4 SCC 578, Zahaira Habibulla H.

Sheikh vs. State of Gurajat; (2004) 4 SCC 158, Satyajit Banerjee vs, State of WB; (2005) 1 SCC 115, pointed out the subtle distinction between the two in the following manner:

"40. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end."

It is to be kept in mind that on the one hand, the right of the accused is to have a speedy trial and on the other, quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time-limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective. **(Niranjan Hemchandra Sashital vs. State of Maharashtra; (2013) 2 SCC (Cri) 737)**

Arts. 21, 32, 72 and 161 – Death penalty awarded for terrorist acts/terrorism – Delay in deciding mercy/clemency petition u/A 72/161 cannot be invoked as ground for commutation of death sentence in such cases

The power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.

While exercising power under Article 72, the President is required to act

on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty-bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Article 72 or 161 of the Constitution.

Time and again, it has been held that while imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty-bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Article 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterised as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay. **(Devender Pal Singh Bhullar v. State (NCT of Delhi); (2013) 6 SCC 195)**

Art. 22 - Preventive Detention – Basis of detention – Gravity of offence is irrelevant in preventive detention matter

The counsel submitted that the gravity of offence is irrelevant in preventive detention matters. Preventive detention is a serious inroad on the liberty of a person. The procedural safeguards are the only protection available to him and, therefore, their strict compliance is necessary.

The learned counsel urged that the gravity of the offence is irrelevant in a preventive detention matter. We entirely agree with this submission. **(Abdul Nasar Adam Ismail vs. State of Maharashtra; (2013) 4 SCC 435)**

Arts. 32 and 226 PIL – Service matter – PIL is not permissible so far service matters are concerned

The Supreme Court has consistently cautioned the courts against entertaining public interest litigation filed by unscrupulous persons, as such meddlers do not hesitate to abuse the process of court. Whenever any public interest is invoked, the Court must examine the case to ensure that there is in fact, genuine public interest involved. The Court must maintain strict vigilance to ensure that there is no abuse of the process of court and that, ordinarily meddlesome bystanders are not granted a visa. Many societal pollutants create new problems of non-redressed grievances, and the court should make an earnest endeavour to take up those cases, where the subjective purpose of the lis justifies the need for it. Even as regards the filing of a public interest litigation, it has been consistently held that such a course of action is not permissible so far as service matters are concerned. **(Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465)**

Arts. 72, 161 – Clemency power – Nature - It is manifestation of prerogative of State

The power vested in the President under Art. 72 and the Governor under Art. 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of people. While exercising power under Art. 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty-bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Art. 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she can- not overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc. In any case, the President or the Governor, as the case may be, had to take cognizance of relevant facts and then decide whether a case is made out for exercise of power under Art. 72 or 161 of the Constitution. **(Devender Pal Singh Bhullar v. State (NCT of Delhi); 2013 Cri.LJ 2888)**

Arts. 72, 161, 226, 32 – Mercy Petition – Delay in disposal cannot itself be ground to exercise power of Judicial review

While imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty-bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Art. 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterised as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay.

Delay can much less be a reason to judicially review decision of President/Governor on mercy petition where a person is convicted r offence under TADA or similar statutes. **(Devender Pal Singh Bhullar v. State (NCT of Delhi); 2013 Cri.LJ 2888)**

Art. 136 – Extra-ordinary jurisdiction – Re-appreciation of evidence – Power of

It is trite that appreciation of evidence is essentially the duty of the trial Court, and the first Appellate Court. But in cases, where, the Courts below are shown to have faltered and ignored material aspects resulting in miscarriage of justice, this Court can and has interfered to grant relief. That is because even when this Court may not be an ordinary Court of appeal, the width and the plenitude of the powers available to it under Article 136 would permit a reappraisal even at the apex stage in cases of manifest injustice. The legal position as to the powers of this Court under Article 136 of the Constitution is well-settled by pronouncements of the Court to which a detailed reference is in our view unnecessary. **(Khairuddin & Ors. v. State of West Bengal; 2013 Cri.LJ 3271 (SC)**

Art. 226 – Writ jurisdiction – Scope – Petition setting aside arbitral award is not maintainable before High Court

In this case, the courts view that this petition whether under Art. 226/227 of the Constitution of India or under Section 34 r/w Section 42 of the Act is not maintainable before this court and the proper remedy available to the petitioner,

if any, is to make proper application under Section 34 of the Act to the Court i.e. the Principal Court of original jurisdiction of the concern district. **(India Waster Energy Development Ltd. v. Greater Noida Industrial Development Authority; 2013 (4) ALJ 01)**

Arts. 226 and 142 – Exercise of power to grant of relief not prayed for is impermissible

Appearing for the appellants, Mr. P.P. Rao, learned Senior Counsel, argued that the High Court had committed an error in quashing the entire selection process even when the petitioners had not made any prayer to that effect. Mr. Rao was at pains to argue that a relief which was not even prayed for by the writ petitioners could not be granted by the Court whatever may have been the compulsion of equity, justice and good conscience. There is, in view of the Court, no merit in that contention of Mr. Rao. The reasons are not far to seek. It is true that the writ petitioners had not impleaded the selected candidates are party-respondents to the case. But it is wholly incorrect to say that the relief prayed for by the petitioners could not be granted to them simply because there was no prayer for the same.

If the model answer key which was used for evaluating the answer sheets was itself defective the result prepared on the basis of the same could be no different. The Division Bench of the High Court was, therefore, perfectly justified in holding that the result of the examination insofar as the same pertained to 'A' series question paper was vitiated. This was bound to affect the result of the entire examination qua every candidate whether or not he was a party to the proceedings. It also goes without saying that if the result was vitiated by the application of a wrong key, any appointment made on the basis thereof would also be rendered unsustainable. The High Court was, in that view, entitled to mould the relief prayed for in the writ petition and issue directions considered necessary not only to maintain the purity of the selection process but also to ensure that no candidate earned an undeserved advantage over others by application of an erroneous key. (**Rajesh Kumar vs. State of Bihar with Abhishek Kumar vs. State of Bihar; (2013) 4 SCC 690)**

Art. 311—Disciplinary inquiry—Doctrine of proof "beyond reasonable doubt" does not apply to such proceeding despite it being quasi-judicial or quasi-criminal

Standard of proof in a Departmental Enquiry which is Quasi Criminal/Quasi Judicial in nature:

A. In M.V. Bijlani vs. Union of India and Ors.; AIR 2006 SC 3475: 2006(3) SLR 105 (SC), the Court held :

> "…Disciplinary proceedings, however, being quasicriminal in nature, there should be some evidences to prove the charge. Although the

charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. "

(Nirmala J. Jhala vs. State of Gujarat; 2013(4) SLR 127 (SC)

Consumer Protection Act

S. 2(1)(d) – Complaint – Maintainability – Commercial users cannot maintain consumer complaint

It clearly shows that it is a case of a bank account opened by a business company in furtherance of its commercial business. The operation of the bank account was to be in terms of the agreement of 5.12.2008 between the two parties.

Evidently, the cause of action in this case would arise only subsequent to 2008 when the amendment of the relevant provision in the Consumer Protection Act, 1986 had already come into effect on 15.3.2003. The amended Section 2(1) (d) (ii) defines the term 'consumer' in the context of hiring of the service (banking service in the present case) in the following terms:-

"(ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or, under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person [but does not include a person who avails of such services for any commercial purpose]"

The above provision, applied to the facts of this case, clearly shows that the Complainant cannot be treated as 'consumer' under the Act. The decision of the State commission is therefore, clearly based on correct appreciation of the facts and the law. (**PDC Marketing Private Limited v. Axis Bank Limited; 2013(3) CPR 164 (NC)**

S. 2(1)(d) – Consumer complaint filed by partnership firm – Maintainability – Held, not maintainable because partnership firm is not a consumer

It is difficult to fathom as to how can a partnership Firm, which is transacting the business of printing and publication of Newspapers, can be said to be a 'Consumer'? It is clear that the employees, representatives, correspondents, etc., would transact the commercial activity. A bare perusal of this case, clearly

goes to show that the Guest House is meant for 'commercial purpose'. By no stretch of imagination, it can be said that the said premises will be used by a person, exclusively for the purpose of earning his livelihood, by means of self-employment.

So, the complainant is not a 'consumer'. Therefore, we dismiss the complaint, but it can approach the appropriate forum for redressal of its grievances, as per law. Filing of this complaint is sheer wastage of the precious time of this Commission. **(M/s Nav Bharat Press (Raipur) Thr. its Partner, Sh. Sameer, M/s Sahara Prime City Ltd. Thr. its Authorised Officer; 2013(3) CPR 465 (NC)**

Ss. 2(1)(d), 14 – Scope of – Government servant is not consumer hence dispute regarding his retiral benefits, P.F., Gratuity cannot be entertained by Consumer Fora

By no stretch of imagination a government servant can raise any dispute regarding his service conditions or for payment of gratuity or GPF or any of his retiral benefits before any of the Forum under the Act. The government servant does not fall under the definition of a "consumer" as defined under Section 2(1)(d)(ii) of the Act. Such government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum, for redressal of any grievance, may be the State Administrative Tribunal, if any, or Civil Court but certainly not a Forum under the Act. **(Dr. Jagmittar Sain Bhagat vs. Director Health Services, Haryana; 2013 AIR SCW 4387 (A)**

Ss. 2(1)(e),(c),(o) – Consumer Forum – Jurisdiction – Complaint made against assessment of unauthorized use of electricity u/s. 126 of Electricity Act – Not maintainable before consumer forum

The acts of indulgence in "unauthorized use of electricity" by a person, as defined in clause (b) of the Explanation below Section 126 of the Electricity Act, 2003 neither has any relationship with "unfair trade practice" or restrictive trade practice" or deficiency in service" nor does it amount to hazardous services by the licencee. Such act of "unauthorized use of electricity" has nothing to do with charging price in excess. Therefore, acts of person indulging in 'unauthorized use of electricity' do not fall within the meaning of "complaint" under Consumer Protection Act. As such despite clear intention of Parliament evident from Ss. 173, 174, 175 of Electricity Act, not to bar the jurisdiction of consumer for a in case of inconsistency between the two Acts the Consumer Forum cannot derive power to adjudicate a dispute in relation to assessment made under Section 126 or offences under Sections 135 to 140 of the Electricity Act, as the acts of indulging in "unauthorized use of electricity" as defined under Section 126 of Electricity Act or committing offence under Sections 135 to 140 of that Act do not fall within the meaning of "complaint" as defined under Section 2(1)(c) of

the Consumer Protection Act, 1986. Moreover the offences referred to in Sections 135 to 140 can be tried only by a Special Court constituted under Sections 135 to 140 of the Electricity Act, 2003 is not maintainable before the Consumer Forum. **(UP Power Corporation Ltd. vs. Anis Ahmad; AIR 2013 SC 2766 (B)**

S. 13(4) – Powers of Consumer Forum – Consumer court cannot take over functions of civil courts

There is no denying the fact that under section 13(4) of the Consumer Protection Act, 1986, the District Forum is armed with the same powers as vested in civil court under the Code of Civil Procedure 1908 but these powers are there for handling specific matters and it is very clear that consumer court cannot take over the functions of the civil courts. In the instant case, we agree with the contention of the petitioner that issues raised in the revision petition as reproduced in this order can be addressed properly by a civil court only. (**Sri Prakash v. Shrikant; 2013(3) CPR 31 (NC)**

Ss. 15, 17, 19 – Whether District Forum can allow complaint even without recording any evidence of complaints – Held, "No"

Perusal of record of District Forum clearly reveals that notice for appearance of petitioner on 2.12.2009 has been issued by District Forum on 9.12.2009. Learned Counsel for the respondent submitted that by inadvertence 9.12.2009 has been mentioned whereas apparently notice was issued on 9.11.2009. This contention cannot be accepted because the date 9.12.2009 has been mentioned on the notice at two places, on the top as well as at bottom. Thus, it becomes clear that notice for appearance on 2.12.2009 has been issued on 9.12.2009. Further, it also reveals that District Forum allowed complaint even without recording any evidence of the complainant. Thus, it becomes clear that District Forum committed error in allowing complaint ex-parte.

Learned State Commission further committed error in dismissing appeal by impugned order without considering aforesaid contention of the petitioner made in the memo of appeal before State Commission and in such circumstances, impugned order is liable to set aside. **(Sahara India vs. Ashok Kumar Ranchand Gunani; 2013(3) CPR 376 (NC)**

Ss. 15, 17, 19 – Awarding of Interest – Interest should be allowed from date of order of District Forum

Perusal of order of District Forum reveals that 12% p.a. interest has been awarded from the date of reputation of claim till its actual payment, only if order of District Forum for making payment is not complied with by the petitioner within a period of 30 days. In such circumstances, award of interest cannot be said to be penal interest, but it appears that interest has been awarded only for due compliance of the order within a period of 30 days. In such circumstances, grant

of interest cannot be termed as penal interest. No doubt, interest has been awarded from the date of repudiation of the claim, whereas interest should have been allowed from the date of order of District Forum because 30 days period was given for compliance of the order of District Forum and interest has been awarded only on failure to comply with the directions within 30 days. In such circumstances, revision is liable to be allowed partly. **(Bajaj Allianz General Insurance Co. Ltd. vs. Nitin Verma; 2013(30) CPR 445 (NC)**

Ss. 15, 19 – State Commission – Power to recall its order – State Commission has no power to recall its order

Complainant filed complaint before District Forum and learned District Forum vide order dated 13.2.2003 allowed complaint and directed OP to allot House No. 63/37 which is still vacant. Both the parties filed appeal before State Commission and learned State Commission dismissed both the appeals. Later on, complainant/petitioner filed application and submitted that by typing mistake, House No. 63/37 has been typed in the orders instead of House No. 62/37 which may be corrected. Learned State Commission vide impugned order dismissed application against which, this revision petition has been filed.

Perusal of record clearly reveals that learned District Forum directed OP/Rajasthan Housing Board to allot House No. 63/37 to the complainant and appeals filed by both the parties were dismissed by learned State Commission. In both the appeals, House No. 63/37 has been mentioned. Learned State Commission in the impugned order observed that there is no typing mistake in the order and order of District Forum for allotment of House No. 63/37 has been affirmed by learned State Commission. It was further observed that learned State Commission has no power to review its order. The Court did not find any illegality, irregularity or jurisdictional error in the impugned order and revision petition is liable to be dismissed. **(Abhay Deo Saxena vs. Rajasthan Housing Board; 2013(3) CPR 378 (NC)**

Ss. 15, 17, 19 – Maintainability of second complaint on same facts – Second complaints for same relief is not legally maintainable

A material point involved in the present case is that second consumer complaint on the same facts has been made by the complainant after his first complaint was dismissed for his non-appearance on 29.08.2007. It is, therefore, to be examined whether the second complaint is maintainable at all duly signed by counsel for the complainant.

It is very clear from the version of the complainant himself that the first complaint no. 307/2007 was dismissed on 29.08.2007 for his non-appearance. It is a matter of general legal procedure that the complainant could have agitated for getting the said order dated 29.08.2007 set aside from the competent authority. In case, the competent authority did not agree to his request, he could

have moved the higher authority by way of appeal, revision petition, etc. The filing of second complaint on the same facts and circumstances has not been provided anywhere as per the established legal provisions. This Commission has also observed in the case of Purusharath Builders Pvt. Ltd. v. Uppal Housing Ltd. & Anr.; (2012) CPJ 500 (NC), that the second complaint was not maintainable. In the said case, the party had withdrawn the previous complaint on the ground that the previous counsel was not competent. The Commission observed that if there was defect in the first complaint, amendment application should have been moved or permission could have been sought or request could have been made to have liberty to file fresh complaint. It was not possible to give permission to fill-up lacuna at this stage.

It is very clear from the above facts that the orders passed by the Fora below suffer from a major irregularity as they have dealt with the second complaint which was legally not maintainable. (**Ansal Housing & Construction Ltd. v. Indian Machinery Company; 2013(3) CPR 207 (NC)**

Ss. 17, 19 – Insurance – Quantum of compensation – Quantum of compensation cannot exceed insured amount

From the averments made by the parties and material on record, the factum of fire incident having occurred has been proved and has not been denied by the petitioner also. The only controversy is regarding the value of the loss suffered by the complainants during fire episode. The insurance policy has been taken for a sum of Rs. l,50,000/- and hence the compensation cannot exceed this amount as correctly observed by the District Forum. It has been stated in the written statement filed by the petitioner that half-burnt racks were intentionally taken away immediately after the fire by the complainant because of which the surveyor was unable to assess the actual condition of the shop. The surveyor has brought out in his report that the size of the shop was 10ft. X 20ft. but the complainant used only 1/3rd portion of the shop for storage of cloth in 3 racks fitted therein, which was clear from the fire marks present on the walls for which the insured agreed during his visit. The remaining shop was being used for running a ration depot. The surveyor has stated that the insured had put partly burnt wooden rack in front of his shop and tried his best to change the original position of the spot so as to mislead the facts. He also did not extend any cooperation in getting the salvage checked and did not produce books of accounts, purchase bills, sales bills, etc. saying that the same had been burnt in fire. The FIR was also silent about the burning of books of accounts. His father Mahaveer Prasad Dhanuka informed the tehsildar that all goods, furniture and records had been burnt. The insured also put pressure on the surveyor to assess the loss on the higher side.

It is made out from the record that the insurance company has already made a payment of Rs.l lakh, whereas the amount for which goods were insured

is Rs.l.5 lakh. Considering the overall facts and circumstances of the case and the material on record, it is prudent to presume that the total loss involved in the case may be taken as Rs. 1.10 lakh and making account for the excess clause, the respondent is entitle to Rs.l lakh, which he has already received from the petitioner. This petition is, therefore, disposed of observing that no further amount shall be payable by the petitioner to the respondent in addition to whatever respondent has already been paid. (**National Insurance Co. Ltd. v. Shiv Shankar; 2013(3) CPR 228 (NC)**

Ss. 17, 19 – Insurance – Suppression of pre-existing ailment can vitiate insurance cover

Complainant has suppressed fact of lapse and revival of policy in his complaint. Complainant simply mentioned in para 11 of the complaint that petitioner was explained about the true facts regarding the illness that the deceased suffered right renal calculi only after September, 2003. In the complaint it has not been mentioned that these facts were disclosed by the deceased to petitioner. During course of arguments, respondent submitted that at the time of revival of policy, these facts were disclosed to the agent of the petitioner, but agent has filled wrong answers in the personal statement regarding health. This fact cannot be believed because this declaration dated 1.11.2003 given at the time of revival of the policy has been signed by the deceased and answers to question no. 2 are in negative which runs as under:

Q.No.2

a) Have you suffered from any illness/ Disease requiring treatment for a week or more? : No
b) Did you ever have any operation, accident or injury? : No.
c) Did you ever undergo ECG, X-ray Screening, blood, Urine or stool Examination? : No.

