JUDICIAL TRAINING & RESEARCH INSTITUTE, U.P.,
LUCKNOW

Quarterly Digest

CONSTITUTIONAL, CIVIL, CRIMINAL & REVENUE LAWS

(Covering important judgments of Supreme Court and Allahabad High Court)

July – September, 2016

Volume: XLIV **Issue No.: 3**

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PART – 1 (SUPREME COURT)

Administrative Law

Doctrine of Promissory Estoppel

Doctrine of Promissory Estoppel doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party applicability of. It is not the law that there can be no promissory estoppels against the government in exercise of its severing, governmental, public or excusive powers. The government can legitimately bound by Government can legitimately be held bound by its promise to exempt the appellant from payment of sales tax. It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a trading or business activity of the Government, so far as the doctrine of promissory estoppel is concerned. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it. **Manuelsons Hotels (P) Ltd. V. State of Kerala, (2016) 6 SCC 766**

Arbitration Act,

Ss. 13, 29, 30, 33 and 34- Powers of arbitrator to award interest pendente lite-

The question for consideration in the present case were whether an arbitrator has the power to award pendente lite interest in case the contract bars the same in a case covered by the Arbitration Act, 1940 and whether decisions of the Supreme Court in **Engineers-De-Space-Age, (1996) 1 SCC 516 and Madnani Construction Corpn. (P) Ltd., (2010) 1 SCC 549** have been correctly decided?

Answering the reference in the terms below, the Supreme Court

Held:

Section 29 of the Arbitration Act, 1940 confers on the court power to award interest from the date of decree. Section 34 CPC confers on the court power to award interest prior to the institution of the suit and during pendency of the suit and post decree. A Constitution Bench of the Supreme Court in **G.C. Roy, (1992) 1 SCC 508** has considered the question of power of the arbitrator to award pendente lite interest in a situation where the agreement does not provide for grant of such interest nor does it prohibit such grant when the agreement is silent as to award of interest and held that if the arbitration agreement or the contract itself provides for interest, the arbitrator would have the jurisdiction to award the interest. Similarly, where the agreement expressly provides that no interest pendent lite shall be payable on the amount due, the arbitrator has no power to award pendent lite interest. The Constitution Bench has also laid down that where the agreement between the parties does not prohibit grant of interest and where the party claims interest and that dispute in referred.

The "Court" has been defined in Section 2(c) of the Act to

mean a civil court have jurisdiction to decide the questions forming the subject-matter of the reference. Section 41 of the Act is extracted hereunder:

Procedure and powers of court. Subject to the provisions of this Act and of rules made thereunder:

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters."

The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law. **Union of India V. Ambica Construction, (2016) 6 SCC 36**

<u>Arbitration & Conciliation Act</u>

Section 11—Appointment of an Arbitrator—Right of a party to appoint the arbitrator—Forfeiture of—Validity of

In the present facts and circumstances it did not lie in the mouth of the respondent contractor that the appellants had committed

a default and had forfeited their right to appoint arbitrators as per terms of the agreement. The learned Judge failed to read the relevant clause of the agreement properly.

The terms of the Agreement bind the parties unless they have chosen to repudiate the same. Relevant terms, if provided, will be material for deciding when the right of a party to appoint the arbitrator will suffer forfeiture and when the other party would be entitled to give notice and on failure, move application under Section 11(6) of the Act. Such terms deserve respect of the parties and attention of the Court.

In view of aforesaid discussions Court finds no option but to set aside the impugned order under appeal. Court orders accordingly. In case the respondent contractor is still desirous of pursuing its claim through arbitration in terms of the agreement, it is given the option to serve a fresh notice for arbitration within a month and on receipt of the same the appellants/railways shall be at liberty to send a panel of requisite number of names to the respondents within 60 days of receipt of the notice so that Arbitral Tribunal is constituted in terms of the Agreement. It goes without saying that if the Railways default in sending the panel within the stipulated time, the contractor will be at liberty to pursue its further remedies as per provisions of the Act and law. **Union of India V. Premco-DKSPL (JV), 2016 (7) SCALE 365**

Section 34(2)—Limitation Act, 1963—Section 14—Arbitration award—Delay in filing objections u/s. 34(2) of the 1996 Act—Condonation of—Conditions in which Section 14 of the Limitation Act will be applicable—Liberal interpretation should be placed on Section 14 of the Limitation Act.

In the case at hand, the respondent appeared before the learned arbitrator and after the award was passed, chose not to file any

objection to the award immediately. On the contrary, the respondent filed an application under Section 11 of 1996 Act before the High Court for appointment of an arbitrator. As has been stated earlier, the learned Single Judge of the High Court distinguished the decision in the case of Sohanlal Chourasia and Another (supra) and came to hold that the application was not maintainable. However, he granted liberty to the respondent to file an objection in accordance with law. The words "in accordance with law" gain significance. It allows an argument to be canvassed by the respondent that the time spent in earlier proceeding deserved exclusion while computing the period of limitation. But, an ominous one for the respondent, whether Section 14 is at all attracted? Had the learned Single Judge stated that the period consumed for pursuing the remedy under Section 11 of the 1996 Act, would be excluded for filing objection, possibly the matter would have been different. In any case, we do not intend to dilate further on that aspect. It is quite clear that the quoted portion herein-above does not so indicate. It only grants liberty to the respondent to file an objection in accordance with law. Section 14(1) of the Act which we have reproduced, lays down that the 13 proceedings must relate to the same matter in issue. It emphasises on due diligence and good faith. Filing of an application under Section 11 of the 1996 Act for an appointment of arbitrator is totally different than an objection to award filed under Section 34 of the 1996 Act. To put it differently, one is at the stage of initiation, and the other at the stage of culmination. By no stretch of imagination, it can be said that the proceedings relate to "same matter in issue". Additionally, the respondent had participated in the arbitral proceeding and was aware of passing of the award. He, may be, by design, invoked the jurisdiction of the High Court for appointment of an arbitrator. We are absolutely conscious that liberal interpretation should be placed on Section 14 of the Act, but if the fact situation exposits absence of

good faith of great magnitude, law should not come to the rescue of such a litigant. We say so because the respondent instead of participating in the arbitration proceedings, could have immediately taken steps for appointment of arbitrator as he thought appropriate or he could have filed his objections under Section 34(2) of the Act within permissible parameters but he chose a way, which we are disposed to think, an innovative path, possibly harbouring the thought that he could contrive the way where he could alone rule. Frankly speaking, this is neither diligence nor good faith. On the contrary, it is absence of both.

In view of the aforesaid analysis, Court finds that the High Court has fallen into grave error by concurring with the opinion expressed by the learned Additional District Judge and, therefore, both the orders deserve to be lancinated and, accordingly, Court so direct. **Commissioner, M.P. Housing Board vs. M/s. Mohanlal and Company, 2016 (7) SCALE 321**

ARMY ACT

(i) OFFENCES TRIABLE BY S C M

An SCM can try any offence punishable under the Act by virtue of sub-Section (1) of Section 120 but this general principle is subject to the provisions appearing in sub-Section (2) of Section 120. Sub-Section (2) of Section 120 deals with some offences in respect of which certain restrictions are applicable. The offences so stipulated are those punishable under Sections 34, 37 and 69 of the Act or those against the Officer holding the Court. Apart from Sections 34, 37 and 69 of the Act, there are various other provisions where different kinds of offences are spelt out and dealt with. For example in Chapter VI of the Act, Section 38 deals with offence of desertion, Section 39 deals with offence of absence without leave, Section 40 deals with striking

or threatening a Superior Officer, Section 41 deals with disobedience to the Superior Officer, Section 42 deals with insubordination and so on. Out of multitude of such offences, only Sections 34, 37 and 69 are mentioned in sub-Section (2) in respect of which restrictions stipulated in sub-Section (2) apply. Additionally, one more category, namely "any offence against the officer holding a Court" is also specified. Such of the offences as are directed against the officer holding the Court, may include those under Sections 40, 41, 42 and so on, depending upon facts of the case.

Sub-Section (2) of Section 120 prescribes that in respect of such stipulated offences, in normal circumstances, an SCM shall not try the accused without making a reference to the officer who is otherwise empowered to convene a DCM in regular course or an SGCM while on active service. It further states that if there is no grave reason for immediate action, such reference to the concerned officer must be made and no person should be tried without such reference in respect of any offence so stipulated i.e. those under Sections 34, 37 and 69 of the Act or those against the officer holding the Court. However no such restriction applies in cases other than Sections 34, 37, and 69 of the Act or offences against the officer holding the Court. This provision thus categorizes the offences in two compartments i.e. those which require a reference and those which do not. This distinction is also noticeable from sub Rule 2 of the Rule 22 which mandates that CO shall not dismiss a charge in respect of offences which require a reference to superior authority in terms of Section 120 (2) of the Act. We must therefore accept the submission that the sentence appearing in Paragraph No.20 of the judgment of the High Court to the effect that only offences under Sections 34,37 and 69 of the Act could be tried by an SCM is not correct.