In the present case, admittedly, assured had suppressed material facts regarding his previous treatment and operation and has furnished false answers regarding his health, operation, X-ray, etc. petitioner has not committed any deficiency in repudiating claim and learned District Forum committed error in allowing complaint and learned State Commission further committed error in dismissing appeal and in such circumstances, revision petition is to be allowed. (**Life Insurance Corporation of India Manager v. Smt. Gurvinder Kaur; 2013(3) CPR 29 (NC)**

Ss. 21(b)—Revisional Jurisdiction—Scope of

The powers of National Commission flows from section 21(b) of the Consumer Protection Act, 1986 which reads thus:-

"(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity."

On reading of the above, it is obvious that the National Commission under its revisional jurisdiction have very limited powers in exercise of revisional jurisdiction. The National Commission can interfere with the orders of the Fora below if they have exceeded their jurisdiction or have acted in exercise of its jurisdiction with illegality or material irregularity. **(New India Assurance Co. Ltd. Yamuna Nagar Thr. its Manager vs. M/s Uni Ply Industries; 2013(3) CPR 297 (NC)**

Criminal Trial

Awarding sentence – Duty of court – Solemn duty of court to strike a proper balance while awarding sentence

The prime objective of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. The most relevant determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing misplaced sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings. The Punishment should not be so lenient that it shocks the conscious of the society being abhorrent to the basic principles of sentencing. Thus, it is the solemn duty of the Court to strike a proper balance while awarding sentence as awarding a lesser sentence encourages a criminal and as a result of the same society suffers. (**State of M.P. v. Babulal; 2013(82) ACC 1000)**

Power of Magistrate to take voice sample – Conflicting views given by Division Bench, hence matter referred to larger Bench

If, despite absence of any provision therefor in Cr.PC, Magistrate can authorize investigating agency to record voice sample of accused. Conflicting answers given by the two Judges comprising present Division Bench. Hence, matter referred to larger Bench.

Answering the above said question in the affirmative, observed, per Desai, J. in her detailed judgment that Magistrate acting under S. 5, identification of Prisoners Act, 1920 can require any person to give his voice sample for purposes of investigation or proceeding under CrPC, and that Magistrate has ancillary or implied power under S. 53 CrPC to pass such order,

Altamas, J. disagreeing therewith, and answering the said question in the negative. **(Ritesh Sinha vs. State of U.P.; (2013) 2 SCC (Cri) 748)**

Medical Jurisprudence – Poisoning - Dead body turning blue is not sufficient to infer that deceased was poisoned to death

The complaint made by the respondent complainant in the instant case proceeded on the assumption that his daughter was administered poison. The said assumption was based on the fact that the body of the deceased had turned blue. The motive for commission of the crime was stated to be non-cordiality of relations between the two families on account of non-fulfillment of dowry demand. However, the evidence produced by the appellants viz. the post-mortem examination report dated 28-9-1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent complainant; the chemical analysis findings contained in the Central Forensic Science Laboratory's report dated 9-2-1993 which has not been disputed by the respondent complainant; the inquest report of the SDM, Delhi dated 6-7-1993, findings whereof have been painstakingly recorded by involving the respondent complainant; the letter of the brother of the deceased dated 22-9-1992 addressed to the deceased just four days before her death, the contents and authenticity whereof are not the subject-matter of challenge at the hands of the respondent complainant; and finally, the telephone bills produced by the appellant-accused substantiating consistent and regular contact between the rival families, which have not been questioned, can lead only to the conclusion that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellant-accused. As far as the allegedly strained relations between the deceased and her in-laws is concerned, the telephone bills demonstrate that phone calls were regularly made by the deceased from her husband’s residence to her parents. The relationship was subsisting even during the time of the deceased's illness. In a letter written by the brother of the deceased just four days before the deceased's death, he had showered praise on the appellants.

Thus, it had been established that the relationship between the two families was cordial and affectionate. This is clearly contrary to what has been alleged in the complaint. Merely because the body of the deceased had turned blue, is not sufficient basis to infer that she had been poisoned to death. In fact, material relied upon by the appellants is sufficient to condemn the factual basis of the accusation as false. **(Rajiv Thapar v. Madan Lal Kapoor; (2013) 3 SCC (Cri) 158)**

Non-explanation of injuries on person of accused – Effect of

Non-explanation of serious injuries on the person of accused may be fatal to the prosecution case. But where the injuries sustained by the accused are minor in nature, even in absence of proper explanation of prosecution, story of the prosecution cannot be disbelieved. **(State of Rajasthan v. Shiv Charan;**

2013(82) ACC 987)

Practice and Procedure – Proper methodology and procedure for deciding criminal cases by criminal courts highlighted

A criminal court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on academic platforms. The views or opinions expressed by Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made at the State Judicial Academies or the National Judicial Academy at Bhopal, only update or open new vistas of knowledge for judicial officers. Criminal courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges' or academicians' opinions, predilections, fondness, inclinations, proclivity on any subject, however eminent they are, shall not influence a decision-making process, especially when Judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. The National Judicial Academy and the State Judicial Academies should educate judicial officers in this regard so that they will not commit such serious errors in future, as in the instant case.

The fundamental requirement is that a Judge presiding over a criminal trial has the sacrosanct duty to demonstrate that he applies the correct principles of law to the facts regard being had to the precedents in the field. A Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarters of the society but not in binding judicial precedents. He should entirely ostracize prejudice and bias. The bias need not be personal but may be an opinionated bias. **(Oma v. State of TN; (2013) 3 SCC (Cri) 208)**

Revisional Power of High Court – Propositions – Narrated

As a broad proposition, the interference may be justified (a) where the decision is grossly erroneous; (b) where there is no compliance with the provisions of law; (c) where the finding of fact affecting the decision is not based on the evidence; (d) where the material evidence of the parties has not been considered; and (e) where the judicial discretion is exercised arbitrarily or perversely.

Hon'ble the Apex Court in "Jagannath Chaudhary v. Ramayan Singh; 2002 (Suppl.) ACC 136(SC)", has held that revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error or point of law and consequently there has been a flagrant miscarriage of justice. (**Ramesh Chandra v. State of Uttar**

Pradesh; 2013(82) ACC 765)

S. 391 – Production of additional evidence purpose of – Power U/s. 391 for producing additional evidence to be exercised exceptionally with circumspection to meet end of justice and not in normal course for filling up lacuna

In this case, court has held that the power under section 391 Cr.P.C. for producing additional evidence is to be exercised exceptionally with circumspection to meet the ends of justice and not in normal course for filling up lacunae and that "Admission of additional evidence should not operate in a manner prejudicial to the prosecution or the defence." The High Court's order was considered to be suffering from the vice of non-application of mind. **(Gaurav v. State of U.P.; 2013(82) ACC 725)**

Employees' Compensation Act

S. 4-A(3) (a) – Whether insurance Company is liable to pay the interest awarded - Held "Yes"

The Apex Court in Pratap Narain Singh Deo v. Shrinivas Sabata; 1976 ACJ 141 (SC), has held that the liability arises as soon as personal injury is caused to the workman and employer has to pay the compensation in accordance with section 4 of the Act, and the failure to pay entails liability to pay interest and penalty under section 4-A of the Act. The relevant para of the judgment is reproduced as under:

"(8) It was the duty of the appellant, under section 4-A (1) of the Act, to pay the compensation at the rate provided by section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a causal contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, court has no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

In view of above discussion, the appeal is partly allowed. The grant of interest as awarded by the Commissioner to be payable by the appellant is upheld. **(New India Assurance. Co. Ltd. V. Bhogender Jha and another; 2013**

ACJ 2003)

S. 4-A (3) (b) - Whether insurance co. is liable to pay the amount of penalty – Held, "No"

As regards grant of penalty, the Supreme Court in Ved Prakash Garg v. Premi Devi; 1998 ACJ 1 (SC), held that the insurance company is not liable to pay the amount of penalty and it is the liability of the employer alone. As regards liability on the insurance company to pay the penalty to the respondent No. 1 the same is set aside. **(New India Assurance Co. Ltd. V. Bhogender Jha and another; 2013 ACJ 2003)**

Evidence Act

S. 3 – Police witness – Not to be viewed with distrust if found reliable and trustworthy

There is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. **(Kashmiri Lal v. State of Haryana; 2013 Cri.LJ 3036)**

S. 3 - Appreciation of – Income-tax Return – Whether any reliance could be placed on the income-tax return by deceased who was not previously income tax assessee was filed after his death? – Held, "No"

Contending that no evidentiary value could be attached to Ex.P17-Income tax return, learned counsel for Appellant has placed reliance upon 2003 ACJ 81 [Oriental Insurance Co., Ltd., v. Kousalya Kawar and others]. In the said case, statement of account was prepared after the demise of the deceased and before the filing of Claim Petition. In the said decision, Division Bench held that mere filing of the statement and challan is of no assistance without proof and they cannot be presumed to be correct, especially when it is a document prepared after the accident in reference to an earlier period. It was further held that the statement is with a mind to show the income and therefore, the Tribunal ought to have appraised it judicially. Under those facts and circumstances, in the said decision, the Division Bench of this Court held that no reliance could be placed upon the statement of account prepared after the demise of the deceased.

In this case, also Ex. P17 - Income tax return for the year 2000-2001 was prepared after the demise of the deceased. Apart from the evidence of PW2, no such witnesses were examined to speak about the tuition centre and that the deceased was earning Rs.1,55,000/- per annum as stated in Ex. P17 - Income tax return. Previously, deceased was not an Income tax assessee. Since previously the deceased was not an Income tax assessee, Court are not inclined to place reliance upon Ex.P17. **(United India Insurance Co. Ltd v. B. Padmavathy and others; 2013**

ACJ 1837)

S. 3 - Police witness - Deposition of – Must be treated with suspect is not an absolute rule

Court may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses. **(Ram Swaroop v. State (Govt. NCT) of Delhi; 2013 Cri.LJ 2997)**

S.3 – Affidavit – Evidentiary value of – Affidavit is not "evidence" within the meaning of S.3 and it needs cross examination of deponent for reliance upon affidavit

An affidavit is not "evidence" within the meaning of Section 3 of the Evidence Act, 1872, and the same can be used as "evidence" only if, for sufficient reasons, the court passes an order under Order 19 CPC. Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact situation. However, in a case where the deponent is available for cross-examination and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such a view stands fully affirmed particularly in view of the amended provisions of Order 18 Rules 4 and 5 CPC. (**Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465)**

S. 3 - Circumstantial evidence – Last seen together - Relevant circumstance - Only if time gap between accused and deceased last seen alive and time when deceased was found is small

The facts would clearly establish that the girl was last seen with the accused. PW8 evidence discloses that the girl and the accused were seen together at a point of time in proximity with the time and date of the commission of the offence. Last seen theory was successfully established by the prosecution beyond any reasonable doubt. This Court in State of U.P. v. Satish; (2005) 3 SCC 114 has held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found is so small that possibility of any person other than the accused being the author of the crime is impossible. This test, in my view, is fully satisfied in the instant case. **(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)**

S. 3 - Circumstantial evidence – Conviction on – Basis of

The standard of proof required to convict a person on circumstantial evidence is well established by a series of judgments of this Court. The circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The Sessions Court as well as the High Court has correctly appreciated the evidence and documents adduced in this case and found that the guilt of the accused is proved beyond reasonable doubt with which we fully concur. **(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)**

S. 3 – Child witness - Conviction on – Basis of – Permissible if evidence of child is credible, truthful and corroborated

It is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. The corroboration is not a must to record a conviction, but as a rule of prudence, the Court thinks it desirable to see that corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable. **(Jagadevappa and Ors. v. State of Karnataka and Ors.; 2013 Cri.LJ 2658)**

S. 3 - Interested witnesses - Testimony of –To be subjected to careful scrutiny and accepted by caution

In Hari Obula Reddy and others v. The State of Andhra Pradesh, a three-Judge Bench has opined that it cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

In this case, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct and we do not perceive that these

witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this court shall be careful and cautious while scanning their testimony and we proceed to do so. **(Kanhaiya Lal & Ors. v. State of Rajasthan; 2013 Cri.LJ 2921)**

S. 3 – Testimony of solitary eye-witness – Relevancy – If testimony of solitary eye-witness found reliable, conviction can be based on has sole testimony

It has been held in catena of decisions of the Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. In Vadivelu Thevar v. The State of Madras; AIR 1957 SC 614, it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. **(Kusti Mallaiah vs State of A.P.; 2013 Cri.LJ 3098)**

S. 3 - Circumstantial Evidence - Grounds for admissibility - Circumstances so established must be of conclusive nature and consistent only with the hypothesis of the guilt of the accused

In Sharad Birdhichand Sarda v. State of Maharashtra the Court held as under;

> "The facts so established should be consistent only with the hypothesis of the guilt of the accused. There should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to

particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused. (**Sujit Biswas Vs. State of Assam; (2013 (82) ACC 467) (SC)**

S. 3 – Appreciation of evidence – Consideration of

Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. **(Sujit Biswas vs State of Assam; 2013 Cri.LJ 3140) (SC)**

S. 8 – Motive – Existence of strong motive is not an essential pre requisite for conviction for murder when there is other credible evidence on record

The counsel for the appellant submitted that the identification of the accused in the court should not be relied upon. We have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eyewitnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eyewitnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see Malkhansingh v. State of M.P.; (2003)5 SCC 746: 2003 SCC (Cri) 1247). This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the

accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent Gopal was detained by deceased Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eyewitnesses on record, the motive pales into insignificance. (**Subal Ghorai vs. State of West Bengal; (2013) 4 SCC 607)**

S. 24 – Extra-judicial Confession – Nature of – It is a weak kind of evidence unless there are good reasons for placing implicit reliance on it or coroborated by independent circumstances

It is well settled that an extra-judicial confession is a weak kind of evidence and unless there are good reasons for placing implicit reliance on it, or it is corroborated by independent circumstances, it is a tenuous basis for showing the complicity of the accused. In the present case there are no good reasons why the appellant would have gone to the house of Updesh Kumar for the purpose of making this extra-judicial confession before PW 9 Ram Naresh and Vedesh Kumar. The said Vedesh Kumar has also not been produced in Court for supporting this version. Most significantly, this extra-judicial confession is said to have been given 3 or 4 days after the incident, whereas the appellant had already been arrested on the second day after the crime. Section 161 Cr.PC statement of this witness, Ram Naresh was also recorded after one and a half months on 28.5.2002. Therefore, court's view that this extra judicial confession also does not help in establishing the complicity of the appellant in this crime. (**Nem Singh alias Mula v. State of U.P.; 2013 (82) ACC 711)**

S. 27 - Discovery evidence – Statement as to person with whom article is found – Is covered by S. 27

The Court, while dealing with the law relating to Section 27 of the Indian Evidence Act referred the judgment in case of State (NCT of Delhi) vs. Navjot Sandhu; (2005) 11 SCC 600**,** wherein it was observed that where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence. As regards Joint disclosures, it was also observed that, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. "A person accused" need not necessarily be a single person, but it could be plurality of the accused. In fact, joint or simultaneous disclosure is a

myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. Court did not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, court found no good reason to eschew such evidence from the regime of S. 27.

The Court also, referred the judgement in Jaffar Hussain Dastagir vs. State of Maharashtra; (1969) 2 SCC 872, 875 wherein it was observed that, under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. **(Sanjay Dutt v. State of Maharashtra, through CBI (STF); AIR 2013 SC 2687)**

S. 32 – Dying Declaration - Two dying declarations - Apparent discrepancies conviction not safe - Accused entitled to benefit of doubt

It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. **(Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P. Hyderabad; 2013 (4) Supreme 450)**

S. 32 – Dying declaration - Certificate by doctor that maker is fit to make statement not an essential requirement in every case

Law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must satisfy that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such stat of the deceased is not essential in every case, Subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such statement cannot be subjected to cross-examination. However, the Court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity. **(State of Madhya Pradesh v. Dal Singh & Ors.; 2013 Cri.LJ 2983)**

S. 32 – Multiple dying declarations made in a fit state of mind - Discrepancies not material - Can be relied upon

In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant. **(Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P. Hyderabad; 2013 (4) Supreme 450)**

S. 32 (1) – Dying declaration – Evidentiary value – Declaration recorded in presence of Magistrate in fit mental condition and it proved by autopsy report – Conviction on basis of dying declaration would be proper

In instant case, the deceased suffered burn injuries on 4.6.2001 at about 4.30 p.m. in her matrimonial home. There is eye-witness account of the incident through Hunny PW-9, minor son of the deceased. The deceased was admitted in Sheel Hospital, Bareilly on 4.6.2001 due to 80% burn injuries of I and II degree and discharged from there on 13.6.2001. There is no medico-legal report of the victim. Her dying declaration was recorded on 5.6.2001 at 4.25 p.m. by PW 11 and thereafter she died on 15.6.2001 in the house of the accused-appellant. Thus she remained alive for about ten days after the incident. Although she was severely burnt but the above facts show that her condition was not overtly critical or precarious when her dying declaration was recorded by PW 11. In this connection court may usefully refer to the case of Munnawar & Ors. v. State of Uttar Pradesh & Ors.; (2010) 5 SCC 451: (2010 (4) ALJ 241), wherein the Apex Court held as under:

> "that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded."

The dying declaration was recorded with the intervention of Sheel Hospital, Bareilly and police of out-post Avas Vikas, P. S. Prem Nagar, Bareilly by Addl. City Magistrate-I, Bareilly Rameshwar Dayal PW 11, who has no animus with the accused or affinity with the deceased or the complainant's family. The dying declaration of the deceased recorded by PW- 11 is reproduced as under:

> A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case.

The story of having burn injuries while cracking joke is belied by the statement of Dr. Harpal Singh PW-4 who had conducted autopsy on the corpse of the deceased on 15.6.2001. He has found that her scalp hairs were burnt. If the deceased sustained burn injuries while working on kerosene -stove accidentally, then scalp hairs cannot be burnt in any situation. Thus court found that the dying declaration of the deceased has no legal infirmity at all and it is also consistent with the case of the prosecution. The deceased has spoken about the manner in which she sustained burn injuries at the hands of the accused. She had not implicated any other family member of the accused-appellant. The defence could not show that the dying declaration is the result of tutoring of Smt. Laxmi deceased in any manner. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 226)**

S. 32 (1) – When dying declaration can become sole basis of conviction without corroboration – When it is voluntary, true, reliable, free from suspicious circumstances, and recorded in accordance with established practice and principles

It is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended

by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same. **(Krishan v. State of Haryana; (2013) 3 SCC (Cri) 125)**

S. 32(1) – Dying declaration – Format prescribed for recording – Effect of – Indeed no such format can be prescribed, so it is not obligatory that a dying declaration should be recorded in question-answer

Insofar as the case before us is concerned, we may only note that there is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question-answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time. **(Surinder Kumar v. State of Punjab; (2013) 3 SCC (Cri) 246)**

S. 45 – Opinion of expert - Evidentiary value – Explained

When there are contradictory opinions of handwriting experts, in is always open to the Court concerned to form its opinion after careful consideration of expert's opinion as also document concerned. It is not uncommon where two experts employed by different parties gave opinion heavily influenced by the interest of the party concerned who approach them.

In any case evidence of an expert is only an opinion. Expert evidence is only a piece of evidence and external evidence. It has to be considered along with other pieces of evidence, which would be the main evidence and which is the corroborative one depends upon the facts of each case. An expert's opinion is admissible to furnish the Court a scientific opinion which is likely to be outside the experience and knowledge of Judge, this kind of testimony, however, has been considered to be of very weak nature and expert is usually required to speak, not to facts, but to opinions. It is quite often surprising to see with what facility, and to what extent, their view would be made to correspondent with the wishes and interests of the parties who call them. They do no, indeed, wilfully misrepresent what they think but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously deposed, they are incapable of expressing candid opinion. **(Om Prakash v. Baijnath Singh; 2013 (4) ALJ 569)**

S. 58 - Admission – Failure of party to prove its defence not amounts to admission

It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. Failure of a party to prove its defence does not amount to admission,

nor it can reverse or discharge the burden of proof of the plaintiff. To an admission made without following procedure under O. 12 or admission having not made during the course of trial S. 58 of Evidence Act does not get attracted. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

S. 73 - Scope and object - Expert opinion is only an opinion evidence on either side and does not aid as in interpretation

In Hari Singh vs. Lachmi; 59 IC 220 the Court observed that the evidence of skilled witness, howsoever eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, howsoever confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect. An expert witness howsoever impartial which calls him. The mere fact of opposition in the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favorable to its interests.

In **Haji Mohammad Ekramul Haq vs. The State of West Bengal; AIR 1959 SC 488** the Court held that an opinion of expert unsupported by any reason is not to be relied on.

In the **Forest Range Officer and others vs. P. Mohammed Ali and other; AIR 1994 SC 120** the Court said:

> "The expert opinion is only an opinion evidence on either side and does not aid us in interpretation."

Who an expert witness would be, has been considered in **State of Himachal Pradesh vs. Jai Lal and other; AIR 1999 SC 3318** and it says:

> "An expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice; or observations; and the must have a special knowledge of the subject."
>
> "Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject."
>
> "18. An expert is not a witness of fact. His evidence is really of an advisory charger. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgement by the application of these criteria to the facts proved by the evidence of the case. Convincing and tested becomes a factor and often an important

factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions."

"19. The report submitted by an expert does not go in evidence automatically. He is to examined as a witness in Court and has to face cross-examination."

(emphasis added)

In **Murari Lal vs. State of Madhya Pradesh 1980 SCC (Cri) 330,** it was held that the Court itself can compare writings since it is so enable vide Section 73 of the Evidence Act. The expert's opinions only act as an aid to the Court and not binding on it. In absence of reliable Expert's opinion or no opinion, the Court can seek guidance from authoritative text books, own experience and knowledge. (**Om Prakash vs. Baijnath Singh (Dead) Represented by Lrs.; 2013(2) ARC 685)**

S. 90 – Presumption u/s 90 relate only to signature, execution and attestation of document and not to correctness of statement made in it

Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. The contents of the document are true or it had been acted upon have to be proved like any other fact. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

Ss. 91, 92 – Oral evidence – Admissibility of oral evidences to explain or contradict terms and conditions of written document is inadmissible

Written agreement for sale of property entered into between buyer and seller. Therein buyer admitted possession of one room of the property sold and part payment made. Later on buyer revoked the agreement and filed a suit for refund. Buyer submitted oral evidence stating that he was not given possession of the room and hence revoked the agreement. Trial Court admitted oral evidence and granted refund. In appeal against this order it was held that the terms and condition of a written document cannot be explained or controverter by oral evidence and such oral evidence is inadmissible under S. 92. In such circumstances buyer not entitled for refund. **(Gulzar Khan v. Smt. Vijay Laxmi; 2013 (4) ALJ 417)**

S. 106 – Burden of proving fact specially within knowledge lies on accused to prove fact as to how his wife received injuries in view of S. 106 of above Act

It is necessary to keep in mind the provisions of Section 106 of the Evidence Act which says that when any fact is specially within the knowledge

of any person, the burden of proving that fact is upon him. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence, The burden would be comparative of a lighter character. In view of S. 106 Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping; quiet and offering no explanation on the supposed premise that the burden to establish it's case lies entirely upon the prosecution to offer any explanation.

The accused has not led any oral evidence in defence to explain the circumstances in which the deceased sustained burn injuries in her matrimonial home.

As such the Court find that the defence is harping on one ground or the other to explain the circumstances in which the deceased has sustained burn injuries. It is important to note that had the deceased suffered burn injuries while cooking food or heating milk on kerosene stove, then her scalp hairs could not be burnt in this manner of incident. Thus, these circumstances unerringly point towards the guilt of the accused and none other. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 226)**

S. 113-A – Presumption as to absence of consent – Applicability

As there was a fiduciary relationship between the accused and the prosecutrix being in their custody and they were trustee, it became a case where fence itself eats the crop and in such a case the provisions of Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') (which came into effect from 25.12.1983) are attracted. Undoubtedly it is a case which provides for a presumption against any consent in a case of rape even if the prosecutrix girl is major, however, every presumption is rebuttable, and no attempt had ever been made by any of the appellants or other accused to rebut the said presumption.

In view of the above, Court is of the considered opinion that it was a fit case where the provisions of Section 114-A of the Evidence Act are attracted and no attempt had ever been made by any of the appellants or other accused to rebut the presumption. In such a case, we do not see any reason to interfere with the finding of fact recorded by the courts below. **(Mohan Lal & Anr. v. State of Punjab; 2013 Cri.LJ 3265 (SC)**

Guardian and Wards Act

Ss. 17 and 25—Custody of children—Entitlement

In the present case, the respondent wife was divorced by the appellant husband after consummating marriage for about ten years. The two minor children were born out the said wedlock till the time of the divorce. They were of tender age at the time of divorce. When the relations between them became strained, the respondent wife lodged a complaint under the Domestic Violence Act and out of the fear and apprehension the respondent wife left her matrimonial home along with her male child aged about 6 years. Her apprehension could not said to be totally misplaced. Apprehension and fear are partly matter of perception as well.

The respondent wife has brought up the male child throughout showering affection and protecting his welfare. She has looked after him and ensured his education in a reputed school for better education and maintaining him to his utmost. She is a Director in a Private Firm and is earning Rs. 80,000/- per month. The appellant husband on the other hand is a businessman as admitted by him also in his cross-examination and is facing financial difficulties. He may be having sufficient resources to maintain the child but that alone does not mean that the welfare of the minor would be better served by granting custody of children to him. The respondent-wife is an educated lady with sufficient income to look after the welfare of both her children.

In a proceeding U/s. 25 it is well established by a series of judgments that it is not the legal claim of guardianship of the minor which is of importance but the welfare of the minor, which is of predominant consideration.

In view of the aforesaid discussions of facts and law and keeping in view the paramount consideration of the welfare of the children, we are convinced that children's interest and welfare will be best served if they are in the custody of the mother. In our opinion, it is not desirable to disturb the custody of male child. It is also desirable that the custody of the female child is given to her mother. Therefore, the order of the court below in giving the exclusive custody of the male child till he attains majority and of female child to the mother deserved to be maintained. **(Irshad Alam vs. Isma Alam; 2013(5) ALJ 248)**

Hindu Marriage Act

S. 13(1)(i-a)—Mental cruelty—What amounts to—False complaint/criminal proceedings can amount to "mental cruelty"

It is pertinent to note that in Samar Ghosh vs, Jaya Ghosh, (2007)4 SCC 511 case, the husband and wife had live separately for more than sixteen-and-a-half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli vs. Neelu Kohli, (2006) 4 SCC 558.

Thus, to the instance illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse. **(K. Srinivas Rao vs. D.A. Deepa; (2013) 2 SCC (Cri) 963)**

Hindu Succession Act

S. 23 - Suit by married Hindu female for partition of dwelling house - Substantial portion of suit property was under tenancy of third parties - Embargo on daughter not having right to claim partition, not applicable

Court have gone through the above two judgments as well as the provisions of law. Court fully agree with the contention made by the learned senior counsel that the embargo of the daughter not being able to claim partition would be applicable only if the house in question was being used as a dwelling unit by the brothers for their residence and not if any portion of the house or substantial portion of the house has been let out to the tenants, while as in the instant case, this was not in dispute that the substantial portion of the suit property was under tenancy of third parties. **(Krishan Sharma v. Raj Rani Bhardwaj and others; AIR 2013 Del 136)**

Indian Contract Act

S. 16 – CPC, O. 6 R. 1 - Contract undue influence - Failure to make specific allegations of undue influence - Not fatal when facts on record justify inference of undue influence

If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the Court has to see is that there is no surprise to the defendant. In Hari Singh v. Kanhaiya Lal; AIR 1999 SC 3325, it was held that mere lack of details in the pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties. **(Joseph John Peter Sandy v. Veronica Thomas Rajkumar and Anr.; AIR 2013 SC 2028)**

S. 16 - 'Undue influence' – Explained – Document - Admissibility and Probative value - Explained

If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on the ground; all that the Court has to see is that there is no surprise to the defendant. In Hari Singh v. Kanhaiya Lal; AIR

1999 SC 3325, it was held that mere lack of details in the pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties.

(C) ADMISSIBILITY OF A DOCUMENT:

In State of Bihar v. Radha Krishna Singh; AIR 1983 SC 684, the Court held as under:

"Admissibility of a document is one thing and its probative value quite another- these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil…. Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavor in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

Reiterating the above proposition in Madan Mohan Singh v. Rajni Kant; 2011(112) RD 63(SC), the Court held that a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. (**Joseph John Peter Sandy v. Veronica Thomas Rajkumar; 2013 (120) RD 548)**

Indian Divorce Act

S. 10(1) (x) – Dissolution of marriage - Cruelty by husband – Specific pleadings and evidence adduced by wife to effect that husband was against having child out of wedlock - Wife was constrained to take precaution from conceiving - Said conduct on part of husband amount to mental cruelty - Wife entitled for dissolution of marriage

In this case it was argued that, despite the specific pleadings the court below took a totally erroneous opinion in holding the, those allegations even if proved cannot be considered as a ground of cruelty in order to attract Section 10(1)(x) and any restrainment or prevention or compulsion from the side of one of the spouses against conceiving need to be construed as an element of cruelty. Since there are specific pleadings and evidence adduced to the effect that the appellant was against having a child out of the wedlock and that the wife was constrained to take precautions from conceiving, the court below ought to have found that there established cruelty from the side of the appellant (Husband), entitling the respondent (wife) to seek divorce under Section 10(1) (x), is the contention.

The Court said that, cardinal objectives and concepts in our social system with respect to marriage and the institution of family is to have a solemn union

of two persons, the man and the woman, to built up a family consisting of offspring. If one of the spouses makes any compulsion or restrainment from being conceived against the cherished wish of giving birth to child, is against the normal instincts of life. It will cause diminution to the desire of spouses in marital life. Definitely the person who is obstructed, restrained or compelled will develop an apprehension in mind that it will be mentally harmful or injurious to live under the matrimonial bond. This will definitely amount to mental cruelty, which constitute ingredients under section 10 (l)(x) of the Divorce Act. In the case at hand such cruelty has been pleaded and proved. The Court said that, it has no hesitation to hold that the respondent was justified in seeking divorce on that ground and she is entitled for dissolution of marriage under section 10(1)(x). **(Stanly Hedger v. Florence; AIR 2013 Ker 122)**

Indian Penal Code

S. 120-B – Conspiracy – Conviction u/s 120-B cannot be sustained when other accused have been acquitted

As far as the appellant is concerned, all the circumstances lead towards his guilt. As far as conspiracy under Section 120-B is concerned, the Court are inclined to think that the High Court erred in not recording an order of acquittal under Section l20-B as no other accused had been found guilty. The conviction under Section 120-B cannot be sustained when the other accused persons have been acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other alleged co-conspirators. It has been so laid down in Fakhruddin v. State of M.P.; AIR 1967 SC 1326: 1967 Cr LJ 1197. Thus, the conviction of the appellant under Section 120-B is set aside. **(Harivadan Babubhai Patel v. State of Gujrat; (2013) 3 SCC (Cri) 27)**

S. 149 – Applicability – Once unlawful assembly is established then it is not necessary that same persons forming it have committed same overt act

The pivotal question of applicability of section 149, LP.C has its foundation on constructive liability which is the sine qua non for its application. It contains essentially only two ingredients, namely, (I) offence committed by any member of any unlawful assembly consisting five or more members and; (I1) such offence must be committed in prosecution of the common object (Section 141, LP.C) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object. It is not necessary that for common object there should be a prior concert as the common object may be formed on spur of the moment. Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under second part of section 149, I.P.C if it is established that the offence was such, as the members knew, was likely to be committed. For instance, if a body of persons go armed to take

forcible possession of the land, it may be presumed that someone is likely to be killed, and all the members of the unlawful assembly must be aware of that likelihood and,' thus, each of them can be held guilty of the offence punishable under section 149, I.P.C The Court must keep in mind the distinction between the two parts of section 149, I.P.C, and, once it is established that unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted for vicarious liability. However, it may be relevant to determine whether the assembly consists of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain the common object of the assembly. However, it is only the rule of caution and not the rule of law. Thus, a mere presence or association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act, being a member of unlawful assembly l as provided for under section 142, IPC. **(State of Rajasthan v. Shiv Charan; 2013(82) ACC 987)**

S. 300 – Murder – Intention – Words used during assault like "maro, maro" do not mean to kill – Assault not pre-mediated

It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.

After analyzing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.

In the facts and circumstances of the case, in considered opinion of the Court, the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the appellants knew that such bodily injury was likely to cause

death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC. **(Litta Singh and another v. State of Rajasthan; 2013 Cri.LJ 3321 (SC)**

S. 300 – Murder – Delay in lodging FIR – Delay of 11 days in lodging FIR is sufficiently explained – Prosecution story not rendered doubtful on ground of delay

In this case it has been held that the deceased struggled for life for about ten days and breathed her last on 14.6.2001 at about 9.15 p.m. It has come in the deposition of PW-l that the accused persons did not cremate her body and none of their family member even participated in her last rites. In these circumstances, Court found that the delay in reporting the crime to the police had been sufficiently explained by the complainant and the prosecution story cannot be doubted on this score. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 266)**

S. 300 – Murder – Testimony of child witness – Reliability

In this case the deceased struggled for life for about ten days and breathed her last on 14.6.2001 at about 9.15 p.m. It has come in the deposition of PW-l that the accused persons did not cremate her body and none of their family member even participated in her last rites. In these circumstances, court found that the delay in reporting the crime to the police had been sufficiently explained by the complainant and the prosecution story cannot be doubted on this score. Counsel for the appellant had also raised a finger about the admissibility of the testimony of Hunny PW-9 (son of the accused and the deceased) on account of his tender age. His deposition was recorded by the trial Court on 10.12.2004 and on that day he had given his age as 8-years, the date of incident is 4.6.2001, thus he was about 4 years and 6 months' old at the time of incident. On perusal of the record we find that before recording statement of Hunny PW-9 on 10.12.2004 i.e. about 3 years and 6 months after the incident, the Presiding Officer has asked 7-general questions to test the capacity and intelligence of child witness to testify before the Court.

After this question-answer session, the Presiding Officer has noted his satisfaction through the following note before recording statement of PW-9:

> "From questions asked from the witness it is found that he is able to understand the question and gave rational answers of the questions. He is giving statement not under any pressure. He is giving statement as per his will."

A child witness is competent to testify u/S.118, Evidence Act, tutoring cannot be a ground to reject his evidence. A child of tender age can be allowed to testify if it has intellectual capacity to understand questions and give rational answers thereto. Trial Judge may resort to any examination of a child witness to test his capacity and intelligence as well as his understanding of the obligation

of an oath. If on a careful scrutiny, the testimony of a child witness is found truthful, there can be obstacle in the way of accepting the same.