The aforesaid provision in Section 120(2) requiring a reference to the superior authority which thought is again echoed in proviso to Rule 22 (3) of the Rules, is a salutory provision and a check on the exercise of drastic power conferred upon a CO and must be scrupulously observed. A case for non-adherence to this requirement must be made out on record and any deviation or non observance of statutory requirements must be viewed seriously. Offences under Sections 34, 37 and 69 of the Act are special categories or kinds of offences where a reference to the officer empowered to convene a DCM or an SGCM is considered imperative unless there are grave reasons for immediate action. Similarly, the offences against the officer holding the Court, where that officer could possibly "be a judge in his own cause", are also put at the same level and similar reference under sub-Section (2) ought to be made. The exercise of power in seeking such reference and consequent consideration in respect thereof must be in keeping with the seriousness attached in respect of these offences. **Union Of India & Ors V. Vishav Priya Singh : 2016(5) Supreme 43 ; 2016 LawSuit(SC) 655 ; 2016 (6) JT 333, 2016 AIR(SC) 3726, 2016 (8) SCC 641 (Civil Appeal No: 8360 of 2010**

(ii) OFFENCES TRIABLE BY WHICH S C M

We now turn to the core question namely as to which CO is competent to convene, constitute and complete the SCM. Is it CO of the Unit to which the accused belonged or CO of the Unit to which he was attached or came to be attached. In this connection there could possibly be three kinds of situations.

a. An accused committing an act constituting an offence while he was part of his regular Unit is tried by SCM by his own CO i.e., the CO of the Unit itself.

b. An accused while being on attachment to a different Unit commits an act constituting an offence and is therefore tried by SCM by the CO of such Unit to which he was sent on attachment. In such cases the offence itself would be committed while the accused was on attachment.

c. An accused committing an act constituting an offence while being part of his regular Unit is later sent on attachment to a different Unit and is then tried by SCM by CO of such Unit i.e., Unit where he was sent on attachment after the offence was committed.

Unlike Rule 39 which specially disqualifies CO of the accused or of the Corps to which the accused belongs from serving on a GCM or DCM, there is no embargo on CO of the Unit to which the accused belongs being the Court for the purposes of trying the accused by SCM. The first of the aforesaid three categories of offences mentioned above can therefore certainly be tried by the CO of the Unit to which he belongs. If the act constituting an offence is linked to the Unit in question when such act was committed, in respect of matters falling in the second category, the offence could logically be tried by the CO of the Unit to which the accused was attached. Could the accused then insist that the CO of his parent unit alone must try him by SCM. Can it be said, his erstwhile connection with the parent unit must be taken to be the governing factor of such extent that the normal linkage of the Unit and the offence in question must stand displaced. Our answer is no. If requirements of Section 120(2) are otherwise complied with and satisfied, the CO of such attached Unit is competent to convene, constitute and complete the SCM. It is in his unit that the offence in question was committed and in that sense he would be in seisin of the matter. The CO of the parent unit would have nothing to do in the matter.

The third category however raises some concern. There could be two sub categories under this. In the first, the commission of offence itself may come to knowledge, though the offence was committed in the parent unit, after the accused was sent on attachment. Secondly, which is the normal course adopted in the matters under consideration, an accused may be sent on attachment to another unit only for being tried by SCM by the CO of that other unit. The commission of an act constituting an offence being connected with the erstwhile unit and having no connection with the unit where he is later sent on attachment, normally the former of the units in question would be appropriate. But the matter need not be considered and decided purely from the perspective of such connection or nexus with the former or the erstwhile unit.

In a given case, the offence itself may have been committed against the CO of the former unit or the CO may be an important witness reflecting on matters in issue or for the purposes of discipline the accused may be required to be moved out of the unit in question. In some cases the presence of the accused even during the conduct of SCM in the Unit in question may be detrimental to maintenance of discipline. The situations could be varying in degree or context and the concept of propriety and expediency may demand that the accused be sent on attachment to and tried in a different unit. Paragraph 24 of the judgment of the High Court of Delhi shows its concern in that behalf and the fact that the High Court was alive to such complexities. But on a view that the CO of the unit other the one to which the accused belonged would be incompetent, the High Court was persuaded to accept the submission advanced on behalf of the accused.

We may gainfully refer to Regulation 9 of the DSR at this stage. Under this regulation the CO could be either:-

a) one who has been appointed by higher authority to be CO to effectively exercise powers vested in a CO; or

b) one who is in immediate command of the unit to which the person is belongs; or

c) one who is in immediate command of the unit to which the person is attached to; or

d) one who is in immediate command of any detachment or distinct sizeable separate portion of a unit with which the person is for the time being serving.

[29] Regulation 9 with its width and amplitude can possibly cover any situation so that there is no room to express any lament as was done in aforesaid Paragraph 24. If the concept of fairness in the procedure demands, as is expressly set out in the form of Rule 39 of the Rules that CO of the Unit to which an accused belongs is disentitled to serve on a GCM or DCM, it would be complete contradiction to insist upon the CO of the Unit to which the accused belongs, regardless of the status and role of such CO in connection with the offence, to be the only authority entitled to convene an SCM. Sections 116 and 120 do not admit of any such construction and in the absence of any express provision to the contrary, Regulation 9 can certainly be the guiding factor. The expression "Commanding Officer" in Section 116 is not qualified by any explanation that he must be the CO of the Unit to which the accused belongs. Regulation 9, in our view, affords such explanation and is completely consistent with and subserves the basic ingredients of fairness and impartiality.

Regulation 381, in the context of trial of Deserters is a special provision. If the Unit to which the accused belongs is serving in high attitude areas or overseas or is engaged in counter-insurgency operations or active hostilities, the accused could be tried in the

manner laid down therein by the CO of the Units specified therein. But Regulation 381 is not the only exception as found by the High Court and the finding that in all circumstances, other than those dealt with by Regulation 381, it is the CO of the Unit to which the accused belongs who alone is competent to convene, constitute and complete an SCM, is incorrect.

It is noticeable that the expression "to which the accused belongs" finds mention in Rule 39 of the Rules as dealt with herein above in the context of GCM or DCM but not with respect to SCM. Under Rule 133 of the Rules the proceedings of an SCM must immediately on promulgation be forwarded through the Deputy Judge Advocate General of the command "in which the trial is held".

On the other hand, under Rule 146 of the Rules the proceedings of an SCM must be preserved with the records of the corps or the department "to which the accused belonged". It is thus possible and well contemplated that the trial by SCM may be held in a unit other than the one to which the accused belongs". Rules 39 and 146 further disclose that wherever the statute wanted to specify the unit or department "to which the accused belonged" it has done that with great clarity. No such qualification is specified in respect the CO who is to convene, constitute and complete the SCM.

Lastly, we must note that Note 5 below Section 120 as appearing in the Manual could possibly point that an NCO or a sepoy could not be attached to another unit for trial by SCM except as provided in Regulation 381 of the DSR. Without going into the question of efficacy and force of such Note below a Section in an Act enacted by the Parliament, for the present purposes it is sufficient to notice that this Note stood deleted on and with effect from 28.08.2001.

Union Of India & Ors V. Vishav Priya Singh : 2016(5) Supreme 43 ; 2016 LawSuit(SC) 655 ; 2016 (6) JT 333, 2016 AIR(SC) 3726, 2016 (8) SCC 641 (Civil Appeal No: 8360 of 2010)

Banking Laws

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002—Section 17 & 18—Appeal—Prayer for refund of pre-deposit—Consideration of

The appellant is aggrieved by the impugned judgment dated 19.8.2014 passed by the High Court of Delhi in Writ Petition (Civil) No. 3896 of 2013.

As per the impugned judgment, the High Court declined to interfere with the order passed by the Debt Recovery Appellate Tribunal, Delhi (for short, the 'DRAT'). The DRAT had turned down the prayer of the appellant for refund of the amount deposited in compliance of the requirement of the second proviso to section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, for maintaining an appeal.

Accordingly, Court dispose of this appeal, set aside the impugned judgment of the High Court as well as the order of the DRAT impugned before the High Court and remit the matter to DRAT for consideration afresh. **Kumar Aluminium Ltd. V. Asset Reconstruction Company India Ltd., 2016 (8) SCALE**

Central Excise Act

Central Excise—CENVAT CREDIT RULES, 2002—Rule 2 (g)—Term 'input'—Definition of—Work 'include' in the statutory definition—Scope of

The answer to the question referred, according to us, is self-contained in the order of reference which has referred, inter alia, to a three judge bench decision of this Court in Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons & Anr. (1991) 3 SCC 617]. There are other decisions of this Court by Coordinate Benches (three judge) on the issue which need not be adverted to specifically inasmuch as it has been clearly held in Regional Director, Employees' State Insurance Corporation (supra) that the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. Court answer the question referred to him in the above manner leaving it for the appropriate bench of this Court to decide on the factual parameters of the case(s) and the entitlement of the assessee(s) to CENVAT credit in the facts of each case. **Ramala Sahkari Chini Mills Ltd., U.P. V. Commissioner Central Excise, Meerut-1, Meerut, 2016(6) SCALE 443**

Civil Procedure Code

Section 11—Principle of res judicata—Applicability—Res judicata applies when issue in earlier suit is directly and substantially the same as in the subsequent suit irrespective of the plea taken with reference to such an issue in the two suits.