Although in cross-examination this witness has stated that in the night yesterday and today morning his maternal grand-father told him about the statement, but it does not mean that he was tutored to give false evidence. Because had it been so, he would not have said that the mother was saved by father also along with grand-father. No suggestion had been given to this witness in cross-examination that his mother accidentally caught fire while boiling milk or cooking food on kerosene stove. Court further find that the child witness had signed in English on his deposition recorded in the trial Court which shows his education and mental status. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 266)**

S. 300—Murder—Non-production of motor-cycle involved in offence—Effect

So far as non-production of the vehicle is concerned, even according to the prosecution, the vehicle was stealthily removed by the accused after committing the crime of killing of the deceased. P.W. 8 stated that the vehicle was dismantled and disposed of in Kabarkhana. Therefore, if the prosecution was not able to produce the vehicle for the above stated reasons, no fault can be found with the prosecution on that score. When it is brought out in evidence through P.W.1, as well as P.W.3 and the injury found on the body of P.W. as mentioned by Doctor who examined him viz. PW2 that the injuries sustained by P.W.1 were due to his fall from a running motorcycle, Court did not find any discrepancy in the evidence placed before the Court in that respect, Therefore, the said submission of the learned senior counsel does not impress upon us to take a different view than what has been held by the Court below. **(Sheo Shankar Singh vs. State of U.P.; 2013(5) ALJ 184)**

S. 300 - Murder – Non-examination of independent witness – Not material when evidence of injured witness though related was natural and there was no ground to discard it

It was contended that according to the prosecution when the accused party attacked the injured party apart from the family members of the injured party, local villagers were also present but yet not was examined by way of independent witness. The said submission has been rightly rejected by the High Court reasons. The High Court has rightly held that though the injured witnesses were related to each other, having regard to the nature of evidence tendered by them, there were no good grounds to discard their version. It has found that their evidence was natural and there was nothing to find fault with their version. It has further held rightly that it's the quality of witness and not the quantity that matters. It has also taken judicial notice of the fact that the public are reluctant to appear and depose

before the Court, especially in criminal cases because of may obvious reasons. (**Manga alias Man Singh v. State of Uttarakhand; 2013 (4) ALJ 581)**

Ss. 300, 149 - Murder – Eye-witnesses - Failure to mention exact role played by each accused is inconsequential when accused had formed unlawful assembly with object to kill deceased

It is next contended by Mr. Jain that the witnesses have not specifically stated about the exact role played by each of the accused persons inasmuch as they have not mentioned who assaulted on which part of the body and with what weapon. On a perusal of the evidence, it transpires that the witnesses have mentioned about the weapons used, the assault made and the parts of the body where injuries were inflicted. True it is, there are some discrepancies but they are absolutely minor. That apart, they had formed an unlawful assembly with a common object to put an end to the lives of the deceased persons. Their common object is writ large because they had the knowledge and they shared the common object from the beginning to the end. Applying the principles laid down in Masalti and others v. The State of Uttar Pradesh, Lalji and others v. State of U.P. and Ramachandran and others v. State of Kerala, Court conclude that all the accused persons were a part of the unlawful assembly with the knowledge of the common object and, accordingly, we unhesitatingly repel the contention of the learned counsel for the appellants. **(Kanhaiya Lal & Ors. v. State of Rajasthan; 2013 Cri.LJ 2921)**

Ss. 302, 364-A and 201 – Murder and kidnapping for ransom – Death sentence – When warranted

Once the person concerned has been shown as having been kidnapped, the onus shifts the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody till he was eliminated. In the instant case, it has been duly established that the victim had been kidnapped by the appellant-accused. In the absence of any material to show release of the victim from his custody in term of Section 106 of the Evidence Act, 1872 it has to be accepted that the custody of the victim had remained with the appellant-accused till he was murdered. The motive/reason for the appellant-accused for taking the extreme step was that ransom as demanded by him had not been paid. Furthermore, pursuant to the confession made by the accused stating that he had strangulated the victim to death, put his body into a gunny bag and thrown the gunny bag in tank, the dead body of the victim in a gunny bag was recovered. The post-mortem report also indicated that the victim had died on account of suffocation prior to his having been drowned. Besides, testimony of PW 13 also revealed that the school bag, books and slate of the victim were recovered from the residence of the appellant-accused. Thus there is sufficient evidence on the record on the

basis whereof even the factum of murder of the victim at the hands of the appellant-accused stands established. **(Sunder v. State; (2013) 3 SCC (Cri) 98)**

S. 302 - Accused last seen with deceased wife in the same room - Not offering any explanation for death, evidence ruling out suicide - Accused strong motive for eliminating wife - Absconding after incident - Conviction justified

In this case, the court reach the inescapable conclusion that appellant had doubted the character of his wife and therefore, had adequate motive to eliminate her. In spite of the fact that he had been in the same room, he failed to furnish any explanation as under what circumstances his wife was found dead. Particularly, in view of the fact that the courts below had excluded the theory of suicide. The same conclusion stands fully fortified by the fact that the saree of deceased was lying in the corner of the room and the version given by the appellant that he had found his wife hanging with a saree around her neck and he cut the same by knife stands fully falsified as in such a fact-situation, part of the saree should have been found hanging with the ceiling of the room. The conduct of the appellant that he had given a false information to his in-laws and while dead body was lying in his house he stayed in a Krishna Guest House; further that he had absconded from the city itself, suggest that he is guilty of the offence. **(Ravirala Laxmaiah v. State of A.P.; 2013 (4) Supreme 468)**

Ss. 302, 395 r/w 149, 147 and 390 – Non-recovery of dead bodies and looted articles for conviction is not mandatory

The High Court reappreciated the evidence of the witnesses in detail and meticulously examined the facts and circumstances of the case in its right perspective and recorded a finding that the prosecution has proved the case against the appellants. In an appeal against acquittal, the appellate court has full power to review the evidence upon which the order of acquittal is founded. The High Court is entitled to reappreciate the entire evidence in order to find out whether findings recorded by the trial court are perverse or unreasonable. (**Lal Bahadur vs. State (NCT of Delhi); (2013) 4 SCC 557)**

Ss. 302, 354 – Death sentence commutation to life imprisonment – Recording of reasons not necessary

Special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. Strictly speaking, therefore, Court is not required to record reasons for commuting the death sentence to one of life imprisonment if is only required to record reasons for either confirming the death sentence or awarding it. **(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)**

S. 304-B, 306 – Dowry death/Abetment of suicide - Proof

There is no dispute that no charge was framed under Section 306 IPC. Though the charge has not been framed under Section 306 yet on a question that has been put under Section 313, it is clear as crystal that they were aware that they are facing a charge under Section 304B, IPC which related not to administration of poison but to consumption of poison by the deceased because of demand of dowry and harassment. It is major evidence in comparison to Section 306, IPC which deals with abetment to suicide by a bride in the context of clause (a) of section 498A, IPC. The test is whether there has been failure of justice or prejudice has been caused to the accused. In Gurbachan Singh v. State of Punjab; AIR 1957 SC 623, the Court examined the question of prejudice and held as under:-

> "In judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

In the case at hand, the basic ingredients of the offence under Section 306, IPC have been established by the prosecution inasmuch as the death has occurred within seven years in an abnormal circumstance and the deceased was meted out with mental cruelty. Thus, the Court convert the conviction from one under Section 304B IPC to that under Section 306, IPC. **(Gurnaib Singh v. State of Punjab; 2013 Cri.LJ 3212 (SC)**

Ss. 375, 21 – Child abuse – Preventive measure - State and Central Govt. directed to constitute special Juvenile Police units

Considering fact that many of child abuse cases go unreported and preventive action is seldom given importance and taken care of, the Court issued following directions:-

(1) The persons in-charge of the schools/ educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping utmost secrecy to the nearest Special Juvenile Police Unit (S.J.P.U.) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

(2) Media personnels, persons in charge of hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of

S. 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with S. 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring it to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the 11 Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

(6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, S.C.P.C.R., Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organisations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

(8) The Central Government and the State Governments are directed to constitute SJPUs in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J.J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

(9) The Central Government and every State Government should take all measures as provided under S. 43 of the Act 32 of2012 to give vide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

(Shankar Kisanrao Khade v. State of Maharashtra; 2013 Cri.LJ 2595)

S. 376 – Rape – Degrades and defiles soul of helpless female - Reduces woman to an animal is most hated crime

Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamount to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible mark. **(Deepak Gulati v. State of Haryana; 2013 Cri.LJ 2990)**

S. 376 - Rape or consensual sexual intercourse under promise to marry is constitutes rape only if from initial stage accused had no intention to keep promise

There is a clear distinction between rape an consensual sex and in a case where there is promise of marriage, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance" S. 90, IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the Court is assured of the fact that from the very beginning, the accused had never really intended to marry her. **(Deepak Gulati v. State of Haryana; 2013 Cri.LJ 2990)**

S. 376 – Delay to Report six months passed after the occurrence of rape – Not fatal where sexual intercourse continued on promise to marry

Sexual intercourse continued on the promise to marry - It is only after the accused- appellant declined to marry the prosecutrix, that a different dimension came to be attached to the physical relationship, which had legitimately continued over the past six months - No delay whatsoever at the hands of the prosecutrix - In the above view of the matter, in the peculiar facts of this case, it is not possible for us to hold, that any doubt can be said to have been created in the version of the prosecution, merely on account of delay in the registration of the first information report. **(Karthi @ Karthick v. State Rep. by Inspector of Police, Tamil Nadu; 2013 (5) Supreme 52)**

S. 376 – Rape – Reduction of sentence below minimum prescribed – Court ought to give reasons

Ordinarily it could not have reduced the sentence to the sentence already undergone by the respondents which is below the minimum prescribed by law. The High Court colds have done so only if it felt that there were extenuating circumstances by giving reasons therefor.

While reducing the sentence, the High Court has merely stated that it was "just and expedient" to do so. These are not the reasons contemplated by the proviso to Section 376(1) of the IPC. Reasons must contain extenuating circumstances which prompted the High Court to reduce the sentence below the prescribed minimum. Sentence bargaining is impermissible in a serious offence like rape. Besides, at the cost of repetition, it must be stated that such a course would be against the mandate of Section 376(1) of the IPC. **(State of Haryana v. Janak Singh & etc.; 2013 Cri.LJ 3317 (SC)**

S. 376 (2) (f) – Brutal rape of 8 years old girl – Conviction u/s 376(2)(f) and sentence of R.I. for life confirmed – Validity of

The trial court and the High Court convicted the appellant-accused under S. 376(2)(j) IPC for brutally raping an 8 year old girl and sentenced him to RI for life.

The appellant submitted that he is a father of four children and their lives would ruined if the sentence of imprisonment for life is affirmed, hence the sentence should reduced to 10 years of RI which is a minimum sentence stipulated in Section 376(2)*(f)* IPC. The other ground that was urged was an impecunious background. Rejecting these submissions, and affirming the sentence of RI for life, the Supreme Court observed that -

Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The

fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

The legislature under Section 376(2)(f) IPC while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court. Almost for the last three decades, the Supreme Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. In the present case, the victim was both physically and psychologically vulnerable. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. In such circumstances, the age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.

Respect for reputation of women in society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a

crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. In the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

The mitigating factors put forth by the appellant are meant to invite mercy but the judicial matrix cannot allow the rainbow of mercy to Magistrate. Exercising the judicial discretion, the sentence of rigorous imprisonment for life is maintained and the judgment of conviction and the order of sentence passed by the High Court is confirmed. **(Shyam Narain v. State (NCT of Delhi); (2013) 3 SCC (Cri) 1)**

S. 498-A and Explanation thereto and S. 306 - Mental cruelty - What constitutes

As regards the limb of cruelty engrafted under Section 498-A IPC, it has come out in evidence that there was ill treatment of the deceased by the mother-in-law and the appellant husband. The bride was in her early twenties. She was turned out of the matrimonial home on certain occasions. This aspect has been established beyond doubt. There can be no dispute that in a family life, there can be differences, quarrels, misgivings and apprehensions but it is the degree which raises it to the level of mental cruelty. A daughter-in-law is to be treated as a member of the family with warmth and affection and not as a stranger with despicable and ignoble indifference. She should not be treated as a housemaid. No impression should be given that she can be thrown out of her matrimonial home at any time. In the present case, considering the evidence of the prosecution witnesses, it is held that it is a case where the bride was treated totally insensitively and harassed. It is not that she has accidentally consumed the poison. She had deliberately put an end to her life. The defence had tried to prove that she was suffering from depression and because such depression, she extinguished the candle of her own life. The testimony of the doctors cited by the defence has rightly not been accepted by the trial Judge as well as by the High Court. They have not been able to bring in adequate material on record that she was suffering from such depression as would force her to commit suicide. On a perusal of the evidence of the said witnesses, it is held that the finding recorded on that score is absolutely impeccable. In view of the same, the evidence brought on record that she was treated with cruelty and harassed is affirmed. **(Gurnaib Singh v. State of Punjab; (2013) 3 SCC (Cri) 49)**

Industrial Disputes Act

S. 33-C(2) – Recovery - Application for contentious amount would not lie - Contentious issue as to the age of superannuation - Court not have been resolved in exercise of power conferred by section 33-C (2) of Act

The Appeal needs to be allowed on a short issue that the application under section 33-C (2) for recovery of the contentious amount would not lie. The application made under section 33-C (2) of the Act raised contentious issue as to the age of superannuation. Such an issue could not have been resolved in exercise of power conferred by section 33-C (2) of the Act. Unless there were an adjudication in respect of the age of superannuation and the ancillary monetary benefits, the application under section 33-C (2) of the Act would not lie. The learned Single Judge has erred in entertaining the contentious issues in an application made under section 33-C (2) of the Act. It is now well settled that the provisions contained in sections 33-C (1) and 33-C (2) are in the nature of execution and are not in the nature of adjudication. **(M/s. Pradip Lamp Works Vs. State of Bihar and others; (2013 (138) FLR 81) (Patna High Court)**

Ss 33(2)(b) and 25-F - Removal from service for unauthorised absence – Award - By Industrial Tribunal - Directing reinstatement of respondent-workman with full backwages - Pursuant to award, the workman has been reinstated - Hence, only question of entitlement of full backwages is to be considered - Though an application for approval of dismissal is rejected by Labour Court - Industrials dispute lingered for years and nobody was really to blame for the delay - Hence, only 50% backwages were awarded to workman

The Tribunal has found that the misconduct was not proved and for that reasons held the order of dismissal as unjustified and awarded full backwages without there being any reasons. There is nothing to indicate as to how the Tribunal determined the award of full backwages. It is true that the Tribunal has referred to the subsequent event of dismissal of the application under section 33(2)(b).

In these circumstances, to strike the balance, in opinion, the award of full backwages as awarded by the Industrial Tribunal and affirmed by the learned Single Judge in writ petition cannot be sustained and the workman would be entitled to 50% backwages. **(Delhi Transport Corporation Vs. Sarjeevan Kumar; (2013 (138) FLR 956) (Delhi High Court)**

Interpretation of Statutes

Definition clause – Definition is extensive when it uses word "includes"

It is well settled that legislature has authority to define a word even artificially and while doing so, it may either be restrictive of its ordinary meaning or it may be extensive of the same. When the legislature uses the expression "means" in the definition clause, the definition is prima facie restrictive and exhaustive. However, use of the expression "includes" in the definition clause

makes it extensive. Many a times, as in the present case, the legislature has used the term "means" and "includes" both and, hence, definition of the expression "active duty" is presumed to be exhaustive. In our opinion, the use of the expression "includes" enlarges the meaning of the word "active duty" and, therefore, it shall not only mean the duty specified in the section but those duty also as declared by the Central Government in the Official Gazette. **(State of J&K v. Lakhwinder Kumar; 2013 Cri.LJ 3307 (SC)**

Juvenile Justice (Care & Protection of Children) Act

S. 7-A, 2(k) and 20 - Explanation (as amended by amendment Act of 2006) – Juvenility - Determination of

Section 7-A and the proviso and the Explanation in the aforesaid Section 20 quoted above were inserted by the Amendment Act of 2006, w.e.f. 22.08.2006 and before the insertion of the Section 7A and proviso and the Explanation in Section 20, this Court delivered the judgment in Pratap Singh v. State of Jharkhand and Another (supra) on 12.02.2005 cited by Mr. Biswas. The judgment of this Court in Pratap Singh v. State of Jharkhand and Another (supra) therefore is of no assistance to decide this matter. After the insertion of Section 7-A and the proviso and explanation in Section 20 in the 2000 Act, this Court delivered the judgment in Hari Ram v. State of Rajasthan and Another. The facts of this case were that the accused committed the offences punishable under Sections 148, 302, 149, 325/149 and 323/149 of the I.P.C. on 30.11.1998. The date of birth of the accused was 17.10.1982. The medical examination of the accused conducted by the Medical Board indicated his age to be between 16-17 years when he committed the offence on 30.11.1998. The High Court held that on the date of the incident the accused was about 16 years of age and was not a juvenile under the 2000 Act and the provisions of 2000 Act were, therefore, not applicable to him. This Court set aside the order of the High Court and held that the accused had not attained the age of 18 years on the date of the commission of the offence and was entitled to the benefit of the 2000 Act, as if the provisions of Section 2(k) thereof had always been in existence even during the operation of the 1986 Act by virtue of Section 20 of the 2000 Act as amended by the Amendment Act of 2006 and accordingly remitted the case of the accused to the Juvenile Justice Board, Ajmer, for disposal in accordance with law. Considering the aforesaid judgment of this Court in Hari Ram v. State of Rajasthan and Another and the provisions of Section 7-A and 20 of the 2000 Act and considering that the appellant no.2 is below 18 years of age as per his birth certificate, the impugned judgment of the High Court qua the appellant no.2 will have to be set aside and the case will have to be remitted to the concerned Juvenile Justice Board, of North Tripura district for disposal of his case in accordance with the provisions of the said Act. **(Subodh Nath and another v. State of Tripura; 2012 (82) ACC 45)**

S.7-A – Juvenile Justice (Care and Protection of Children) Rules, R.12(3) – Juvenility – Determination of – In absence of matriculation certificate, date of birth, recorded in school first attended, to be considered

In this case opposite party No. 2 has not passed matriculation examination and, therefore, there is no matriculation or equivalent certificate to shows his date of birth. In the absence of matriculation certificate, the date of birth recorded in the school first attended has to be taken into consideration. No documentary or oral evidence was led to show the date of birth recorded in the school first attended. It was the case of the complainant that opposite party No. 2 studied in village school. Even from the affidavit, it is apparent that opposite party No. 2 passed class-V examination in the year 2003-04. There was no difficulty in filing the documentary evidence regarding date of birth recorded in the school first attended but the same evidence appears to be deliberately withheld by opposite party No. 2. Even if no evidence was led on behalf of opposite party No. 2 to show his date of birth recorded in the school first attended, it was the duty of the Board to summon the relevant documents from the village school or the school where opposite party No. 2 studied from class-I to class-V and a decision regarding age of opposite party No. 2 could have been taken on that basis but the Board did not consider it proper to summon any such records or witnesses. (**Darshan Singh v. State of U.P.; 2013(82) ACC 796)**

Ss. 20, 49 – Benefit of Act of 2000 – Cannot be denied on ground that accused was above 16 years at time of offence but less than 18 years at time of offence

As on the date the offence was committed the appellant was admittedly a juvenile having regard to the provisions of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98 of the Rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000. He was, therefore, entitled to the benefit of the said provision, which benefit, it is evident, has been wrongly denied by the High Court only because the High Court remained oblivious of the pronouncement of this Court in Hari Ram's case. **(Bharat Bhushan v. State of Himanchal Pradesh; 2013 Cri.LJ 2932)**

Motor Vehicles Act

S. 2(28) – 'Motor Vehicle' – Definition of

Any vehicle which is mechanically propelled and adapted for use upon roads and does not fall within the exceptions provided in Section 2(28), is a motor vehicle within the meaning of Section 2(28) of the MV Act. The tractor is a machine run by diesel or petrol. It is a self-propelled vehicle for hauling other vehicles. It is used for different purposes. It is also used for agricultural purposes, along with other implements, such as harrows, ploughs, tillers, blade-terracers, seed-drills, etc. It is a self-propelled vehicle capable of pulling alone as defined

under the definition of motor vehicles. It does not fall within any of the exclusions as defined under the MV Act. Thus, it is a motor vehicle in terms of the definition under Section 2(28) of the MV Act, which definition has been adopted by the MV Act. So, even without referring to the definition of the tractor, if the definition of the motor vehicle as given under the MV Act is strictly construed, even then the tractor is a motor vehicle as defined under the MV Act. The tractor is not only used for agricultural purposes but is also used for other purposes as stated above. Therefore, it cannot be said that the tractor in its popular meaning is only used for agricultural purposes and, thus, is not a motor vehicle as defined under the MV Act. The tractor is a motor vehicle is also proved by this definition under Section 2(44) of the MV Act. Different types of motor vehicles have been defined under the provisions of the MV Act, and the tractor is one of them. Thus, considering the question from any angle, the tractor is a motor vehicle as defined under the MV Act. **(Rajasthan SRTC v. Santhosh; (2013) 3 SCC (Cri) 37)**

S. 147 – Motor Insurance – Tractor-trolley – Liability of insurance company – Tractor and trolley are two different motor vehicles and have to be insural separately and trolley was not insured – Insurance Co. is not liable

As it is settled that a tractor is not a transport vehicle and can only be used for agricultural purposes. It cannot carry passengers. It is equally settled that tractor and trolley are two different motor vehicles and have to be insured separately. The trolley in the present case was not insured.

In Oriental Insurance Co. Ltd. v. Brij Mohan; 2007 ACJ 1909 (SC), the Supreme Court held that as the tractor-trolley was not insured in addition to the tractor and the tractor was not being used for agricultural purposes for which it was insured, the claim of the labourer travelling in the trolley on being injured in an accident was not maintainable against the insurance company and the owner of the vehicle was liable for the compensation. The aforesaid decision was followed by the Apex Court in United India Insurance Co. Ltd. v. Serjerao; 2008 ACJ 254 (SC). It was held that liability regarding labourers travelling in trolleys is only upon the owner of tractor-trolley and the insurance company is not liable to indemnify the loss.

Similar view has been expressed by the Apex Court in National Insurance Company Limited v. Chinnamma; 2004 ACJ 1909 (SC). In the said case the tractor and the trolley attached to it were used for transporting vegetables for sale in the market and not for agricultural purposes. It was held that the tractor was meant to be used for agricultural purposes. It cannot be used as a transport vehicle. The trailer or the trolley attached to the tractor would also be required to be used for agricultural purposes unless registered otherwise.

In view of aforesaid facts and circumstances, there is no force in the

appeal and the same is dismissed as devoid of merit**. (Mohan Kushwaha v. Ghanshyam; 2013 ACJ 1496)**

S. 149(2)(a)(i)(a) – Motor insurance – Route permit – Violation – Liability of insurance can – If there was breach of policy then insurance co. can be absolved from liability

There was another deficiency apparent in the form of route permit. The offending vehicle was being plied without such route permit which is again a violation of the terms and conditions of the insurance policy. Hon'ble Supreme Court in National Insurance Co. Ltd. v. Challa Bharathamma; 2004 ACJ 2094 (SC), has observed as under:

"The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of section 149 (2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of insurer. The High Court was, therefore, not justified in holding the insurer liable."

In this view of the matter, this court feels that the appellants have failed to establish that there was no violation of the terms and conditions of the insurance policy. It being so, no fault can be found in the findings recorded by the learned Tribunal in exonerating the insurance company and holding the appellants, driver and owner, to indemnify the award. No other point has been raised. The impugned award of the Tribunal is upheld**. (Jamil Khan v. Bajaj Allianz General Insurance Co. Ltd.; 2013 ACJ 1640)**

S. 165 – Claim Tribunal – Jurisdiction – Determination of

Section 165(1) of the Motor Vehicles Act confers the power on the State Government to constitute one or more Motor Accidents Claims Tribunals by notification in the Official Gazette for such area as may be specified in the notification. Such Tribunals are constituted for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles, or damage to any property of a third party so arising, or both. Section 175 of the Motor Vehicles Act contains a prohibition that 'no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal.

It must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for

compensation in respect of accidents arising out of use of motor vehicles. There are other premises for such cause of action.

Thus in view of aforesaid decision, it is clear that the allegation and proof of negligence in the use of motor vehicle on the part of driver or owner of the motor vehicle is not a condition precedent for entertaining the claim for compensation. What is essential is that the accident should be incidental to the use of motor vehicle. Therefore, as the incident arose out of use of motor vehicle the tribunal has got jurisdiction. **(Branch Manager, National Insurance Co. Ltd. v. Rahmath and others; 2013 ACJ 1982)**

S. 166 – Claim application – Maintainability of – claim application cannot be defeated on technicality, granting of compensation has social purpose

The granting of compensation has a social purpose and cannot be allowed to get defeated by the technicalities, mystic may be's and such irregularities have no role to play. However, the Court has gone through the award again on the Court, and the Court is of the view that issue no. 3 rightly came to be decided in favour of claimants-respondents. It needs to be stated herein that the issue has not been pressed before the Tribunal by the appellant. **(National Insurance Company Ltd. v. Bakhta and others; 2013 ACJ 2155 (J&K HC)**

S. 166 (1) (c) – Claim application – Widow Remarriage - Widow is entitled to claim compensation in spite of remarriage

The expression 'legal representative' in section 166 of Motor Vehicles Act, having regard to the object of the Act, is not to be given the same meaning as it may find in other enactments dealing with the rights of widows before and after remarriage like Jammu and Kashmir Hindu Marriage Act, 1980 The Jammu and Kashmir Hindu Adaptation Maintenance Act, 1960, The Jammu and Kashmir Hindu Succession Act, 1966, as is sought to be projected by the appellant. A widow in our society, court is well aware, is not the same person as she is when her husband's is alive and not snatched by cruel hands of death. She does not only lose her status and prestige in the family, clan and society, but is victimised, harassed, tormented, marginalized, avoided and exposed to innumerable prejudices and cruel practices. Her remarriage in most of the cases, as against her first marriage, is out of compulsion rather than love and longing. She at times has to make a big compromise and may in most of the cases be compelled to tie a marital knot second time in life to get two square meals, a few clothes and shelter, if not love, affection, respect and dignity. It would be highly preposterous to say that a widow on her remarriage is compensated and does not any more suffer any loss, with which she was visited, when she lost her husband. The widow while losing her husband loses almost everything in her life that can never be compensated by her remarriage. The widow represents her deceased husband all the times even after her remarriage till she breathes her last. It would be highly unjust and unfair to say that the widow on her remarriage loses the right to be

compensated for the loss she suffered because of death of her husband or that the compensation should be restricted to the period between her husband's death and her remarriage. Holding so would amount to erroneously presuming that her remarriage fully compensated the widow for the loss she suffered because of death of her husband.

The law on the subject was reiterated in Vimla v. Dinesh Kumar Sharma; 2008 ACJ 816(MP), as under:

"It is understandable that life of a widow, after the death of her husband, in the family cripples abnormally. Generally, she is subjected to all kinds of indignities, compelling her to leave and fall back on parents where she is taken to be an eyesore by the families of her brothers, particularly when parents are not alive and even if they are alive they can hardly look after her due to old age. With this background it is considered necessary that a widow marries as early as possible. Therefore, in case she has done so, her claim for compensation cannot be defeated by remarriage. It would be highly improper to compel her to lead a life of a widow till she receives the compensation.

There is one more aspect of the matter. It is well-known fact that in our society, the life of a widow becomes miserable. If she has no financial support she has to survive on the mercy of other relations which expose her to any kind of exploitation or to adopt immoral ways for her survival. Instead of doing that, if she remarries then that can give her a way to lead her life in more respectable manner. This option is legally permissible and, therefore, should be encouraged and the widow should not be punished by depriving her from compensation for the death of her husband."

From the above discussion, the legal proposition that emerges is that a widow can, even after her remarriage, file and maintain a claim petition under the Motor Vehicles Act, 1988 and would be entitled to get compensation from the owner of the offending vehicle or the insurance company with which the offending vehicle was insured, on account of death of her husband in a vehicular accident. **(United India Insurance Co. Ltd. v. Asha Rani and others; 2013 ACJ 1679)**

Ss 166, 168(1) and 163-A - Case of injury/permanent disablement - Just and fair compensation – Determination of - Loss of earning as well as disability suffered by the claimant - Held, compensation can be paid for both - Loss of income or earning may be ascertained by applying the same as provided under the Second Schedule to the Act.

The important question which arise for consideration in these appeals is whether compensation in a motor vehicle accident case is payable to a claimant for both heads, viz., loss of earning capacity as well as permanent disability. These appeals are directed against the common judgment and order dated

29.01.2007 passed the High Court of Judicature at Madras in C.M.A. Nos. 82 and 150 of 2001 whereby the High Court partly allowed the appeal filed by the respondent-herein and dismissed the appeal preferred by the appellant-herein.

In Para 16 of the impugned judgment, the High Court, while computing the loss of earning capacity, without any acceptable reason, applied the multiplier of 10 and fixed a sum of Rs. 3,20,000/- (Rs. 8000/-x10x12x1/3) as against Rs. 4,00,000/- determined by the Tribunal. Learned counsel appearing for the appellant submitted that even for determining just and fair compensation in the case of injury/permanent disablement, the/courts are free to apply multiplier method for which he relied on a decision of the Madras High Court in United India Insurance Co. Ltd. v. Veluchamy and Anr., 2005 (1) CTC 38. While agreeing with the said decision, though multiplier method cannot be mechanically applied to ascertain the future loss of income or earning power, depending on various factors such as nature and extent disablement, avocation of the injured whether it would affect his or her employment or earning power, we are of the view that the loss of income or earnings may be ascertained by applying the same as provided under the second Schedule to the Act. Inasmuch as in the case on hand, the age of the claimant, i.e., 45 years, on the date of the incident has not been disputed by the Transport Corporation, we are of the view that the proper multiplier in terms of the second Schedule is 13 which was rightly applied by the Tribunal, Accordingly, while modifying the quantum under the loss of earning capacity, namely, Rs. 329,000/- as fixed by the High Court, we restore the amount to Rs. 4,00,000/- as determined by the Tribunal.

Though, learned counsel for the appellant prayed for interest @ 12%, we are not inclined to accept the same, on the other hand, the rate of interest, namely, 9%, as fixed by the High Court, is reasonable and acceptable.

In the light of the above discussion, the appellant is entitled to the following additional amount:

(a) Towards 85% permanent disability….Rs. 1,00,000/-
(b) Towards loss of earning/earning capacity

By applying the multiplier 13….Rs. 80,000/- (in addition to the amount of Rs. 3,20,000/-fixed by the High Court).

Accordingly, in addition to the amount awarded by the High Court, the claimant/the appellant herein is entitled to an additional amount of Rs. 1,80,000/-. Further, we make it clear that altogether the appellant is entitled to a total compensation of Rs. 8,52,822/- with interest at the rate of 9% from the date of claim petition till the date of deposit.

The appeals filed by the claimant/appellant are allowed in part to the extent mentioned above with no order as to costs. **(S. Manickam Vs.**

Metopolitan Transport Corp. Ltd.; (2013 (31) LCD 1398)

S. 168—Compensation—Permanent disability and loss of earning capacity—Compensation under head, permanent disability cannot be denied because compensation has been granted under loss of earning capacity

The determination of quantum in motor accidents cases and compensation under the Workmen's Compensation Act, 1923 must be liberal since the law values life and limb in free country in generous scales. The adjudicating authority, while determining the quantum of compensation, has to take note of the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned, Compensation under the head 'permanent disability' cannot be denied on the ground that substantial amount had been fixed under the head 'loss of earning' and 'loss of earning capacity'. **(S. Manickam vs. Metropolitan Transport Corpn. Ltd.; AIR 2013 SC 2629 (A)**

S. 168, 147, 95—Accident compensation—Entitlement of employee of vehicle owner which caused accident is not limited to compensation under workmen's compensation Act but also entitled to compensation under MV Act in case policy so provides

Compensation payable to the employee of owner of vehicle that caused accident cannot be restricted merely to one under the Workmen's Compensation Act and it can be expanded provided the contractual document which is the policy of insurance incorporates such clause regarding the premium to be paid taking into account the nature of the policy. The rider no doubt is that the statutory liability cannot be more than what is required under the statute under Section 95 of the Motor Vehicles Act. But that cannot bind the parties or prohibit from contracting or creating unlimited or higher liability to cover wider risk and the insured is bound by the terms of the contract specified in the policy in regard to unlimited or higher liability as the case may be. Thus, it is although correct that limited statutory liability cannot be extended to make it unlimited or higher, it is also manifestly clear that insofar as the entitlement of the claimant/deceased cleaner of the vehicle is concerned, the same cannot be restricted to the compensation under the Workmen's Compensation Act and is entitled to compensation even under the Motor Vehicles Act which will depend upon the terms and conditions of the policy of insurance. **(Ramchandra vs. Regional Manager, United India Insurance Co. Ltd.; AIR 2013 SC 2561 (A)**

S. 168 (1) – Just compensation – Determination of – Court has to grant just compensation even if it is more than the amount claim

It is settled law that this court can grant compensation more than the amount claimed in the claim petition. Therefore, there is no legal impediment to grant compensation of Rs. 9,70,400 to the claimants. The compensation amount

shall carry interest at the rate of 7.5 per cent per annum from the date of petition till the date of realization. **(Bodige Padam and others v. Makul Shanker and others; 2013 ACJ 1844)**

S. 168(1) – Just compensation – Whether compensation more than claimed can be awarded to a claimant if he is entitled to it according to facts and evidence - Held, "yes"

It is settled law that this court or the Tribunal can grant compensation more than the amount claimed in the claim petition. Therefore, there is no legal impediment to grant compensation of Rs.3,55,000 to the claimant, even though he claimed an amount of Rs.1,50,000 in the claim petition. (**K. Ramana v. K. Thirumala Reddy; 2013 ACJ 1633)**

Quantum – Fatal accident – Principle of assessment – Compensation for pain, shock agony is not permissible in fatal accident

The Court has gone through the file, perusal whereof reveals that claimants have led evidence and have proved that the deceased was earning Rs. 10,000 per month and Tribunal after deducting 1/3rd for personal expenses, held that claimants have lost source of dependency to the tune of Rs. 6,667 per month and while keeping in view the age of the deceased and of the claimants applied multiplier 5 and awarded Rs. 6,700/-x5x12=Rs.4,02,000 under the head loss of dependency. However, Tribunal has fallen in error in awarding compensation under the head pain, shock and agony to the tune of Rs. 20,000 which is impermissible. **(National Insurance Company Ltd. v. Bakhta and others; 2013 ACJ 2155 (J&K HC)**

Fatal accident – Deceased children aged between 8 and 15 – Claimants were parent – Tribunal awarded Rs.2,25,000 for each child – Award upheld

Appeal No. 758 of 2011 has been filed by the insurance company against the awarding of claims by the M.A.C.T. in Claim Case No. 263 of 2007 (28 of 1999) to the claimants on account of death of Mohar, son of Somoti and Tanti. The Court has considered the arguments of the counsel for the insurance company.

As per the post-mortem report the age of deceased Mohar was found to be 18 years and as per the panchnama his age was found to be 14 years and he was not earning anything. As per the decisions of Mohammed Ishaq v. Dhiraj, 2007 RAR (Raj) (sic); Sobhagyadevi v. Sukhveer Singh, 2006 RAR 591 (Raj); Lalaram v. Ganpat Lal, 2005 RAR 463 (Raj); and S.C. Mittal v. Rajasthan State Road Trans. Corpn., 2006 ACJ 875 (Rajasthan), in which a sum of Rs. 2,25,000 was awarded as compensation, the M.A.C.T. awarded a sum of Rs. 2,25,000 to the claimants. The Court is in agreement with the findings arrived at by the M.A.C.T. granting compensation in the amount of Rs. 2,25,000 as per the rulings cited above. Thus the appeal filed by the insurance company against the grant of

compensation deserves to be rejected.

Appeal No. 768 of 2011 has been filed by the insurance company against the awarding of claims by the M.A.C.T. in Claim Case No. 267 of 2007 (32 of 1999) on account of death of Poonam, daughter of Sunita, claimant. (**United India Insurance Co. Ltd. v. Janki Devi; 2013 ACJ 1509)**

Injury – Principles of assessment – Compensation on compassionate grounds – Grant of – No compensation can be granted on compassionate grounds unless the same could be allowed under the provisions of the Act

Though the provisions of the Act with regard to grant of compensation to the victims of roadside accidents are beneficial provisions, yet no compensation can be awarded on compassionate grounds unless the same could be allowed under the provisions of the Act. (**New India Assurance Co. Ltd. v. Sewa Singh; 2013 ACJ 1573)**

Deductions – Whether amount received as salary on compassionate employment of any dependant of the deceased is liable for deduction while determining compensation under MV Act – Held, "No", compassionate appointment cannot be termed as pecuniary advantage

The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction?"

'Compassionate appointment' can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case the employee dies in harness, i.e., while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and has no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as 'pecuniary advantage' that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act. (**Vimal Kanwar v. Kishore Dan; 2013 ACJ 1441)**

Narcotic Drugs and Psychotropic Substances Act

S. 2 (vii) (a) "Commercial quantity"- Applicability of Amended Act of 2001 - Amendment in N.D.P.S of commercial quantities not applicable in pending

appeal

The third limb of submission pertains to determination of commercial and non-commercial quantity. The learned Counsel for the appellant has commended us to the decision in E. Micheal Raj V. Intelligence Officer, Narcotic Control Bureau. In the said case it has been held as follows;

> "As a consequence of the Amending Act, the sentence structure underwent a drastic change. The Amending Act for the first time introduced the concept of commercial quantity in relation to narcotic drugs or psychotropic substance by adding Clause (vii a) in section, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term small quantity is defined in section 2, Clause (xxxiii a), any quantity lesser than the quantity specified by Central Government by notification in the Official Gazette. Under the rationalized sentence structure, the punishment would vary depending upon whether the quantity of offending material is small quantity, commercial quantity or something in between".

After so stating, the two learned Judges proceeded to state that the intention of the legislature for introduction of the amendment to punish the people who commit less serious offence with less severe punishment and those who commit great crimes, to impose more severe punishment be it noted, in the said case, the narcotic drug which was found in possession of the appellant as per the Analyst's repost was 60 gms. which was more than 5 gms., i.e., small quantity, but less than 250 gms., i.e., commercial quantity.

As in the case at hand, the appeal was pending in 1996, the ameliorative provision brought by way of amendment in the year 2001 would not be applicable to the accused-appellant. Therefore, the submission advanced by the learned Counsel for the appellant is devoid of any substratum and, accordingly, stands rejected. (**Kashmiri Lal Vs. State of Haryana; 2013 (82) ACC 356 (SC)**

S. 20 (b)(ii) – Possession of charas of commercial quantity – Proof of

This is an appeal preferred by the appellant Afzal under Section 374(2), Cr.P.C. against the judgment and order dated 15.03.2004 passed by Special Judge, N.D.P.S. Act, Lucknow, convicting the appellant Mohd. Afzal and one Banwari Lal of the charge under Sections 20(b)(ii) and 25 of the N.D.P.S. Act and sentenced the appellant Afzal to rigorous imprisonment for 14 years and a fine of Rs. 1,50,000/-for the offence under Section 20(b)(ii) of N.D .P.S. Act and in default of payment of fine, the appellant will undergo a further rigorous imprisonment for three years.

Court not found any force in the submission of learned counsel for the appellant that prosecution failed to prove his case. The witnesses of fact before whom Charas was recovered were Custom Officers and there is no reason to

disbelieve their evidence. Their evidence was supported by the confessional statement of accused which was recorded before Custom Officers and as they are not police personnel, hence the statement recorded before them reliance can be placed.