Res judicata applies when issue in earlier suit is directly and substantially the same as in the subsequent suit irrespective of the plea taken with reference to such an issue in the two suits. The finding on the issue of title and right of possession, having been heard and finally

decided in the earlier suit, operated as a bar to trial of the subsequent suit as rightly held by the trial court. Thus, the reversal of the said finding by the appellate court and the High Court is unsustainable. **Mohammed Khan (D) Th. LRs vs. Ibrahim Khan, 2016 (7) SCALE 474**

Section 24—Transfer petition—One petition pending in Subordinate Court, Karur, Tamil Nadu while another petition pending in the Family Court at Coimbatore—Both the parties have agreed that both the cases can be tried in Family Court at Coimbatore

The dispute essentially is as to whether HMOP No. 63 of 2013 on the file of Subordinate Judge, Karur, Tamil Nadu and HMOP No. 1050 of 2014, which is pending in the Family Court at Coimbatore, should be tried in Karur or in Coimbatore.

The learned counsel on both sides have agreed that both the cases can be tried in Family Court at Coimbatore. Therefore, this appeal is disposed of by transferring HMOP No. 63 of 2013, pending in the Court of Subordinate Judge, Karur, Tamil Nadu to the Family Court at Coimbatore to consolidate both the cases and dispose of the same expeditiously and preferably within six months from the date of first appearance of the parties pursuant to this order.

The parties shall appear before the Family Court at Coimbatore on 02.08.2016. **Aarthi vs. R.M. Rajeshkumar, 2016(6) SCALE 706**

Section 96; Order 41, Rule 27—Appeal—Powers of first appellate court—Additional evidence in appeal—Permissibility to adduce

It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while

hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate Court to appreciate the entire evidence and may come to a conclusion different from that of the Trial Court.

This takes us to the next question in relation to the application filed under Order 41 Rule 27 of the Code. In our considered view, the High Court committed another error when it rejected the application filed by the appellant under Order 41 Rule 27 of the Code. This application, in our opinion, should have been allowed for more than one reason.

Order 41 Rule 27 of the Code is a provision which enables the party to file additional evidence at the first and second appellate stage. If the party to appeal is able to satisfy the appellate Court that there is justifiable reason for not filing such evidence at the trial stage and that the additional evidence is relevant and material for deciding the rights of the parties which are the subject matter of the lis, the Court should allow the party to file such additional evidence. After all, the Court has to do substantial justice to the parties. Merely because the Court allowed one party to file additional evidence in appeal would not by itself mean that the Court has also decided the entire case in his favour and accepted such evidence. Indeed once the additional evidence is allowed to be taken on record, the appellate Court is under obligation to give opportunity to the other side to file additional evidence by way of rebuttal.

Coming to the case, since we have allowed the application made by the appellant under Order 41 Rule 27 of the Code and has permitted the appellant to file additional evidence then as a necessary consequence, the impugned order has to be set aside and respondents

are granted an opportunity to file additional evidence in rebuttal, if they so wish to file. **Union of India vs. K.V. Lakshman, 2016(6) SCALE 147**

Section 100—Appeal—Questions of Law—Appeal allowed by the High Court without framing the question of law—Whether impugned judgment delivered by the High Court is sustainable—Held, No.

The learned counsel appearing for the appellants has submitted that the appeal was allowed by the High Court without framing the questions of law. The said fact has not been disputed by the learned counsel for the respondents.

In the circumstances, the impugned judgment delivered by the High Court is set aside and the matter is remanded to the High Court, so that it can be decided afresh after framing the questions of law and hearing the concerned parties. **Karanjit Singh vs. Parkash Kaur, 2016 (7) SCALE 566**

Section 100; Order 27, Rule 5B—Second appeal—Substantial questions of law—Validity of

In Court's considered view, the appeal does involve the substantial questions of law and, therefore, the High Court should have admitted the appeal by framing substantial questions of law arising in the case and then after giving notice to the respondent for its final hearing as provided under Section 100 of the Code should have decided the appeal finally on merits. As a matter of fact, having regard to the nature of controversy and keeping in view the issues involved, such as the issue regarding ownership rights coupled with the issue regarding proper interpretation of documents (exhibits) to prove the ownership rights over the suit land, Court is of the view that

these issues do constitute substantial questions of law, viz., whether the Courts below were justified in properly interpreting the documents/exhibits relied upon by the parties for determining the ownership rights over the suit land? In other words, Court is of the view that where the Court is required to properly interpret the nature of the documents, it does not involve any issue of fact as such but it only involves legal issue based on admitted documents. It is, therefore, obligatory upon the High Court to decide the legality and correctness of such findings as to which party's documents are to be preferred for conferring title over the suit land. In this case, the High Court could do so only when it had first admitted the appeal and framed substantial questions of law as required under Section 100 of the Code. **Haryana State vs. Gram Panchayat Village Kalehri, 2016(6) SCALE 157]**

Order VII Rule 11—Application for rejection of election petition—Application u/O VII Rule 11, CPC can be filed at any stage—Once an application is filed under Order VII Rule 11, CPC, the Court has to dispose of the same before proceeding with the trial—Defendant is entitled to file the application for rejection before filing his written statement

Once an application is filed under Order VII Rule 11 of the CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (Election Petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter (See Saleem Bhai and others v. State of Maharashtra and others[2]). But once an application for

rejection is filed, the court has to dispose of the same before proceeding with the trial court.

However, we may hasten to add that the liberty to file an application for rejection under Order VII Rule 11 of the CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement.

Apparently, in the present case, it is seen that Annexure-P/4-Affidavit dated 15.03.2015, with a prayer … "to dismiss the present Election Petition under Order VII Rule 11 of the CPC…", was filed within thirty days of the receipt of the summons in the Election Petition. However, the court was not inclined to consider the same in the absence of a formal application, and thus, Annexure-P/5-Application No. E.A. No. 222 of 2016 was filed on 22.02.2016 leading to the impugned order, posting the application for consideration at the time of final hearing.

The procedure adopted by the court is not warranted under law. Without disposing of an application under Order VII Rule 11 of the CPC, the court cannot proceed with the trial. In that view of the matter, the impugned order is only to be set aside. Ordered accordingly.

However, the concern expressed by the High Court with regard to the alleged attempt on the part of the appellant for delaying the trial of the Election Petition cannot be brushed aside. Therefore, we have heard the learned Senior Counsel appearing for the appellant on the application under Order VII Rule 11 of the CPC. We are satisfied that the said Application does not come within the purview of any of the situations under Order VII Rule 11 (a) to (f) of the CPC. Therefore, the application is rejected. In the peculiar facts of this case which we have narrated above, the appellant is given an opportunity to file written statement in the Election

Petition within two weeks from today. **R.K. Roja vs. U.S. Rayudu, 2016(6) SCALE 729**

Order VII Rule 11—Election petition—Applications filed under Order 7 Rule 11, CPC—Taking decision in the said applications ought not to have been postponed till the disposal of the Election Petitions—

Upon hearing the learned counsel and upon refusal of the impugned order, in the peculiar facts of these cases, Court is of the view that the High Court should have finally decided Miscellaneous Case Nos.26 and 27 of 2016 arising out of Election Petition Nos. 20 and 17 of 2014 as these applications have been filed under Order 7 Rule 11 of the Civil Procedure Code, 1908. In Court's opinion taking decision in the said applications ought not to have been postponed till the disposal of the Election Petitions.

In the circumstances, the impugned order dated 22nd June, 2016 passed in Miscalleneous Case Nos. 26 and 27 of 2016 in Election Petition Nos. 20 and 17 of 2014 is set aside with a direction that the said applications shall be decided as soon as possible and preferably within two weeks from the date of receipt of a copy of this order by the High Court. Needless to say that after the disposal of Miscellaneous Applications filed under Order 7 Rule 11 of the Civil Procedure Code, 1908 the Election Petitions shall also be decided as soon as possible and within six months from the date of disposal of the above stated Miscellaneous Applications. **Sahadev Xaxa vs. Jogesh Kumar Singh, 2016 (8) SCALE 62**

Order XVII Rules 1 & 2; Order XVIII Rule 17—Adjournments—A counsel appearing for a litigant has to have

institutional responsibility to cooperate in recording of evidence should be continuous instead of seeking adjournment

It is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. That apart, it has also been held that the Courts should constantly endeavour to follow such a time schedule so that the purpose of amendments brought in the Code of Civil Procedure are not defeated.

In the case at hand, as Court has stated hereinbefore, the examination-in-chief continued for long and the matter was adjourned seven times. The defendant sought adjournment after adjournment for cross-examination on some pretext or the other which are really not entertainable in law. But the trial Court eventually granted permission subject to payment of costs. Regardless of the allowance extended, the defendant stood embedded on his adamantine platform and prayed for adjournment as if it was his right to seek adjournment on any ground whatsoever and on any circumstance. The non-concern of the defendant-petitioner shown towards the proceedings of the Court is absolutely manifest. The disregard shown to the plaintiff's age is also visible from the marathon of interlocutory applications filed. A counsel appearing for a litigant has to have institutional responsibility. The Code of Civil Procedure so command. Applications are not to be filed on the grounds which we have referred to hereinabove and that too in such a brazen and obtrusive manner. It is wholly reprehensible. The law does not countenance it and, if we permit ourselves to say so, the professional ethics decries such practice. It is because such acts are against the majesty of law.

In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants

deploy all sorts of methods in protracting the litigation. The court has further laid down that it is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further.

In the case at hand, it can indubitably be stated that the defendant-petitioner has acted in a manner to cause colossal insult to justice and to the concept of speedy disposal of civil litigation. We are constrained to say the virus of seeking adjournment has to be controlled. **Gayathri vs. M. Girish, 2016 (7) SCALE 461**

Order XXI Rule 97 & 99—Evacuee Interest (Separation) Act, 1951—Execution petition—Objection—While a genuine petition to execution of a decree can certainly be considered, the court cannot be oblivious of frivolous objections being filed after a decree is passed in long drawn contested proceedings—Attempt to deprive the decree holder of benefit of such decree should be discouraged by the court where such objection is raised.

It is clear from the finding recorded by the courts below that the predecessor of the respondents was party to the sale certificate which the respondents never challenged. There is no evidence on record that they were in possession prior to the passing of the decree as they did not take in proceedings in spite of knowledge of the proceedings for a long period of time. The suit was duly contested by the original defendants for a long period of 30 years. It could not, thus, be held that the original defendants had colluded with the appellants plaintiffs. In this view of the matter, there was no jurisdiction for the High Court to have set aside the order of the courts below only by observing that the executing court had not recorded finding that regular enquiry, as a suit, was not required. This observation is also against the record as the executing court has, after

finding that the objections were misconceived in substance, held that no regular enquiry as a suit was required. There was thus, no infirmity in the finding recorded by the courts below in rejecting the objections.

While a genuine petition to execution of a decree can certainly be considered, the court cannot be oblivious of frivolous objections being filed after a decree is passed in long drawn contested proceedings. Attempt to deprive the decree holder of benefit of such decree should be discouraged by the court where such objection is raised. The impugned order is thus, clearly erroneous and unsustainable and not a result of sound judicial approach. **Bool Chand (D) Th. LRs. Vs. Rabia, 2016 (7) SCALE 317**

Order XXXIX, Rule 2A—Imposition of penalty of imprisonment—justifiability

According to appellant, who was at the relevant time working as a Junior Engineer, he had only implemented the order passed by the Commissioner, Municipal Corporation, and that too under the direct supervision of superior officers. Commissioner and Joint Commissioner, Municipal Corporation were discharged in the proceedings. Trial Court, in a petition filed under Order 39 Rule 2A, CPC imposed penalty of imprisonment for a period of one month, only on appellant whether the appellant can be discharged from the charges, accepting the apology tendered by him in Court. **O.P. Verma V. Shahmal, 2016 (8) SCALE 344**

<u>Constitution of India</u>

Article 12, 226/227—Writ jurisdiction—Board of Control for Cricket in India (BCCI), not a State, is amenable to jurisdiction of the High Court since it discharges public functions

The proceedings that led to the setting-up of the Committee arose out of a public interest petition. The directions issued by this Court proceeded on a clear finding recorded by this Court that even when BCCI is not a state within the meaning of Article 12 of the Constitution of India, it is amenable to the jurisdiction of the High Court since it discharges public functions. That part of the controversy stands concluded by judgment of this Court in the earlier round and cannot be reopened. **Board of Control for Cricket vs. Cricket Assn. of Bihar, 2016 (7) SCALE 143**

Article 19(1)(c)— Right to form associations, union or cooperative societies—Nature and scope of right guaranteed u/s. 19(1)(c) of the Constitution

The right, it is evident from the above, is guaranteed in favour of citizens and citizens alone. Recourse to Article 19(1)(C) is not, therefore, open to juristic or other persons and entities who are non-citizens. Confronted with this position, it was argued on behalf of the BCCI and intervening associations that even when the provisions of Article 19(1)(c) may not be available to the State Cricket Associations who are members of BCCI , yet the recommendations made by the Committee, if accepted, would prejudicially affect the citizens who have come together to form such State associations. It was contended that this Court could in its discretion lift the veil to determine whether the right of any citizen/citizens was affected and grant suitable relief if the answer was in the affirmative. It was contended that once this Court decides to do so it will find that citizens comprising the State

Cricket Associations are the ones actually affected by the recommendations in question.

Court regrets our inability to accept the submission so vehemently urged before us by learned Counsel for the BCCI and the State Cricket Associations. We say so, firstly because no citizen has come forward in the present proceedings or in the earlier round to complain of the violation of any fundamental right guaranteed under Article 19(1)(c) of the Constitution. Secondly and more importantly because the recommendations do not, in Court's opinion, affect the composition of the State Cricket Associations in any manner. Citizens who have come together to form the State Associations continue to associate as before with no change in their internal composition. If that be so as it indeed is the right guaranteed under Article 19(1)(c) stands exercised, which exercise would continue to enjoy the protection of the constitutional guarantee till the Association/Union or co-operative Society, as the case may be, continues to exist. What is, however, important is that the right under Article 19(1)(c) does not extend to guaranting to the citizens the concomitant right to pursue their goals and objects uninhibited by any regulatory or other control. **Board of Control for Cricket vs. Cricket Assn. of Bihar, 2016 (7) SCALE 143**

Article 124 & 136—Special Leave to Appeal—Grant of—Need for a restrained approach towards grant of special leave to appeal against judgments and orders passed by the High Courts

We have given our anxious consideration to the submissions made at the Bar. Certain facts are beyond Page 19 19 dispute. It is not in dispute that the Supreme Court was never meant to be a regular court of appeal. It was meant to exercise its powers under Article 136 of the Constitution only in cases which raised important questions

involving interpretation of the Constitution or questions of general public importance or questions of constitutionality of State or Central legislations or those raising important issues touching Centre-State relationship etc. The jurisdiction may also have been available to the Court where it found gross miscarriage of justice or an error so outrageous as no reasonable person would countenance. The power to interfere was not meant to be exercisable just because prolonged argument would eventually reveal some error or irregularity or a possible alternative view on a subject that did not cause any miscarriage of justice of a kind that would shock the conscience of the court on the subject. The long line of decisions of the Court to which we have made reference earlier supports that view. The fact, however remains that the filing of cases in the Supreme Court over the past six decades has grown so sharply that the Judge strength in the Supreme Court is proving inadequate to deal with the same. Statistics show that more than 3/4th Page 20 20 of the total number of cases filed are dismissed in limine. Even so, the dismissal is only after the court has applied its mind and heard arguments which consume considerable time of the Judges. Dismissal of an overwhelming number of cases has not and does not discourage the litigants or the member of the Bar from filing cases. That is why the number of cases filed is on the rise every year. **V. Vasanthakumar V. H.C. Bhatia, 2016(6) SCALE 834**

Art 163(1) Indian Constitution: Nature & Scope of discretionary powers of Governor-

Article 163 does not give the Governor a general discretionary power to act against or without the advice of his Council of Ministers. The area for the exercise of his discretion is limited. Even this limited area, his choice of action should not be arbitrary or fanciful. It must be

a choice dictated by reason, actuated by good faith and tempered by caution

Limited situation that finality expressed in Article 163(2) would apply to functions exercised by the Governor in his own discretion, as are permissible within the framework of Article 163(1), and additionally, in situations where the clear intent underlying a constitutional provision, so requires i.e., where the exercise of such power on the aid and advice, would run contrary to the constitutional scheme, or would be contradictory in terms council of ministers.

Limited Situation when discretionary power of Governor can be exercisable independent of, or contrary to aid and advice of council of ministers are-

Firstly, the measure of discretionary power of the Governor, is limited to the scope postulated therefor, under Article 163(1).