From the above discussion, it is clear that the prosecution fully proved that Charas was recovered from the possession of appellant. The recovered Charas is of commercial quantity and the conviction recorded by trial court of appellant under Section 20(b)(ii) of NDPS Act is justified and court confirm it. **(Afzal v. Union of India; 2013 (4) ALJ 100)**

S. 32-A – Restriction on power of remission U/s. 32-A does not violate right to life

The petitioner has been convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter for short "the NDPS Act") by an order of the learned Sessions Judge, Sirsa, Haryana dated 27.7.1990. He has been sentenced to undergo RI for a period of 10 years and also to pay a fine of Rs. 1,00,000/- (One lakh only), in default, to suffer further RI for a period of 3 years. The said order has been confirmed in appeal. The petitioner, on the date of the filing of the present writ petition, had undergone custody for a period of more than 7 years. He contends that taking into account the remissions which would have been due to him under different Government Notifications/Orders issued from time to time he would have been entitled to be released from prison. However, by virtue of the provisions of Section 32A of the NDPS Act, the benefit of such remissions have been denied to him resulting in his continued custody. Consequently, by means of this writ petition under Article 32 of the Constitution, he has challenged the constitutional validity of Section 32A of the NDPS Act, inter-alia, on the ground that the said provision violates the fundamental rights of the petitioner under Articles 14, 20(1) and 21 of the Constitution.

Insofar as the challenge founded on violation of Articles 14 and 21 is concerned, the issue stands squarely covered by the decision of this Court in Dadu alias Tulsidas vs. State of Maharashtra; AIR 2000 SC 3203=(2000) 8 SCC 437. The following extract from para 15 from the decision in Dadu which deals with the contentions advanced on the basis of Articles 14 and 21 and the views of this Court on the said contentions amply sums up the situation. **(Budh Singh v. State of Haryana and Anr.; 2013 Cri.LJ 3061 (SC)**

S. 50 – Search of person of accused – Observance of safeguards provided by S. 50 is not required when seizure was from bags and not form person of accused

In the case at hand 32 bags of poppy straw powder weighing 64 Kgs. had been seized from two bags. It has not been seized from the person of the

accused-appellant. It has been established by adducing cogent and reliable evidence that the bags belonged to the appellant. In Ajmer Singh v. State of Haryana the appellant was carrying a bag on his shoulder and the said bag was searched and contraband articles were seized. While dealing with the applicability of Section 50 of the NDPS Act, two learned Judges referred to the decisions in Madan Lal v. State of H.P. and State of H.P. v. Pawan Kumar and came to hold as follows: -

"Thus, applying the interpretation of the word "search of person" as laid down by this Court in the decision mentioned above, to facts of present case, it is clear that the compliance with Section 50 of the Act is not required. Therefore, the search conducted by the investigating officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance with Section 50 of the Act."

Tested on the bedrock of the aforesaid dictum, the contention, that there has been non-compliance of Section 50 of the NDPS Act so assiduously raised is wholly sans substance. **(Ram Swaroop v. State (Govt. NCT) of Delhi; 2013 Cri.LJ 2997)**

S. 50 – Applicability – S.50 applies when seizure is made from person of accused

The second plank of submission pertains to non-compliance of Section 50 of the Act. There is no dispute over the fact that the seizure had taken place from the tool box of the scooter. There is ample evidence on record that the scooter belongs to the appellant. When a vehicle is searched and not the person of an accused, needless to emphasise, Section 50 of the Act is not attracted. **(Kashmiri Lal v. State of Haryana; 2013 Cri.LJ 3036 (SC)**

Negotiable Instruments Act

S. 138 – Scope – Dishonour of cheque on ground that signature of drawer of cheque do not match specimen signatures available with

The two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. The expression "amount of money is insufficient" appearing in S. 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would

inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied. **(M/S Laxmi Dyechem v. State of Gujarat & Ors.; 2013 Cri.LJ 3288 (SC)**

S. 138—Dishonour of cheque—Criminal liability—Drawer of cheque alone can be prosecuted

U/s. 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the present case, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque brought to notice of Supreme Court though contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque. In case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to S. 41 of the NI Act which would have no application in the case on hand. The proceedings filed U/s. 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said the appellant but certainly not U/s. 138. The culpability attached to dishonor of a cheque can, in no case "except in a case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding U/s. 138 of the Act. Thus, criminal proceedings against appellant quashed. **(Aparna A. Shah vs. Sheth Developers Pvt. Ltd.; 2013 CrLJ 3743 (SC)**

Ss. 138 and 142 - Period of taking cognizance U/s 138, NI Act cannot be taken before expiry of period of 15 days notice

In the instant case, the magistrate has passed orders on 24-12-2002 for recoding the statement of the complainant under section 200 Cr.P.C. Thus, from the proposition of law discussed above and formulated by Apex Court, it is clear that the Magistrate has taken cognizance on 24-12-2002 undoubtedly; the notice was served on 10-12-2002. Thus the complaint was filed before 15 days of the service of notice and cognizance was also taken before 15 days of the notice.

Relying upon the decision of Narsingh Das Tapadia v. Goverdhan Das Partani and another, the Court has in the case of Smt. Hemlata Gupta v. State of U.P and another Court, held that: "controversy in the case has been finally settled by Apex Court that in case of complaint filed prior to expiry of 15 days of the notice it can be said to be incompetent. The bar of expiry of 15 days is for taking cognizance."

In the instant case, cognizance has been taken on 24-12-2002, so till then no cause of action has arisen.

The purpose of notice under Section 138(b) of the Act is to afford opportunity for making payment so that initiation of criminal proceeding may be avoided. The complaint was filed before 15 days of service of notice so there was still an opportunity for the respondent no. 2 repay the amount. The complaint petition should have been filed on 26-12-2008. Hence, the Court had no jurisdiction to take cognizance as the condition precedent for taking cognizance under sections 138(c) and 142(b), NI Act was not present. (**Lakhan Sing Vs. State of Uttar Pradesh and others; (2013 (82) ACC 578 (SC)**

Payment of Gratuity Act

S. 2(s) - Order passed by competent authority - Directing appellant establishment to pay the amount of Rs. 46,200/- with interest @ 10% - Amount of gratuity can be calculated even if lump sum compensation paid in lieu of reinstatement - In calculating the amount of travelling allowance rightly taken into account - Learned Single Judge rightly not interfered with concurrent findings/order of two lower authorities

The amount of gratuity would be payable to him as per the scheme of the Act for the period during which he had worked. Under the circumstances, it cannot be said that merely because lump sum compensation in lieu of reinstatement has been ordered, the right to get gratuity as per the Act would get extinguished or would not remain.

The Court is, in the present case, only required to consider as to whether washing allowance and transport allowance should be included in the wages or not. So far as washing allowance is concerned, it is Rs. 0.40 Ps. The said amount of allowance is in addition to the wages and cannot be equates as emoluments while on duty and therefore, it appears to us that the said allowance cannot be included in the wages.

As per the definition, all emoluments while the workman is on duty are to be included for the purpose of gratuity. The incidence of entitlement of travelling allowance is not contingent of any other circumstances except while on duty. Therefore, we find that though it is titled as travelling allowance, it cannot be excluded while calculating wages, as sought to be canvassed.

The liability to pay gratuity as per the Act would accrue on the date when the person concerned is made to retire. **(R.M. Engineering Works Vs. Khushal Bhai Mani Lal Chavda and others; (2013 (138) FLR 478) (Guj HC)**

Practice and Procedure

Judgments - Observations, comments and remarks by the superior courts about the unmerited and fallacious orders passed by an officer - Held, a judge of a superior court is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. (2012) 6 SCC 491 (Para 28) ref.- Adverse remarks expunged

This Special Appeal has been filed by Sri Kamal Kishore Sharma, District Judge, Lucknow only for expunging/setting aside the observations/remaraks and order to place the remark in the personal file of the appellant vide order dated 23.5.2013 passed by the learned Single Judge in Writ Petition No. 136 (R/C) 2012 in re: Grish Chopra v. District Judge, Lucknow and others.

Coming to the case at hand, in our considered opinion, the observations, the comment and the eventual directions were wholly unwarranted and uncalled for. The learned District Judge had acted on the basis of the directions given by this Court in Ganga Prasad v. M/S Haneef Opticains and others; (2005 Vol. 2 ARC page 723) in which this Court has directed that the District Judge while granting stay order shall impose condition of payment or reasonable amount, which may be about 50% of current rent (i.e. rent on which building in dispute may be let out at the time of stay order, in this no detailed enquiry needs be made mere guess work bases on common sense may do). The learned Single Judge, as I manifest, had a different perception of the whole scenario. Perception of fact and application of law may be erroneous, but that never warrants such kind of observations and directions.

Regard being has to the aforesaid, we unhesitatingly expunge the remarks and the direction. A copy of t he order be sent to the Registrar General of this Court to placed on the personal file of the Judicial Officer concerned. The appeal is allowed accordingly. **(Kamal Kishore Sharma v. Grish Chopra; (2013 (31) LDC 1506)**

Parallel Remedies – Two parallel remedies inrespect of same matter

Learned prescribed authority has observed in the impugned order dated 20.5.2011 that since the judgment has been passed ex parte, without hearing the applicant and, as such, setting aside of the order is “necessary”, otherwise the

applicant will suffer irreparable loss. This observation has been made unnecessarily by the learned prescribed authority, by ignoring the mischief underneath this application. When an ex parte judgment is passed, it shall not necessarily be set aside. It is as well an order as an order passed after full hearing of the parties. There is no difference between an order passed in detail or passed ex parte, by Court of law. Both the orders have got the same force. An order of a Court of law is binding for all the time to come, unless set aside, rescinded, modified or otherwise recalled. In either case, when Rent appeal No.52 of 2010 was filed by the petitioner (tenant), an application under Order IX, Rule 13 of the Code of Civil Procedure could not have been filed simultaneously as laid down by the Hon'ble Apex Court in Jai Singh v. Union of India; 1977(1) SCC 1, wherein it was held that appellant cannot pursue two parallel remedies in respect of the same matter at the same time. On this score, the impugned order is violative of the directions of the Hon'ble Apex Court and deserves to be quashed. (**Mathura Singh v. Additional Judge, Small Causes-II, Lucknow; 2013(120) RD 176)**

Prevention of Corruption Act

Ss. 7, 8, 9, 10, 11, 12 and 13—Cr.PC S. 482—Conduct of accused in delaying trial—Impermissibility of quashment in such case – Corruption case cannot be quashed when delay caused by accused

In considering the issue of quashment on the ground of delay, the court must consider the impact of the crime on society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of the Supreme Court, it is clear as crystal that no time-limit can be stipulated for disposal of a criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective.

It is perceivable that delay in the present case has occurred due to the dilatory tactics adopted by the accused, laxity on the part of the prosecution and faults on the part of the system i.e. to keep the court vacant. Though there was no order directing stay of the proceedings before the trial court, yet at the instance of the accused, adjournments were sought. After the High Court clarified the position, the accused, by exhibition of inherent proclivity, sought adjournments and filed miscellaneous applications for prolonging the trial, possibly harbouring the notion that asking for adjournment is a right of the accused and filing applications is his unexceptional legal right. The accused is not debarred in law to file applications, but when delay is caused on the said score, he cannot advance a plea that the delay in trial has caused colossal hardship and agony warranting quashment of the entire criminal proceedings. **(Niranjan Hemchandra Sashital vs. State of Maharashtra; (2013) 2 SCC (Cri) 737)**

S. 19(1) – Sanction to prosecute – Pre-requisite for prosecution of public servant

The following principles can be culled out: -

a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

b) The sanction order may expressly show that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution.

c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him.

d) Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

e) The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

f) If the sanctioning authority has perused all the materials placed before him and some of them have not been proved that would not vitiate the order of sanction.

g) The order of sanction is a pre-requisite as it is intended to provide a safeguard to public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity.

(State of Maharashtra through CBI v. Mahesh G. Jain; 2013 Cri.LJ 3092 (SC)

S. 19(1) – Validity of sanction order not to be tested by adopting hyper technical approach

It is incumbent on the prosecution to prove that valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out. The sanction order may expressly shows that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him. **(State of Maharashtra through CBI v. Mahesh G. Jain; 2013 Cri.LJ 3092 (SC)**

S. 20 – Presumption under – Tainted money recovered from pocket of the

accused - No cogent and acceptable explanation given by him - Presumption under section 20 of the Act attracted

The prosecution, in order to bring home the guilt of the accused persons, examined seven witnesses, got sixteen documents exhibited and marked eleven material objects. On the basis of the evidence brought on record, the learned Special Judge came to hold that the money was recovered from accused No. 2 and there being no cogent, credible and acceptable explanation given by him and regard being had to the other circumstances, the presumption as provided under Section 20 of the Act was attracted. That apart, the learned Special Judge held that there was a consensus as regards the demand and acceptance of the money and, therefore, the prosecution had brought home the charge against both the accused persons and, accordingly, sentenced them as has been stated hereinbefore. **(Syed Yousuf Hussain v. State of A.P.; 2013 (82) ACC 14)**

Provincial Small Cause Courts Act

S. 23 - Return of plaints in suits involving questions of title - Legality of

Section 23 of Act 1887 reads as under:

"23. Return of plaints in suits involving questions of title. -- (1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

(2) When a Court returns a plaint under sub-section (1), it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877, be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction."

Section 23 of Act 1887 has been considered at umpteen times by the Court and on some occasions by the Apex Court also. The interpretation and mischief covered by Section 23 has been explained and clarified time and again. In Court’s view it is no more res integra.

Referring to an earlier decision of this Court in Noola Vs. S. Chaman Lal; AIR 1935 All 148, the Court in Ram Jiwan Mishra said that to attract Section 23 of Act 1887, it is not necessary that there must be dispute of title between the parties in the sense that both of them are claiming title among themselves. Under the section the enquiry is limited only to the right of the plaintiff and to the relief claimed by him. The Court accordingly upheld objection that the suit was not

maintainable. Then in Smt. Kela Devi and others Vs. Rameshwar Dayal 1982 ARC 149, the Court said:

"A complicated question of title was involved in the present case. The Small Cause Court has no jurisdiction to adjudicate upon it".

In Pratap Singh Vs. IXth ADJ, Fatehpur and others; 2000 (2) ARC 41=2000(3)AWC 1995, in paragraphs 5, 6 & 7 of the judgment the Court (2) Pratap Singh v. IXth Additional District Judge, Fatehpur and Ors.; 2000 (3) AWC 1995: 2000 (2) ARC 41; said:-

".....The object of the Section is to enable the Small Cause Court to decline to exercise its jurisdiction in small causes suit when the right of the plaintiff and the relief claimed by him depend upon the proof or disproof of a title to an immovable property or other title which the Small Causes Court cannot finally determine and to return the plaint to be presented to a Court having jurisdiction to determine the title. In effect, the rights to, or interests in immovable property are elaborately excluded, but as questions of this character may arise incidentally in Small causes suits, a facultative provision is made by Section 23 enabling the Small Causes Court to send the matter to ordinary Civil Court but not obliging it to do so".

In Mahendra Pal Singh and others Vs. District Judge, Jhansi and another; 2004 (1) ARC 697, the Court said:

"since intricate question of title is involved in the present case, the revisional Court, had rightly exercised its discretion under Section 23 of the Act in directing the trial Court to return the plaint for presentation to the proper Court".

From the above, it is also clear that Small Cause Court has no jurisdiction to consider validity of sale deed in the proceedings arising in Small Cause Court Suit and that matter could have been examined only in regular suit. If revisional court was of the view that this issue was necessary to be decided in the case in hand, appropriate course open to it was to direct for return of plaint to plaintiffs so as to be presented before regular court in regular suit proceedings. In view of the above, the impugned judgment cannot be sustained. (**Gurmala vs. Mohd. Ishaq; 2013(2) ARC 752)**

Registration Act

S. 17—Unregistered gift deed—Admissibility – Unregistered gift deed not admissible to prove transfer of property in dispute but only for collateral purpose, thus unregistered gift deed thus not admissible

It cannot be doubted that rule of evidence cannot enlarge or alter the provision of substantive law. It cannot confer rights if there are none under substantive law. What thus follows from section and proviso is that, for

example, in respect of a suit for specific performance if it is maintainable at law otherwise, then, in such suit, an unregistered document can be received in evidence. Looking into the exposition of law, discussed above, it cannot be doubted that an unregistered gift deed may not be admissible in evidence to affect property in dispute but for collateral purposes the document may be admissible in evidence and the facts stated therein admitting that property in dispute was owned and belong to Sri Makhan would be a fact for which such document cannot be said to be admissible in evidence and has rightly been so applied by the court below. **(Sheo Ram vs. Lachhaman; 2013(5) ALJ 79)**

S.17(1)(b) – Unregistered partition deed – Admissibility – Document inadmissible being not registered

From bare perusal of document in question it cannot be doubted that though it may be said to be a settlement between family members but as a result of settlement, parties thereto have sought to give effect to partition of property, initially belonged to late Mangelal Sharma, and, therefore, in effect, document in question has resulted in giving effect to partition of property.

In the present case, document in question has been signed by Sri Mangelal Sharma and witnessed by Swaroop Singh Tomar. It does not contain signatures of all the members of joint family. It thus cannot be said that it was a mere "family settlement" between members of family and signed by all the members. If the aforesaid document sought to be enforced so as to determine title of respective parties, i.e. plaintiff and defendants 1 and 2 on the property of late Mangelal Sharma, it would have to be given status of 'partition deed' and its registration was necessary. In view of the Court, the aforesaid document has rightly been held inadmissible in evidence being not registered. **(Raj Gopal Sharma vs. Krishna Gopal Sharma; 2013(5) ALJ 374)**

S. 49—Unregisrered lease deed—Admissibility

In this case, lease deed in respect of municipal land for period of 30 years and lease deed allegedly in favour of plaintiff was unregistered document and hence invalid and inadmissible as evidence. So, no right/interest in property created in favour of plaintiffs. **(Dr. Lokesh Chandra vs. Municipal Board, Bisalpur; 2013(5) ALJ 371)**

Representation of the People Act

S. 8(4)—MP/MLA—Disqualification on conviction—Deferment of effect of disqualification in case of sitting members by S. 8(4)—MP/MLA get disqualified to contest election or to member of house immediately on his conviction

Arts. 102 and 191 clearly provide that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e)

of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, it because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both for a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same.

It cannot be said that S.8(4) does not lay down different set of disqualifications for sitting members but merely defers the effect of disqualification till the appeal or revision filed against conviction by sitting members gets decided. This is so because of Arts. 101(3)(a) and 190(3)(A) which provide for vacation of seat on disqualification. Article 101(3)(a) provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in Clause (1) or Cl. (2) of Art. 102, his seat shall thereupon become vacant and similarly Article 190(3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of disqualifications mentioned in Clauses (1) or (2) of Art. 191 his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a member of either House of Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting member will have effect.

The seat of member of house who has incurred disqualification to become vacant need await the decision of President or Governor as the case may be under Articles 103 and 192, respectively of the Constitution. The filling of the seat which falls vacant, however, may await the decision of the President or the Governor under Articles 103 and 192 respectively.

It is thus clear that the affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State and for a person who is sitting member of a House of Parliament or a House of the State Legislature and

the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of the Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution and is ultra vires the Constitution.

It cannot be said that in case of frivolous conviction the member would be remediless. S. 389 of Criminal PC gives power to appellate Court to stay sentence and even conviction. On conviction being stayed the disqualification would cease to operate from date of stay order.

The Court however gave prospective effect of the judgment considering fact that the knowledge that sitting members of Parliament or State Legislatures will not longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date judgment is pronounced and punishing a person under law which he did not know would be against principles of natural justice. **(Lily Thomas vs. Union of India; AIR 2013 SC 2662 (B)**

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act

S. 3 - SCs, STs – Caste Certificate – Challenge to status of holder of – Necessity to give opportunity to cross examine of witness is integral part and parcel of the Natural Justice

The right of cross-examination is an integral part of the principles of natural justice. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the Government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. So also when the validity of a duly granted caste certificate is challenged. The government servant concerned/ certificate holder can do so only when he is told what the charges against him are. He can, therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that the certificate holder will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the certificate holder, he will not be able to conduct an effective and useful cross-examination. Not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of

natural justice. **(Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465)**

Service Laws

Adverse remark—Communication of—Every entry in ACR, whether it poor, fair, average, good or very good must be communicated within reasonable period

In the case of Dev Dutt vs. Union of India and others; (2008) 8 SCC 725, the Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). Every entry in the ACR of a public service must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 & 18 of the report in Dev Dutt at page 733:

"In our opinion, every entry in ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

Thus it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

In opinion of the Court, the view taken in Deve Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objective. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording remarks relation to a public servant and the system becomes more conforming to the principles of natural justice. The Court, accordingly, hold that every entry in ACR—poor, fair, average, good or very

good– must be communicated to him/her within a reasonable period. **(Sukhdev Singh vs. Union of India; 2013(4) SLR 440 (SC)**

Constitution of India - Articles 16, 226—Compassionate appointment—Appointment cannot be given to the second member of the family by the respondents in case where a family member is already in employment

Court has considered the submissions of the learned counsel for the parties. The petitioner sought compassionate appointment on the ground that his mother, who has employed with Central Coalfields Limited has dies, therefore, he is entitled to the compassionate appointment. The respondents' contention was that the mother of the petitioner died but the petitioner's father is already in service with the respondent-Company. Therefore, he is not entitled to the appointment.

Paragraph-6 of the judgment of Hon'ble Supreme Court delivered in the case of SAIL vs. Awadhesh Singh and another is complete answer to the controversy as in the case of SAIL the Hon'ble Supreme Court has not accepted the policy of giving appointment to the dependents, whose family member is already in employment. Para-6 of the said judgment is quoted hereunder:

"6. Having regard to the submissions made by the learned counsel for both parties, the only question that crops up for our consideration is whether under the memorandum of agreement it is permissible for a dependant of the deceased to claim an appointment on compassionate ground, even when some other dependant of the deceased is already in service. Be it stated that the memorandum of agreement in question is not a statutory scheme and therefore would be unenforceable in an application under Article 226 of the Constitution of India. The memorandum of agreement for appointment on compassionate ground had been evolved by the employer so that on the sudden death of an employee his dependants would not be on the road as destitute and can maintain themselves if an appointment is given to any one of the dependants of the deceased. Such a Scheme cannot at all be conceived if some other dependant of the deceased is already in service. The very purpose for which such Scheme had been evolved would get frustrated if a claim on priority basis is made by a dependant of the deceased notwithstanding the fact that the other dependant of the deceased is already in service. In this view of the matter Court is unable to sustain the decision of the Patna High Court in the impugned judgments. It may be stated that a Bench of this Court has already taken a similar view in the case of S.Mohan vs. Govt. of T.N. With which Court has respectful concurrence."

In view of the above reasons, it is held that appointment cannot be given to the second member of the family by the respondents in a case where another family member is already in employment. **(Fulchand vs. Central Coalfield Ltd.; 2013 (3) SLR 341 (Jhar)**

Constitution of India, Article 226—Date of birth—Correction in—When permissible

Request for correction of birth date in the service record has to be made within five years of the entry into Government service and further it has to be clearly established that a genuine, bonafide mistake has occurred. Petitioner joined the service in 1980, service book mentions the date of birth of the petitioner as 27.3.1952. Request for correction in the birth date made for the first time on 17.2.2003, which is almost after 22 years and not clearly established that a genuine bonafide mistake occurred in the service record since no conclusive material regarding the correct date of birth put forth. So not a fit case for interference in exercise of writ jurisdiction under Article 226. **(Pramodini Muzawar (Mrs.) vs. Secretary of Tourism; 2013(4) SLR 376 (Bom)**

Constitution of India, Arts. 14 and 311—Penalty—Order without assigning reason withholding two increments would be unsustainable and liable to be set aside

The disciplinary authority without assigning any reason whatsoever passed the order dated 27.3.1990 imposing penalty of withholding two increments without cumulative effect w.e.f. 1.1.1991. The only so-called reason assigned in the impugned order was that the explanation given by the respondent was 'carefully considered' and there was due application of mind to the facts of the case. The learned Single Judge has held that the order of punishment cannot sustain it being totally cryptic and laconic as it does not assign any reason whatsoever.

Court's considered view, no interference with the order(s) under appeal is called for. We say so for the reason that even in the case of minor punishment imposed by way of disciplinary action, it is imperative upon the disciplinary authority to assign reasons as to why the explanation given by the delinquent was unacceptable or the imposition of penalty justified. A self-speaking order is an integral part of the principles of natural justice and fair play. The order of punishment in a domestic enquiry may not be akin to a 'judgment' of the Court but ought to meet with the defence plea. The conclusion of punitive action in a mechanical manner or without supporting reasons would suffice to declare the action illegal and arbitrary. **(FCI vs. Harbhajan Dass; 2013 (4) SLR 414 (P&H)**

Regularisation – Entitlement – Complete adhoc appointment does not create any entitlement to regularization

The Society issued advertisement in the newspaper for appointment on the post of Lecturer in History and pursuant to that Respondent 1 along with other candidates participated in the interview conducted by the College. After the selection process and interview, Respondent 1 was not selected rather one T.S. Malleshappa

was selected for the said post. The said Malleshappa joined and continued for about a year and thereafter he left service and joined MPhil course. Thereafter, the Society issued another advertisement dated 3-5-1996 inviting applications from eligible candidates for the post of Lecturer and one R. Siddegora was appointed as Lecturer in History on probation for a period of two years. Curiously enough, Respondent 1 did not challenge the selection and appointment of the abovenamed two candidates, Malleshappa and Siddegora. Instead a writ petition was filed by Respondent 1 seeking regularisation of his services on the post of Lecturer in History with all consequential benefits. Respondent 1 ultimately approached the Tribunal. As noticed above, the Tribunal on the basis of some entries made in the registers maintained by the College passed the impugned order for regularisation of the services with all monetary benefits. It is worth mentioning here that the Tribunal although came to the conclusion that the certificate produced by Respondent 1 goes to show that he was in the College as temporary and part-time employee even then the Tribunal held that due to passage of time the Court will be justified in directing the College/ Society to regularise his services. The Tribunal although directed regularisation as mentioned hereinabove, but in the subsequent paragraph the Tribunal further directed reinstatement of the respondent in service.

In considered opinion of the Court, the Tribunal completely misdirected itself in passing such an order of regularisation and reinstatement in a case where the respondent allegedly worked in the College as part-time Lecturer without any appointment letter and without any selection process. Since the Society never issued any letter of appointment, a letter of termination was also not served upon the respondent.

As stated above, in the absence of any appointment letter issued in favour of the respondent as he was temporary/part-time lecturer in the College, there cannot be any legitimate expectation for his continuing in the service. This was the reason that when in the years 1995 and 1996, two persons were appointed one after the other on the post of Lecturer in History, the respondent did not challenge the said appointments. Even assuming that the respondent was permitted to work in the College as part-time lecturer for some period, the action of the management of the College asking him to stop doing work cannot be held to be punitive. The termination simpliciter is not per se illegal and is not violative of the principles of natural justice. (**B.T. Krishnamurthy vs. Sri Basaveswara Education Society with Sri Basaveswara Education Society vs. T.D. Vishwanath; (2013) 4 SCC 490)**

Specific Relief Act

S. 2(b)—Family settlement—What does not constitutes

In the present case, document in question has been signed by Sri Mangelal Sharma and witnessed by Swaroop Singh Tomar. It does not contain signatures of all the members of joint family. It thus cannot be said that it was a

mere “family settlement” between members of family and signed by all the members. If the aforesaid document sought to be enforced so as to determine title of respective parties, i.e. plaintiff and defendants 1 and 2 on the property of late Mangelal Sharma, it would have to be given status of ‘partition deed’ and its registration was necessary. **(Raj Gopal Sharma vs. Krishna Gopal Sharma; 2013(5) ALJ 374)**

Tort

Composite Negligence - Claim application - Necessary party – In case of composite negligence victim of accident can proceed against any of joint tortfeasers to claim compensation

The grounds of challenge are that the accident took place on account of rash and negligent driving of the truck driver who came from the opposite direction and struck against bus number MAC APP 264/2005 Page 1 of 30 UP-02B-6972 driven by the Appellant's (Corporation) driver. The First Respondent also contributed to the accident as he held his arm outside the window. It is averred that the compensation awarded is exorbitant and excessive. The First Respondent filed cross objections on the ground that the compensation awarded is too low and meager and cannot be said to be just and proper as envisaged under Section 168 of the Motor Vehicles Act, 1988 (the M.V. Act).

Firstly, there was no negligence on First Respondent's part in placing his elbow/arm on window sill which I would deal in detail a little later. The driver of the bus was not produced by the Appellant Corporation to prove the manner of the accident. Thus, it could not be said that there was no negligence on the part of the bus driver or that the truck driver was at fault. Assuming that the driver of the bus number UP-02B-6972 and the truck driver were equally responsible, this would be a case of composite negligence. In such cases, it is for the victim to elect as to against which of the two tortfeasors he would proceed to claim the compensation. In this connection, can supported by a judgment of the Supreme Court in T.O. Anthony v. Karvarnan & Ors.; (2008) 3 SCC 748, it was held as under:-

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the MAC APP 264/2005 Page 4 of 30 other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then

the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence."

(**Uttaranchal Transport Corporation v. Navneet Jerath; 2013 ACJ 1966)**

Negligence – Contributory negligence – Res ipsa loquitur – Applicability – Head-on collision between two trucks

Except the evidence in the nature of first information report Exh.38 and *spot panchnama* Exh.39, there is no other evidence on the point to prove manner in which the accident occurred, and vis-a-vis the negligence of the drivers of the vehicles. However, admittedly, it was the case of head on collision, which resulted in drivers of both the vehicles sustaining fatal injuries. The front side of both the vehicles were damaged considerably. By applying the principles of *res ipsa loquitur*, the learned Tribunal in para 16 of the judgment held that it was the case of composite negligence. After observing that cabins of both the trucks were damaged, the learned Tribunal thought it fit to attribute degree of negligence equally to the drivers of both the ill-fated vehicles. In the absence of evidence to the contrary, the finding reached by the learned Tribunal cannot be interfered with. **(New India Assurance Co. Ltd. v. N. Senjilaxmi and others; 2013 ACJ 2033 (Bom, Nagpur Bench)**

Transfer of Property Act

S. 52 – Lis pendens - Doctrine of - Does not annul transaction/transfer made during pendency of lis - It merely makes such transfer subject to rights of parties to suit

The doctrine of lis pendents is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a Court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this Section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation. **(Thomson Press (India) Ltd. v. Nanak Builders & Investors P. Ltd & Ors.; AIR 2013 SC 2389)**

S. 52 - Lis-pendens - Meaning

The doctrine of lis pendens is recognised under Section 52 of Transfer of Property Act, 1882. This doctrine is expressed in the maxim *"ut lite pendent nihil innoveture".* It imposes a prohibition on transfer or otherwise dealing of any property, during the pendency of a suit, provided the conditions laid down in Section 52 are satisfied. **(Sheoraj Singh & Others v. Zahir Ahmad & Others; 2013 (3) ARC 111)**

S. 53-A - Applicability of - In order to take shelter of this provision, one has to satisfy all four conditions as narrated

In order to take shelter behind the above provision, one has to satisfy the following conditions as are evident from bare reading of Section 53A of Act, 1882:

(i) The contract should have been in writing, signed by or on behalf of transferor.

(ii) The transferee should have got possession of immovable property covered by contract as a part-performance of the contract.

(iii) If the transferee is already in possession and he continues in possession in part-performance of the contract, he further should have done some act in furtherance of the contract.

(iv) The transferee has either performed his part of contract or is willing to perform his part of the contract.

It has been held reputedly that all the postulates of Section 53A are since qua none and a party cannot derive benefit by fulfilling only one or more conditions. It must have to satisfy all the conditions altogether.

In para 17 of the judgement in Shrimant Shamrao Suryavanshi & Anr., the Court, after noticing various conditions applicable in Section 53A, has said:

"we are, therefore, on the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation".

Section 53-A of Act, 1882, in my view contemplates a different situation and has no application in the case in hand. It contemplates a situation and recognize certain rights in a given contingency namely, through a contract, in law, is required to be registered but not registered or instrument of transfer exist, but transfer is not completed in the manner prescribed therefore by the law for the time being enforce, and, if these two conditions exist, what a transferor or transferee can enforce in law or not when there is a part performance of contract is a situation dealt with by Section 53-A. But for the purpose of specific performance of contract, Court did not find any relationship there with Section 53-A of Act, 1882. (**Om Prakash vs. Baijnath Singh (Dead) represented by Lrs.; 2013(2) ARC 685)**

S. 106 - Notice under - Validity of

By reading clause -7 and the last paragraph of the notice, it is quite clear that landlord sufficiently put the tenant on notice that he did not want to keep him

as tenant and notice of 30 days was being given and within 30 days rent must be paid and house must b vacated.

The only fault which may be found with the notice is that it requires to pay the rent and deliver possession within 30 days. However after the amendment of section 106, T.P. Act w.e.f. 2003 even if the period is short, notice does not become invalid. (**Subhash Chand Tyagi vs. Ajay Kumar Mishra; 2013 (2) ARC 731)**

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

S. 12—Scope—Precedence given by S. 12 to special court trial over trial in other court

Section 12 clearly mandates that the trial under Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of other courts. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. The emphasis in S. 12 is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. From the provision of S. 12 it is quite vivid that the trial is not hampered as the trial in other courts is to remain in abeyance by the legislative command. Thus, the question of procrastination of trial does not arise. As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus, S. 12 does not frustrate concept of fair and speedy trial which are the imperative facets of Art. 21 of the Constitution. **(Dharmendra Kirthal vs. State of U.P.; AIR 2013 SC 2569 (D)**

S. 14—Scope of—Gangster is distinct from accused under other law—Differentiation made by Act between accused under Act and accused under other law

There is a distinction between an accused who faces trial in other courts and the accused in the special courts because the accused herein is tried by the Special Court as he is a gangster as defined under Section 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. It is a crime of a different nature. Apart from normal criminality, the accused is also involved in organized crime for a different purpose and motive. The accused persons under the Act belong to altogether a different category. The legislature has felt that they are to be dealt with in a different manner and, accordingly, the trial is mandated to be held by the special courts in an expeditious manner. The intention of the legislature is to curb such kind of organized crimes which have become epidemic in the society. Thus, the accused under the Act is in a distinct category and the differentiation between

the two, namely, a person arrayed as an accused in respect of offences under other Acts and an accused under the Act is a rational one. It cannot be said to be arbitrary. It does not defeat the concept of permissible classification. **(Dharmendra Kirthal vs. State of U.P.; AIR 2013 SC 2569 (G)**

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

S. 2(1) (d) – Exemption from applicability of Act – Building - Consideration of

It would be appropriate at this stage to go through Section 2 (1) (d) of Act, 1972, which reads as under:

"(d) any building used or intended to be used for any other industrial purpose (that is to say, the for the purpose of manufacture, preservation or processing of any goods) or as a cinema or theatre, where the plant and apparatus installed for such purpose in the building is leased out along with the building;

Provided that nothing in this clause shall apply in relation to any shop or other building, situated within the precincts of the cinema or theatre, the tenancy in respect of which has been created separately from the tenancy in respect of the cinema or theatre,"

A perusal thereof shows that in a building used or intended to be used for any industrial purpose, if let out along with plant and apparatus installed for such purpose, only then the aforesaid provision would be attracted and not otherwise. Proviso to Section 2 (1) (d) of Act, 1972 admittedly has no role to play in the present case.

The authorities cited by Sri Jain, learned Senior Advocate, in support of argument that Section 2 (1) (d) of Act, 1972 would be attracted, has no application for the reason that whether a printing press is an industrial purpose or not, need not be looked into in this case, when, admittedly, the building in dispute was not let out along with its plant and machinery which is a necessary ingredients to attract Section 2 (1) (d) of Act, 1972, and, in absence thereof, Section/provision itself would not be attracted, even if it is assumed that a printing press would satisfy the term "industrial purpose".

Looking to the matter in the light of above, Court have no manner of doubt that Section 2 (1) (d) of Act 1972 does not come to operate in the present case and, therefore, the proceedings cannot be held incompetent. The Courts below have rightly held that property in dispute is within the ambit of Act, 1972 and proceedings initiated by respondent-landlord are valid and competent. **(Suresh Chand Sharma v. Nand Kumar Kamal; 2013 (4) ALJ 795)**

Ss. 2(1) (g) and 21 (8) - Enhancement of rent - When application for enhancement filed then it should be determined on same formula as stipulated u/s 21 (8) of above Act

Now the time has come for providing general provision for enhancement of rent by the court as State Legislature for last several decades has failed in its duty to consider this aspect. Such provision is therein some other States Act e.g. Bengal and Kerala as noticed by the Supreme Court in Pallawi Resources Ltd. Vs. Protos Engineering Company Pvt. Ltd.; AIR 2010 SC 1969 and Seshambal (dead) through L.Rs. v. Chelur Corporation Chelur Building and Ors.; AIR 2010 SC 1521.

The most leading authority on this question is reported in Satyawati Sharma (dead) by L.Rs. Vs. Union of India and another; (2008) 5 SCC 287. In the said case, the Supreme Court held that absence of provision of release of tenanted commercial building on the ground of bona fide need of landlord was violative of Article-14 of the Constitution of India (Delhi Rent Control Act provided for release of tenanted accommodation on the ground of bona fide need of the landlord only in case of residential buildings).