Secondly, under Article 163(1) the discretionary power of the Governor extends to situations, wherein a constitutional provision expressly requires the Governor to act in his own discretion.

Thirdly, the Governor can additionally discharge functions in his own discretion, where such intent emerges from a legitimate interpretation of the concerned provision, and the same cannot be construed otherwise.

Fourthly, in situations where this Court has declared, that the Governor should exercise the particular function at his own and without any aid or advice, because of the impermissibility of the other alternative, by reason of conflict of interest.

Fifthly, the submission advanced on behalf of the respondents, that the exercise of discretion under Article 163(2) is final and beyond the scope of judicial review cannot be accepted. Firstly, because we have rejected the submission advanced by the respondents, that the scope and extent of discretion vested with the Governor has to be ascertained from Article 163(2), on the basis whereof the submission

was canvassed. And secondly, any discretion exercised beyond the Governor's jurisdictional authority, would certainly be subject to judicial review. Shamser Singh V. State of Punjab, (1974) 2 SCC 831 quoted and relied upon. **Nabam Prebia & Bamang Pelix V. Dy. Speaker, Arunachal Pradesh Legislative Assembly, (21016) 8 SCC 1**

Article 226—Bank guarantee—Prayer made that interest of appellants be protected by issuing a direction to respondents that they should furnish Bank Guarantee for claiming the difference between old and new rates—This point was not canvassed before the High Court.

In this case, the limited request made by Mr.N. K. Kaul, learned Additional Solicitor General, is that the interest of the appellants may be protected by issuing a direction to the respondents that they should furnish Bank Guarantee for claiming the diference between old and new rates. This is a point, apparently not canvassed before the High Court and it is for the appellants to apprise this point to the High Court.

Therefore, with liberty to the appellants to approach the High Court in that regard, this appeal is disposed of. **Food Corporation of India V. Rice Millers Association, District Gondia, 2016 (7) SCALE 568**

Art. 226 - Writ of Mandamus

A Writ of Mandamus cannot be issued to the executive to frame rules or regulations which are in the nature of subordinate legislation. (See: State of Jammu & Kashmir v. A.R. Zakki & Ors. 1992 Supp. (1) SCC 548 at paragraphs 10 and 15, and State of Uttar

Pradesh and Ors. v. Mahindra and Mahindra Limited (2011) 13 SCC 77 at 81**).** This is for the reason that a court would then trespass into forbidden territory, as our Constitution recognizes a broad division of powers between legislative and judicial activity.

However, though the power to grant exemption under a statutory provision may amount to subordinate legislation in a given case, but being in the domain of exercise of discretionary power, is subject to the same tests in administrative law, as is executive or administrative action, as to its validity one of these tests being the well-known **Wednesbury principle, (1985) 1 SCC 641** under which a court may strike down an abuse of such discretionary power on grounds that irrelevant circumstances have been taken into account or relevant circumstances have not been taken into account (for example).**Manuelsons Hotels Private Limited V. State of Kerala and others, (2016) 6 SCC 766**

Article 323A & 323B—Tribunals—Issue of composition and functioning of Tribunals and statutory framework thereof—Its impact on working of this Court and on the rule of law—Desirability, constitutionality of provisions for composition of Tribunals as substitutes for High Courts and exclusion of High Court jurisdiction on account of direct appeals to this Court—This Court frames questions required to the examined by the Law Commission

It is well known that in the wake of 42nd Amendment to the Constitution of India, incorporating Article 323A and 323B of the Constitution under Part XIVA, various Tribunals have been set up. The Tribunals constitute alternative institutional mechanism for dispute resolution. The declared objective of such Tribunals is inability of the existing system of courts to cope up with the volume

of work. This Court has gone into the question of validity of scheme under which the High Court is bypassed without the alternative institutional mechanism being equally effective for the access to justice which was necessary component of rule of law and this Court being over burdened with routine matters in several judgments to which reference may be made.

The above resume of law laid down by this Court may call for review of composition of Tribunals under the Electricity Act or other corresponding statutes. Appeals to this Court on question of law or substantial question of law show that Tribunals deal with such questions or substantial questions. Direct appeals to this Court has the result of denial of access to the High Court. Such Tribunals thus become substitute for High Courts without manner of appointment to such Tribunals being the same as the manner of appointment of High Court Judges. A perusal of Sections 113(b)(i) to (iii) and 113(3) read with Section 78, Sections 84, 85 and 125 of the Electricity Act and corresponding provisions of similar Acts may, thus, need a fresh look.

Apart from the above aspect, further question is whether providing appeals to this Court in routine, without there being issues of general public importance, is not a serious obstruction to the effective working of this Court.

The questions which may be required to be examined by the Law Commission are : I Whether any changes in the statutory framework constituting various Tribunals with regard to persons appointed, manner of appointment, duration of appointment, etc. is necessary in the light of judgment of this Court in Madras Bar Association (supra) or on any other consideration from the point of view of strengthening the rule of law? II Whether it is permissible and advisable to provide appeals routinely to this Court only on a question

of law or substantial question of law which is not of national or public importance without affecting the constitutional role assigned to the Supreme Court having regard to the desirability of decision being rendered within reasonable time? III Whether direct statutory appeals to the Supreme Court bypassing the High Courts from the orders of Tribunal affects access to justice to litigants in remote areas of the country? IV Whether it is desirable to exclude jurisdiction of all courts in absence of equally effective alternative Page 48 48 mechanism for access to justice at grass root level as has been done in provisions of TDSAT Act (Sections 14 and 15). V Any other incidental or connected issue which may be considered appropriate. **Gujarat Urja Vikas Nigam Ltd. V. Essar Power Limited, 2016 (7) SCALE 742**

Criminal Procedure Code

In criminal cases governed by the Code - the Court - not powerless and may allow amendment in appropriate cases - to avoid the multiplicity of the proceedings.

What court is emphasizing is that even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings. The argument of the learned counsel for the appellant, therefore, that there is no power of amendment has to be negated. **Kunapareddy @ Nookala Shanka Balaji V. Kunapareddy Swarna Kumari & Anr 2016(4) Supreme 481 ; 2016 LawSuit(SC) 579 ;**

2016 AIR(SC) 2519, 2016 (5) JT 365, 2016 AIR(SCW) 2519, 2016 (2) Crimes(SC) 277, 2016 CrLR 600, 2016 (5) Scale 703

Sec. 41 - Discussing the law as laid in Joginder Kumar v. State of U.P.(1994) 4 SCC 260 ; Nilabati Behera v. State of Orissa (1993) 2 SCC 746 ; State of M.P. v. Shyamsunder Trivedi (1995) 4 SCC 262 ; Arnesh Kumar v. State of Bihar and another (2014) 8 SCC 273 and Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1 held that not only there are violation of guidelines issued in the case of **D.K. Basu v. State of W.B.[(1997) 1 SCC 416]**, there are also flagrant violation of mandate of law enshrined under Section 41 and Section 41-A of CrPC. The investigating officers in no circumstances can flout the law with brazen proclivity. In such a situation, the public law remedy which has been postulated in **Sube Singh v. State of Haryana[(2006) 3 SCC 178], Hardeep Singh v. State of M.P.[(2012) 1 SCC 748],** comes into play. The constitutional courts taking note of suffering and humiliation are entitled to grant compensation. That has been regarded as a redeeming feature. In the case at hand, taking into consideration the totality of facts and circumstances, the court think it appropriate to grant a sum of Rs.5,00,000/- (rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State of M.P. within three months hence. It will be open to the State to proceed against the erring officials, if so advised. **Dr. Rini Johar & Anr. V. State of M.P. & Ors. 2016(4) Supreme 397 AIR 2016 SC 2679 (Writ Petition (CRIMINAL) No. 30 Of 2015)**

Section 197 Cr.P.C. - no scope for invoking – under Water (Prevention and control of Pollution) Act, 1974 - Section 5 Cr.P.C. - in the absence of specific provisions to the contrary, nothing

contained in the Cr.P.C. - would affect any special or local laws - providing any special form or procedure

The question that was posed for consideration before the Division Bench was that both the appellants admittedly being public servants, the prosecution as against them could not have been lodged under Section 48 of the Water (Prevention and control of Pollution) Act, 1974 [hereinafter called the '1974 Act']. The said contention was raised on the footing that being public servants, sanction under Section 197 Cr.P.C. was required before the prosecution was launched against them. The Division Bench held that by vSection 5 Cr.P.C., the said Section makes it clear that in the absence of specific provisions to the contrary, nothing contained in the Cr.P.C. would affect any special or local laws providing for any special form or procedure prescribed to be made applicable. irtue of Section 48 read along with Section 49(1) of the 1974 Act, there was a clear conflict with Sections 415 and 197 of the Criminal Procedure Code and consequently Section 60 of the 1974 Act would operate and, therefore, the protection claimed by the appellants under Section 197 Cr.P.C. cannot be extended to them. Under Section 48, the guilt is deemed to be committed the moment the offence under the 1974 Act is alleged against the Head of the Department of a Government Department. It is a rebuttable presumption and under the proviso to Section 48, the Head of the Department will get an opportunity to demonstrate that the offence was committed without his knowledge or that in spite of due diligence to prevent the commission of such an offence, the same came to be committed. It is far different from saying that the safeguard provided under the proviso to Section 48 of the 1974 Act would in any manner enable the Head of the Department of the Government Department to seek umbrage under Section 197 Cr.P.C. and such a course if permitted to be made that would certainly conflict with the deemed fiction power created under Section 48 of the 1974 Act.