The Supreme Court held that it was a fit case where the court should exercise the legislative powers, which are to be exercised rarely. The Supreme Court accordingly issued direction in the nature of legislative enactment directing that it must be read into/ deemed to be included in the Delhi Rent Control Act that landlord can seek release of commercial building also like residential building on the ground of his bona fide need.

Accordingly, in Court's opinion, absence of general provision of enhancement of rent in U.P. Rent Control Act is such an alarming and rarest of rare situation that court has got no option except to exercise the powers akin to law making power and to provide general provision for enhancement of rent.

Accordingly, on the analogy of Section 21(8) of the U.P. Rent Control Act, it is directed that henceforth any landlord of a building which is carrying less than Rs.2000/- per month rent may file an application before the R.C. & E.O. (Delegatee of the DM) for enhancement of rent against a private tenant also. If such an application is filed, the rent to be enhanced by R.C.&E.O. shall be determined exactly on the same formula as is provided under Section 21(8) of the Act, however it is provided that under no circumstances, the rent shall be enhanced to more than Rs.2000/- per month, which is the upper limit of the rent for the buildings to remain within U.P. Rent Control Act by virtue of Section 2(1)(g) of the U.P. Rent Control Act. It is further directed that if such an application is filed and rent is enhanced, then for ten years from the date of filing of application, landlord shall not be entitled to file application for release on the ground of bona fide need. **(Awadha Raj Singh v. ADJ Gorakhpur & Others; 2013 (3) ARC 151)**

S. 13 - Restriction on occupation of building without allotment or release – Validity of

The Apex Court in the case of Nutan Kumar & Ors. v. IInd Additional District Judge & Ors.; 2002 (2) ARC 645, had held that Section 13 of the said Act specifically provides that a person who occupies, without an allotment order in his favour, shall be deemed to be an unauthorized occupant of such premises. As he is in unauthorized occupation he is like a trespasser. A suit for ejectment of a trespasser to get back possession from a trespasser could always be filed. Such a suit would not be on the contract/agreement between the parties and would thus not be hit by principles of public policy also. However, the Apex Court in the aforementioned case has not said that for ejecting an unauthorized occupant/trespasser only the suit is a remedy. It has not anywhere put any restriction on the appropriate authority, to seek ejectment of the unauthorized occupant/trespasser by initiating the proceedings under Section 12 of the Act in the light of Sections 11 and 13 of the Act.

"The premises in the possession of an unauthorized occupant would be deemed to be vacant for the purposes of Rent Control Act, even if an unauthorized occupant is inducted into the premises contrary to the provisions of the Act by the landlord himself, the legislature has not placed any restriction on the rent control authorities to initiate proceedings under Section 12 of the Act. So far as the release of such premises which are deemed to be vacant under Section 12 (4) of the Act is concerned."

"Bare perusal of the record clearly would show that there is no cogent material on record to establish that the Respondent No. 1 or his father was occupying the disputed premises with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 i.e. 5th July, 1976, therefore, Respondent No. 1 who is admittedly occupying the premises in dispute without allotment order is an unauthorized occupant within the meaning of Sections 11, 12, 13 and 31 of the Act."

The Learned Rent Control and Eviction Officer has got the disputed premises inspected, through local inspection, in which the illegal possession of the petitioner was found. It has also been mentioned in the order that the petitioner has delivered its possession to Premshila Vishwakarma by illegal means. The learned Prescribed Authority has found that the petitioner has occupied the disputed premises without allotment order and, as such, the premises become vacant in view of Section 12 of U.P. Act No. 13 of 1972. The evidence available on the records does not prove the status of the petitioner as tenant. However, this observation shall not be treated to be conclusive or on merits, which can well be challenged before the District Judge, concerned. **(Ram Milan Alias Chandu Milan v. Addl. City Magistrate (V)/Rent Control & Eviction Officer & Anr.; 2013 (3) ARC 86)**

S. 20 – Provisions under – Scope - Section 20 of Act only places certain restriction upon right of land lord to evict tenant, thus, section 20 merely curtails/restricts - The rights Hence suit for recovery of rent could be filed under common law

In this case an argument of learned counsel for landlord's respondent that under Section 20(2) of the Act suit for eviction may be filed on the ground of default but suit for recovery of rent alone cannot be filed is not acceptable. Suit for recovery of rent can be filed under common law like all other suits. Section 20 of the Act only places certain restrictions upon the right of the landlord to evict the tenant. It does not provide remedy to seek eviction to the landlord. Such remedy is already there under common law. Even if Rent Control Act does not apply landlord, can very well seek eviction of the tenant under common law. Section 20 merely curtails/restricts the right. Accordingly, Court find that the impugned order issuing certificate of recovery is completely without jurisdiction. **(Roman Catholic Diocese of Agra limited, Datedral House v. Rajendra Singh and Other; 2013 (3) ARC 72)**

S. - 21 Question of Applicability of Act - If rent of premises in dispute is more than Rs. 2000/-, hence above Act not applicable

In this case court has observed that, as rent of premises in dispute found more than Rs. 2000 hence, 1972 Act noticed not applicable. (**Dinesh Chandra (Dr.) Vs. Krishna Kumar Goel; (2013 (2) ARC 710)**

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

Ss. 331, 143, 9 – CPC, O-20 R-18 – Suit for partition - Adjudication – Bar to civil courts jurisdiction

The Court clearly held that future probable use of land will not determine its nature but it has to be seen as to what was its nature at the time of execution of instrument.

In the present case admittedly there is no declaration under Section 143 of Act, 1951. The exposition of law as discussed above clinches the issue in question in favour of petittioner and Sri Avadhesh Kumar, learned counsel appearing for respondents despite repeated query neither could place any authority taking otherwise view not could advance any other submission so as to pursue this Court to take a different view

Since the land in dispute, dispute and irrespective of nature of construction as discussed above, continued to be an "agricultural land" in absence of any declaration made under Section 143, evidently Civil Court had no jurisdiction to decide the matter being barred by Section 331 of Act, 1951. The dispute could have been settled in Revenue Court. **(Satgur Dayal v. IV Additional District Judge, Kheri & others; 2013 (4) ALJ 595)**

Words and Phrases

"Consent" – Meaning of

In State of U.P. v. Chhotey Lal; (2000) 7 SCC 224: 2000 SCC (Cri) 1331 the following passage from the judgment of a three-Judge Bench of this Court in State of HP. v. Mango Ram' on the meaning of "consent" for the purpose of the offence of rape as defined in Section 375 IPC, is quoted: (Chhotey Lal case, SCC p. 560, para 20)

"Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.' (Mango Ram case, SCC pp. 230-31, para 13)" **(Roop Singh v. State of M.P.; (2013) 3 SCC (Cri) 24)**

"Imprisonment of life" – Meaning of

Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would be subject to any order passed in exercise of clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the Constitution of India are granted in exercise of prerogative power. As observed in State of UP v. Sanjay Kumar, (2010)8 SCC 537: (1012) 3 SCC (Cri) 970 (SCC p. 546, para 24) there is no scope of judicial review of such orders except on very limited grounds such as the non-application of mind while passing the order, non-consideration of relevant material, or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly, reasonably and in terms of restrictions imposed in several provisions of the Code. **(Mohinder Singh v. State of Punjab; (2013) 3 SCC (Cri) 137)**

Workmen's Compensation Act

Ss 3 and 4 – Guidelines - For assessment of permanent disability - And calculating compensation therefore - Given by Hon'ble Court - Lose of earning capacity of claimants on account of grievous injuries sustained by each of them in the accident - Have to be ascertained in view of principles of law enunciated by Apex Court - Concept of functional disablement is quite distinct with loss in earning capacity of an individual who suffers injury in an accident

Lose of earning capacity of claimant's on account of grievous injuries sustained by each of them in the accident have to be ascertained in view of the

aforesaid principles of law enunciated by Apex Court.

Concept of functional disablement is quite distinct with loss in earning capacity of an individual who suffers injury in an accident. They are not the same. The claimant in each case had led overwhelming evidence to prove that on account of injuries suffered by each of them they are totally incapacitated to engage themselves in any vocation which they were pursuing prior to the accident. **(HDFC Ergo General Insurance Co. Ltd. Vs. Virendra Gaur and another; (2013 (138) FLR 788) (All HC)**

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Statutory Provisions:

English translation of Sahakarlta Anubhag-I, Noti. No. 776/IL-I-13-8(39)13, dated April 4, 2013, published in the U.P. Gazette, Extra., Part 4, Section (Kha), dated 4th April, 2013, pp. 3-4

In exercise of the powers under Section 130 of the **Uttar Pradesh Co-operative Society Act, 1965 *(U.P.* Act No. 11 of 1966)** read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904) the Governor is pleased to make the following rule with a view to amending the Uttar Pradesh Co- operative Society Rules, 1968:

1. Short title and commencement.-(1) These rules may be called the **Uttar Pradesh Cooperative Society (Forty-Eight Amendment) Rules, 2013.**

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

2. Amendment of Rule 84-A.-In the Uttar Pradesh Co-operative Society Rules, 1968, for Rule 84-A, the following rule shall be *substituted,* namely-

84-A. The general body of co-operative society shall in the following cases be constituted-

(1) by delegates of its members-

(a) Where the society has as its members individuals, and other persons referred to in clauses *(c)* to (j) of sub-section (1) of Section 17 of the Act, if any and the area of operation of the society extends to more than one revenue district.

(b) Where the society has as its members co-operative societies and
persons referred to in clauses *(c)* to (j) of sub-section (1) of Section 17 of the Act, if any.

(2) by all the individual members and any delegates of other members of the society-

(a) Where the society has as its members-

(i) individual, and

(ii) At least one co-operative society; and

(iii) Other persons referred to in clauses *(c)* to (j) of sub-section (1) of Section 17 of the Act, if any,

(b) Where the co-operative society has as its members individuals and other persons referred to in clauses *(c)* to (j) of sub-section (1) of Section 17 of the Act, if any,

(3) in the case of Consumer Co-operative Societies, Cane Co-

operative
Societies and Co-operative Sugar Factory Societies, by delegates of their members where the number of individual members and other persons referred to in clauses (b) to (f) of sub-section (1) of Section 17 of the Act, if any, is 1500 or more.

(4) by delegates of its members where the society has its members individuals, the number where of exceeds 1500 (one thousand five hundred) and the area of operation of the society extends to more than one revenue district:

Provided that the number of such delegates shall exceed one hundred. However this restriction shall not apply in the case of Cane Co-operative Societies and Co-operative Sugar Factory Societies in which the number of delegates shall be in accordance with their bylaws, but shall not in any case exceed one thousand five hundred.

Explanation.- The term "member" used in this rule shall include an ordinary member and a sympathizer member but shall not include a nominal or an association member.

English translation of Kar Evam Nibandhan Anubhag-Z, Notl. No. K.N. 7·344IXI·2012· 312(98) 2012, dated April 1, 2013, published in the U.P. Gazette, Extra., Part 4, Section (Kha), dated 1st April, 2013, p. 2 [A.P. 96]

In exercise of the powers under clause (a) of sub-section (I) of Section 9 of the **Indian Stamp Act, 1899 (Act No. 2 of 1899)** as amended in its application to Uttar Pradesh read with Section 21 of the General Clauses Act, 1897 (Act No. 10 of 1897) the Governor is pleased to remit, with effect from the date of publication of this notification in the Gazette, the stamp duty chargeable under clause (a) of Article 23 of Schedule I-B of the said Act of 1899 on the instruments of purchase of land from any source for the purpose of poultry farming in all districts of Uttar Pradesh:

Provided that the remit under this notification shall be available if the District Magistrate or the Chief Veterinary Doctor of the concern district shall sign such instrument as witness for the purpose of confirming the fact that the transfer is being executed under the said policy.

LEGAL QUIZ:

Q. 1 Whether transfer application referred by a private person (complainant) is maintainable in Session trial?

Ans. Sec. 408(1) Cr.PC empowers a Session Judge to transfer any particular case to one criminal court to another criminal court in his sessions division. Under Section 408(2) the Session Judge may act either on the report of the lower Court or on the Application of a party interested or on his own initiative.

1. Radhey Shyam & Ors. V. State of U.P., 1984 ACrR 292
2. Pappu v. State of U.P. and another, 2007 (57) ACC 14

Q.2 Whether an application for claiming a juvenile is maintainable after passing of Sentence?

Ans. See the following provisions of Juvenile Justice (Care & Protection of Children) Act, 2000.

Section 7-A – Procedure to be followed when claim of juvenility is raised before any Court- (1) Whenever a claim of juvenility is raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

(1) Provided that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act. (2) If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the board for passing appropriate order, and the sentence, if any, passed by a Court shall be deemed to have no effect.

Q. 3 ,d fd'kksj vipkjh ds Åij 302] 376 vkbZ-ih-lh- ds vUrxZr vkjksi gSA Charge ds Lrj ij mlus vijk/k ls deny fd;k gSA og 2½ lky tsy es fcrk pqdk gSA vc og Confess djuk pkgrk gS D;k Confession record djds Convict fd;k tk ldrk gSA fQygky P.O. dks D;k izfdz;k viukuh pkfg,A

Ans. There is no provision in Juvenile Justice (Care & Protection) Act, 2000, which restrain a juvenile in conflict with law from pleading guilty before a competent criminal court, if he is of sufficient maturity age. So, confession of a juvenile in conflict with law can legally be recorded if he is not a doli incapax.

However, Hon'ble Allahabad High Court in Crl. Appeal No. 1840 of 1985 Balwant v. State of U.P. decided on 23.11.2007 made a distinction between confessional statement under S. 164 Cr.PC and confessional statement in examination under S. 313 Cr.PC and hold that accused cannot be convicted merely on the basis of admissions made in the answers given to the questions put to him in examination under S. 313 Cr.PC when there is no other substantive incriminating evidence against accused.

Further, Section 54 of the Juvenile Justice Act provides to follow the procedure of holding inquiry as far as may be for trial of summons cases. Chapter 20 of Code of Criminal Procedure provides that at the stage of statement of accused (Charge), accused may plead guilty and if he chooses not to plead guilty and is not convicted then the Magistrate shall proceed to take all such evidence produced by prosecution and defence and thereafter shall pass appropriate order. It is also pertinent here to mention that section 14 of the Juvenile Act uses the word "Inquiry" and under section 15 of the Juvenile Act it is provided that Board on being satisfied that Juvenile has committed offence, may pass any order as mentioned in section 15.

Rule 97 (4) of Juvenile Justice (Care & Protection of Children) Rules, 2007 provides that while computing the period of detention or stay or sentence of a juvenile in conflict with law or of a child all such period which the juvenile or the child has already spent in custody, detention, stay or sentence of imprisonment shall be counted as part of the period of stay or detention or sentence of imprisonment contained in the final order of the Court or the Board.

Q. 4 (1) Whether a High Court Judge holds 'Judicial Office? (2) Whether a High Court Judge is liable for Contempt of Court?

Ans.1 Article 236(b) provides "the expression judicial service means a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge"

In para 25 of Padam Prasad v. Union of India, AIR 1992 SC 1213 it was held, "we, Therefore, hold that expression "Judicial office" under Art. 217 (2)(a) of Constitution means a judicial officer who belongs to the judicial service as defined under art. 236 (b) of the Constitution. In order to qualify for appointment as a judge of High Court under Art. 217 (2) (a) a person must hold a judicial office which must be part of judicial service.

A High Court Judge on the other side is a constitutional functionary.

(Ans. 2) Relevant case law on the point is Harish Chandra v. Justice S. Ali Ahmad, AIR 1986 Pat. 65 (FB)

Explaining the provisions of Contempt of Courts Act Patna High Court in above mentioned case held that in view of S. 9 and language of S. 16 itself it has

to be held that S. 16 does not purport to enlarge the scope of the Act by including even the judges of the courts of Record. In my opinion, it only gives statutory recognition in respect of contempt of court committed by Judge and magistrates presiding over Subordinate Court. (para 11)

It was further held "when Sec. 16(1) says that a judge …. Shall also be liable for contempt of his Court" it obviously does not refer to the Supreme Court or High Court. In respect of Supreme Court or High Court there is no question of any judge being liable for contempt of his own court, in other words, the court room in which such Judge is presiding. Only a judge of subordinate court can be said to have committed contempt of his own court i.e. the court in which such judge is presiding. if the framers of the Act wanted to include even the Supreme Court and High Court Judges under S. 16, then in normal course it was expected that it should have been specifically mentioned that a Judge of the Supreme Court or a High Court can be held liable for Contempt of the supreme Court or the High Court, as the case may be.

Q. 5 Whether a dismissed employee who has been reinstated on the basis of stay order of the High Court should be considered for promotion?

Ans. Under Article 16 of the Constitution of India the right to be considered for promotion is a fundamental right.

Please see: Badri Nath v. State of Tamil Nadu, JT 2000 (Suppl. 1) SC 346 and Ajit Singh and another v. State of Punjab, 1999(5) SLR 268

The case of such employee is not covered under office memorandum no. 13/21/89-Ka-a-1997, dated 28.5.1997 which provides procedure for keeping the recommendations under sealed cover. As a consequence of the Stay order it will be deemed that the operation of the dismissal order has been stayed and the dismissal order is no more in existence.

Please see: Shiv Chander Kapoor v. Amar Bose, AIR 1990 SC 325

In view of the above position it appears proper that the employee be duly considered for promotion. However, in case of his promotion such promotion will be subject to the final decision of the proceedings in which stay order has been granted.

Q.6 (i) Whether Evidence of victim is sufficient for conviction of accused? (ii) Whether conviction can be awarded if there is discrepancy between Evidence of witnesses and Medical Report?

Ans. Victim of Rape/Prosecutrix as witness - No Corroboration Required & Appreciation of Evidence in Trial of Offence u/s 376 IPC /Gang Rape.

An accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Woman

or girl raped is not an accomplice and to insist for corroboration of the testimony amounts to insult to womanhood. On principle the evidence of victim of sexual assault stands on par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from rules devised by the courts in the western would. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune. See—

1. Om Prakash v. State of U.P.; 2006 (55) ACC 556(SC)
2. State of Rajasthan v. Biramal; 2005 (53) ACC 246 (SC)
3. State of H.P. v. Shree Kant Shekarim; (2004) 8 SCC 153
4. Aman Kuamr v. State of Haryana; 2004(50) ACC 35 (SC)
5. Vimal Suresh Kamble v. Shaluverapinake Apal S.P.; (2003 SCC 175
6. Visveswaran v. State; (2003) 6 SCC 73
7. Bhupinder Sharma v. State of H.P.; (2003) 8 SCC 551
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15. State of Maharashtra v. Chandra Prakash Kewalchand Jain; AIR 1990 SC 568
16. Bharwada Bhoginbai Hirjibhai v. State of Gujarat; AIR 1983 SC 753
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