In this context, when we refer to Section 5 Cr.P.C., the said Section makes it clear that in the absence of specific provisions to the contrary, nothing contained in the Cr.P.C. would affect any special or local laws providing for any special form or procedure prescribed to be made applicable. There is no specific provision providing for any sanction to be secured for proceeding against a public servant under the 1974 Act. If one can visualise a situation where Section 197 Cr.P.C. is made applicable in respect of any prosecution under the 1974 Act and in that process the sanction is refused by the State by invoking Section 197 Cr.P.C. that would virtually negate the deeming fiction provided under Section 48 by which the Head of the Department of Government Department would otherwise be deemed guilty of the offence under the 1974 Act. In such a situation the outcome of application of Section 197 Cr.P.C. by resorting to reliance placed by Section 4(2) Cr.P.C. would directly conflict with Section 48 of the 1974 Act and consequently Section 60 of the 1974 Act would automatically come into play which has an overriding effect over any other enactment other than the 1974 Act. In the light of the said statutory prescription contained in Section 48, we find that there is no scope for invoking Section 197 Cr.P.C. even though the appellants are stated to be public servants. **V.C.Chinnappa Goudar V. Kar. State Pollution Control Bd.& Anr. (2016) 2 SCC (Cri) 407 ; (2015) 14 SCC 535 (Criminal Appeal No. 755/2010)**

Sec. 202 -Magistrate takes cognizance - issues process - in contravention of provisions of Sections 200 and 202 Cr.P.C. - order of the Magistrate may be vitiated - but then the relief not by invoking Section 203 Cr.P.C. - the remedy lies in invoking Section 482 of the Code.

The facts are: The appellant had filed a private complaint under

Section 200 of the Code against the respondents for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("Act" for short). The learned Magistrate, by order dated 04.09.2010, took cognizance of the offence and the complaint was registered as CC No. 41505 of 2010. Thereafter, the learned Magistrate, upon recording the evidence of the appellant and perusing through the documents produced along with the complaint, was satisfied that a prima facie case has been made out for the offence punishable under Section 138 of the Act and issued summons to the respondents by order dated 16.09.2010. After service of summons, the respondents had filed an application under Sections 202, 203 and 245 of the Code questioning the maintainability of the complaint due to lack of territorial jurisdiction of the Court. The learned Magistrate, after hearing the parties, has allowed the said application and proceeded to recall his previous order issuing summons to the respondents and returned the complaint to the appellant, with a direction to present the complaint before the competent Court by order dated 22.09.2011.

Being aggrieved by the aforesaid order, the appellant had filed a petition under Section 482 of the Code before the High Court. The High Court while concurring with the view taken by the learned Magistrate has rejected the said petition.

The scheme of the Code does not provide for review of order of issuance of process and prohibits interference by the accused at the interlocutory stage under Section 203. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section

203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code. Hence the High Court is not justified in rejecting the petition filed by the appellant under Section 482 of the Code. **M/S Iris Computers Ltd. V. M/S Askari Infotech Pvt. Ltd.& Ors (2016) 2 SCC (Cri) 389 ; (2015) 14 SCC 399 (Criminal Appeal No. 250 Of 2013)**

Ss. 212, 214 - Charge Under section 397 IPC- not framed – but the charges framed adequately encompass all essential facts building up the offences - order of remand was not passed – the case should have been decided on merits - the purpose of framing a charge - to acquaint the accused - with the incriminating facts and circumstances.

Charge-sheet under Sections 120B/302/380/394 and 397 read with Section 34 IPC was laid against them. The trial court framed charges against the respondents-accused under Sections 120B/302/390/392/457 read with Section 34 IPC The High Court, as the impugned judgment and order would reveal, not only did find fault with the trial court in omitting to frame charge under Section 397 IPC the High Court interfered with the conviction of the respondents-accused and remitted the matter to the trial court to frame charge under Section 397 IPC

Having regard to the number of persons allegedly involved in the offences, as disclosed by the prosecution, the crimes committed are of murder in the course of robbery together with lurking house trespass and house breaking by night in order to commit offence punishable with imprisonment with common intention. Though Section 397 IPC deals with robbery or dacoity with attempt to cause death or grievous hurt and prescribes punishment by way of

imprisonment of not less than seven years, in our view, the High Court ought to have decided the appeals on merit without remanding the case to the trial court for fresh adjudication after framing charge under Section 397 IPC and recording additional evidence, if deemed necessary.

The purpose of framing a charge against an accused person is to acquaint him with the incriminating facts and circumstances proposed to be proved against him in the trial to follow. The principal objective is to afford him an opportunity of preparing his defence against the charge. The possibility of prejudice to the accused arises, if he is not made conversant with the entire gamut of facts constituting the accusations leveled against him. Though Section 397 IPC, having regard to the case of the prosecution, may not be wholly irrelevant, the charges framed against the respondents-accused by the trial court, do adequately encompass all essential facts building up the offences imputed against them.

In view of the inclusion of Section 34 IPC in the array of offences, for which the respondents-accused had been charged by the trial court, as well as the facts and the evidence sought to be relied upon by the prosecution, in our estimate, the order of remand was not alled for and the appeals should have been decided on merits, on the basis of the charges already framed and the materials on record. The deduction of the High Court that the omission to frame charge under Section 397 IPC has resulted in miscarriage of justice is unconvincing in the facts of this case. That meanwhile more than a decade has passed since the date of the incident, cannot also be readily over-looked. **Bharamappa Gogi V. Praveen Murthy & Ors. Etc. (2016) 2 SCC (Cri) 540 ; (2016) 6 SCC 268 (Criminal Appeal Nos. 2216-2217 Of 2010)**

TRIAL AFTER DEATH

Ss. 226, 235 - No legal provision – to continue prosecution - upon death of the accused.

In fact, we find that the learned District Judge could not have proceeded with the attachment proceedings at all since the attachment proceedings were initiated by the State against Ramachandraiah under clause 3 of the Criminal Law Amendment Ordinance, 1944, who was actually dead. Clause 3 contemplates that such an application must be made to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, in respect of property which the State Government believes the said person to have procured by means of the offences. It is incomprehensible, therefore, that such an application could have been made in regard to a dead person who obviously cannot be said to be ordinarily resident or carrying on business anywhere. There is no legal provision which enables continuance of prosecution upon death of the accused. We must record that the proceedings and the decisions of the courts below are disturbing, to say the least. In the first place, though the accused had died, the trial court proceeded with the trial and recorded a conviction two years after his death. Then, this null and void conviction was used as a basis for making an attachment of his properties before the Sessions Court. Astonishingly, all applications succeeded, the attachment was made absolute and over and above all, the High Court upheld the attachment. **U Subhadramma & Ors V. State Of A P : 2016(4) Supreme 700 ; 2016 LawSuit(SC) 638 ; 2016 (6) JT 242, 2016 AIR (SC) 3095, 2016 (7) SCC 797, 2016 (3) SCC(Cri) 236, 2016 (2) AllCriR 2229 (Criminal Appeal No: 1596 of 2011)**

Sec. 251 -The particulars of the offence - disclosing to the accused - shall be stated to him.

A perusal of Section 251 leaves no room for any doubt, that "… the particulars of the offence of which he is accused shall be stated to him…". The particulars for an offence postulated for the non-proviso category (- where the activity of a collective investment scheme, is commenced after 25.1.1995), under Section 12(1B) of the SEBI Act, would be the date on which the accused commenced sponsoring or carrying on a collective investment scheme. If such date fell within the period when the initiation of a new collective investment endeavour stood barred under Section 12(1B), the accused had to be accosted of the same. And only thereupon, the accused would have understood, what charge was being levelled against him. Merely mention of the statutory provision, namely, Section 12(1B) of the SEBI Act, would not amount to disclosing to the accused, the particulars of the offence of which they were accused. One cannot lose sight of the fact, that implications for the proviso category (-those who commenced operations before 25.1.1995) and the non-proviso category (-those who commenced operations after 25.1.1995) are different. A perusal of the chargesheet reveals, that the respondents herein were being treated as belonging to the proviso category. But learned counsel for 'the Board' desires us to treat them as belonging to the non-proviso category, and to proceed against them for having engaged themselves in activities concerning collective investment, on the basis of the material available on the record of the case. This, in our considered view is clearly impermissible. We are also of the view, that Section 251 of the Cr.P.C. will not remedy the above defect and deficiency in the complaint. In the above view of the matter, for the reasons recorded hereinabove, and additionally, for the reasons recorded while rejecting the first contention advanced at

the hands of the learned senior counsel for 'the Board', we find no merit in the submission founded on Section 251 of the Cr.P.C. **Securities and Exchange Board of India V. Gaurav Varshney & Anr. 2016(5) Supreme 417 (Criminal Appeal Nos. 827-830 of 2012)**

Section 306. - Magistrate exercised his jurisdiction - even after the appointment of a Special Judge under the PC Act - the same is only a curable irregularity - provided the order is passed in good faith.

Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-bye. Both the alternatives are available. In those cases where chargesheet is filed before the Magistrate, he will have to commit it to the Special Judge. In this situation, the provisions of Section 306 of the Code would be applicable and the Magistrate would be empowered to exercise the power under the said provision. In contrast, in those cases where Special Judge takes cognizance of offence directly, as he is authorised to do so in view of Section 5(2) of

PC Act, Section 306 of the Code would get bypassed and as the Special Judge has taken cognizance, it is Section 307 of the Code which would become applicable. Sub-section (2) of Section 5 of PC Act makes this position clear by prescribing that it is the Special Judge who would exercise his powers to tender of pardon as can clearly be spelled out by the language employed in that provision. Section 5(2) is to be read in conjunction with Section 5(1) of the PC Act.

We have already held, both the Magistrate as well as the Special Judge has concurrent jurisdiction in granting pardon under Section 306 Cr.P.C. while the investigation is going on. But, in a case, where the Magistrate has exercised his jurisdiction under Section 306 Cr.P.C. even after the appointment of a Special Judge under the PC Act and has passed an order granting pardon, the same is only a curable irregularity, which will not vitiate the proceedings, provided the order is passed in good faith. In fact, in the instant case, the Special Judge himself has referred the application to the Chief Metropolitan Magistrate/Metropolitan Magistrate to deal with the same since the case was under investigation. In such circumstances, we find no error in the Special Judge directing the Chief Metropolitan Magistrate or the Metropolitan Magistrate to pass appropriate orders on the application of CBI in granting pardon to the second respondent so as to facilitate the investigation." **State Through CBI, Chennai V. V. Arul Kumar AIR 2016 SC 2551 (CRIMINAL Appeal No. 499 Of 2016)**

Sec. 306 - Conviction under section - in a case of suicide - when the relevant and material facts are already part of charge under Section 498-A and 304-B of the IPC.

The issue of conviction under Section 306 of the IPC is definitely not res integra in view of judgment of this Court in somewhat similar circumstances in the case of K. Prema S. Rao and another v. Yadla Srinivasa Rao and others, 2003 1 SCC 217. In that case the acquittal of the husband of the deceased under 304-B IPC was not reversed but this Court while upholding the conviction of the all the three accused under Section 498-A IPC, further convicted the husband of the victim under Section 306 IPC after discussing issues relating to absence of a charge under Section 306 IPC in a case of suicide when the relevant and material facts are already part of charge under Section 498-A and 304-B of the IPC. That judgment rendered by a Bench of Three Judges in somewhat identical facts, in our view leaves no scope for accepting the second contention on behalf of the appellant. **Satish Shetty V. State Of Karnataka 2016(4) Supreme 412 ; 2016 (6) JT 10, 2016 AIR(SC) 2689, 2016 CrLJ 3147, 2016 (2) AllCriR 1840, Criminal Appeal 1358 of 2008**

Sec. 432 - For remission – the factors to be seen

The High Court has opined that the State of Gujarat is the appropriate Government. It is because it has been guided by the principle that the first respondent was convicted and sentenced in the State of Gujarat. The most important thing is that the High Court has referred to, as has been indicated earlier, many aspects of human rights and individual liberty and, if we allow ourselves to say so, the whole discussion is in the realm of abstractions. The Court has not found that the order passed by the State of Gujarat was bereft of appropriate consideration of necessary facts or there has been violation of principles of equality. The High Court has not noticed that the order is bereft of reason. It has been clearly stated in the impugned order that the convict was involved in disruptive activities, criminal conspiracy, smuggling of arms, ammunitions and explosives

and further he had also been involved in various other activities. It has also been mentioned that the prisoner under disguise of common name used to purchase vehicles for transportation and his conduct showed that he had wide spread network to cause harm and create disturbance to National Security. Because of the aforesaid reasons remission was declined. In such a fact situation, the view expressed by the High Court to consider the case on the basis of the observations made by it in the judgment is not correct. **State Of Gujarat & Anr V. Lal Singh @ Manjit Singh & Ors : 2016(4) Supreme 657 ; 2016 LawSuit(SC) 608 ; 2016 (6) JT 519, 2016 AIR(SC) 3197, 2016 (8) SCC 370 (Criminal Appeal No: 171 of 2016)**

Ss.432, 433 - Multiple sentences for imprisonment for life - cannot be directed to run consecutively - Such sentences - be super imposed - so that any remission or commutation in one - does not ipso facto result for the other.

The legal position is, thus, fairly well settled that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, the provisions of Section 31 under Cr.P.C. must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational for it will disregard the fact that humans like all other living beings have but one life to live. So understood Section 31 (1) would permit consecutive running of sentences only if such sentences do not happen to be life sentences. That is, in our opinion, the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences.

While multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be super imposed over each other so that any remission or commutation granted by the competent authority in one does not ipso facto result in remission of the sentence awarded to the prisoner for the other. **Muthuramalingam & Ors. V. State Rep. by Insp. of Police AIR 2016 SC 3340 ; 2016(5) Supreme 581 [Five Judges Bench] (Criminal Appeal Nos.231-233 Of 2009)**

S.433-SENTENCE REDUCTION

The accused was aged around 75 years. Out of three accused two have expired. Litigation was pending for quite some time. The appellant has undergone five months in jail. The submission that the sentence of the accused should be reduced to that of "already undergone" as against his total sentence of 2 years is not accepted as, it would be too lenient in the facts of the case. Having regard to the totality of the circumstances such as nature of offences committed and findings recorded by the Court, the sentence awarded to the appellant can be reduced from "two years" to "one year". **Nirmal Dass V. State Of Punjab AIR 2016 SC 2562 (Criminal Appeal No.531 OF 2016)**

Sec. 434 - The Court can - direct - to undergo the term sentence - before the commencement of life sentence.

The accused has been sentenced to imprisonment for different terms apart from being awarded imprisonment for life. The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutive. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can,

therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence. Whether or not the direction of the Court below calls for any modification or alteration is a matter with which we are not concerned. The Regular Bench hearing the appeals would be free to deal with that aspect of the matter having regard to what we have said in the foregoing paragraphs. **Muthuramalingam & Ors. V. State Rep. by Insp. of Police AIR 2016 SC 3340 ; 2016(5) Supreme 581 [Five Judges Bench] (Criminal Appeal Nos.231-233 Of 2009)**

Whether the court has been given judicial discretion to levy no fine or a fine of less than five thousand rupees under Section 85(a)(i)(b) of the Employees' State Insurance Corporation Act - held No – but can reduce the sentence of imprisonmen - as per proviso

Section 85(a)(i)(b) of the Employees' State Insurance Corporation Act prescribes punishment for a particular offence as imprisonment which shall not be less than six months and the convict shall also be liable to fine of five thousand rupees. The proviso however empowers the court that it may, "for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;". The question to be answered is whether the court has been given judicial discretion only to reduce the sentence of imprisonment for any term lesser than six months or

whether it also has discretion to levy no fine or a fine of less than five thousand rupees.

In our considered view, the clause "shall also be liable to fine", in the context of Indian Penal Code may be capable of being treated as directory and thus conferring on the court a discretion to impose sentence of fine also in addition to imprisonment although such discretion stands somewhat impaired. But clearly no minimum fine is prescribed for the offences under the IPC nor that Act was enacted with the special purpose of preventing economic offences. The object of creating offence and penalty under the Employees' State Insurance Act, 1948 is clearly to create deterrence against violation of provisions of the Act which are beneficial for the employees. Non-payment of contributions is an economic offence and therefore the Legislature has not only fixed a minimum term of imprisonment but also a fixed amount of fine of five thousand rupees under Section 85(a)(i)(b) of the Act. There is no discretion of awarding less than the specified fee, under the main provision. It is only the proviso which is in the nature of an exception whereunder the court is vested with discretion limited to imposition of imprisonment for a lesser term. Conspicuously, no words are found in the proviso for imposing a lesser fine than that of five thousand rupees. In such a situation the intention of the Legislature is clear and brooks no interpretation. The law is well settled that when the wordings of the Stature are clear, no interpretation is required unless there is a requirement of saving the provisions from vice of unconstitutionality or absurdity. Neither of the twin situations is attracted herein.

Hence, it is held that the amount of fine has to be Rupees five thousand and the courts have no discretion to reduce the same once the offence has been established. The discretion as per proviso is

confined only in respect of term of imprisonment. **Employees State Insurance Corporation V. A.K. Abdul Samad & Anr. (2016) 2 SCC (Cri) 470 ; (2016) 4 SCC 785 (Criminal Appeal Nos.1065-1066 Of 2005)**

PARITY IN SENTENCE

Parity claimed – in sentence – must be contrued in accordance with the circumstances under which the previous sentence was ordered.

On behalf of the appellants it has been highlighted that the other three co-accused who were convicted for similar offences were ordered by the High Court to be released on probation of good conduct for the term of imprisonment. Although such relief was granted to those three co-accused mainly on consideration of their old age varying between 85 to 75 years, the appellants claim parity on account of similar role assigned to all the five convicts. The parity claimed by the appellants is misconceived. The concession shown to other three convicts was mainly on the ground of their extreme old age and that in our view justified the special treatment extended in their case. The High Court enhanced the sentence from three years to five years RI for the main offence because it was concerned and moved by the suffering of the injured Budhram on account of the sole head injury caused by lathi. Budhram was brought to court but was unable to depose because of mental impairment suffered by him. Had the prosecution witnesses been able to pinpoint the accused who caused the head injury on Budhram, we would have definitely treated him to be responsible of a graver offence meriting higher punishment but unfortunately no such specific role has been assigned to any of the five convicts. In such a situation, considering the other facts and circumstances, particularly the genesis of the occurrence which was on account of a dispute between the parties over a right to have a

drain in a passage, we are persuaded to reduce the period of sentence for the offences under Section 325 read with Section 149 of the IPC in respect of both the appellants from five years to three years RI. However, the amount of fine and conviction and sentence for other offences are left intact. **Bijender @ Papu and Anr. V. State of Haryana 2016(4) Supreme 434 ; AIR 2016 SC 2710 (CRIMINAL APPEAL NO.463 OF 2016)**

FOR PARDON / REMISSION

FOR PAROLE

Parole - power is administrative in character - does not affect the power of the High Court under Article 226 of the Constitution.

So far as direction for grant of parole is concerned, we find that the learned Judge has directed parole to be granted for three months forthwith. In Sunil Fulchand Shah v. Union of India and others, 2000 3 SCC 409 the Constitution Bench while dealing with the grant of temporary release or parole under Section 12(1) and Section 12(1-A) of the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) had observed that the exercise of the said power is administrative in character but it does not affect the power of the High Court under Article 226 of the Constitution. However, the constitutional court before directing the temporary release where the request is made to be released on parole for a specified reason and for a specified period should form an opinion that request has been unjustifiably refused or where the interest of justice warranted for issue of such order of temporary release. The Court further ruled that jurisdiction has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court should leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu. **State Of Gujarat & Anr V. Lal Singh @ Manjit**

Singh & Ors : 2016(4) Supreme 657 ; 2016 Law Suit(SC) 608 ; 2016 (6) JT 519, 2016 AIR(SC) 3197, 2016 (8) SCC 370 (Criminal Appeal No: 171 of 2016)

Section 465 of the Cr.P.C

Omissions and/or irregularities - in matters of procedure - be overlooked – if it does not occasion "failure of justice".

Section 465 of the Cr.P.C. pertains to omissions or irregularities in matters of procedure. It is, therefore, that both the sub-Sections of Section 465, pointedly refer to proceedings under the Cr.P.C. Added to the above it is of some significance, that Chapter XXXV of the Cr.P.C. include Sections 460 to 466. The heading of the instant Chapter is "Irregular Proceedings". Not only that, each one of the Sections in Chapter XXXV of the Cr.P.C. make pointed reference only to matters of procedure. There can be no doubt, therefore, that omissions and/or irregularities in matters of procedure can be overlooked, subject to the condition, that such an omission or irregularity does not occasion "failure of justice".

Having so interpreted Section 465 of the Cr.P.C., we may also indicate, that material facts constituting the offence, for which an accused is being charged, must mandatorily be put to the accused. Lack of material facts, which are vital to establish the ingredients of an offence, cannot be viewed as a procedural omission. The above requirement is not procedural, but substantive. **Securities and Exchange Board of India V. Gaurav Varshney & Anr. 2016(5) Supreme 417 (Criminal Appeal Nos. 827-830 of 2012)**

Evidence Act

Sec. 3 - Prosecution suppressed the genesis and origin of the occurrence - failed to explain the injuries on the person of the accused - adverse inference against the prosecution

Once the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused including death of father of the accused persons, the only possible and probable course left open was to grant benefit of doubt to the accused persons. The accused persons can legitimately claim right to use force once they saw their parents being assaulted and when actually it has been shown that due to such assault and injury their father subsequently died. In the given facts, adverse inference must be drawn against the prosecution for not offering any explanation much less a plausible one. Drawing of such adverse inference is given a go-bye in the case of free fight mainly because the occurrence in that case may take place at different spots and in such a manner that a witness may not reasonably be expected to see and therefore explain the injuries sustained by the defence party. This is not the factual situation in the present case. **Bhagwan Sahai and Anr. V. State of Rajasthan 2016(4) Supreme 409 ; AIR 2016 SC 1714**

Sec. 3 - APPRICIATION OF EVIDENCE OF INJURED PERSON

Injured witness - generally reliable - but even an injured witness must be subjected to careful scrutiny

The proposition of law that an injured witness is generally reliable is no doubt correct but even an injured witness must be subjected to careful scrutiny if circumstances and materials available

on record suggest that he may have falsely implicated some innocent persons also as an afterthought on account of enmity and vendetta.

Thus as per prosecution case there is no corresponding injury on the person of victim to support the allegation of assault against the lady. Coupled with this fact the initial version also creates a serious doubt that specific allegations against the accused persons have been developed later in the course of deposition in Court. Such allegation has come only from one witness without support from any independent witness. In such circumstances and due to lack of convincing medical evidence, the credibility of specific allegations against the accused persons required serious consideration.

The exaggerated and contradictory deposition of the victim should not be believed, in view of the fact that the parties were having land dispute from before and even then in the FIR no specific role was assigned to the some accused persons while specific role was assigned to two co-accused. The medical evidence also does not corroborate the subsequent allegations made by the victim against the accused persons. The broad features of the case also reveal that the two male accused were allegedly having a gun and an axe in their hand and they used these weapons only to cause injuries which did not pose any danger to the life of the victim. In such circumstances the women accused could have hardly any reason to unnecessarily get involved into assault so as to cause simple injuries by fists and kicks. **Indira Devi and Ors. Versus State of Himachal Pradesh(Criminal Appeal No.524 Of 2016)**

EVIDENCE OF HOSTILE WITNESS

Sec. 3 -Hostile Witness - can be relied - if there are other material - to corroborate the said evidence

The evidence of a witness who has been declared hostile can be relied if there are some other material on the basis of which said evidence can be corroborated. More so, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile.

It is relevant to note that the trial began against six accused persons. Shivlochan in his examination-in-chief took the name of Devraj alone who was stated to have assaulted Devi Prasad. Shivlochan did not mention in his examination-in-chief about the presence of other accused which may be a reason for the prosecution to get the witness declared as hostile. It is, however, relevant to note that even in the cross-examination the witness repeated that he heard Devraj saying "Maro Sale Ko" who had assaulted Devi Prasad and Devi Prasad @ Prachar cried "Bachao Bachao". The factum of assault by Devraj was throughout maintained by the witness. Thus, even though witness was declared as hostile witness his evidence so far as the role of Devraj is unshaken. Similarly, evidence of Ajar Das, where in his examination-in-chief he stated that accused Devraj gave three lathi blows to Devi Prasad which was seen by him. The witness further stated that Devraj threatened him to run away otherwise he shall also be assaulted. Even after the witness was declared hostile he maintained his stand that he forbidden Devraj from assaulting Devi Prasad. He further stated that he saw Devraj and Dinda assaulting Devi Prasad in the night and on the next day the dead body was found below Rakhet Pulia. The witness further stated that due to land dispute Devraj and Dinda had assaulted Devi Prasad. In cross-examination he voluntarily stated that he had seen the accused giving three lathi blows. Further, he stated that he did not see that whom he has beaten because it was dark. The statement in cross-

examination in no manner dilute the value of the evidence. It was Devi Prasad who received injury whose dead body was found next day morning. The statement that it was Devraj who gave three lathi blows obviously referred to lathi blow to Devi Prasad-deceased. Thus, we conclude that in spite of witnesses Shivlochan and Ajar Das having been declared as hostile witnesses their evidence that Devraj assaulted Devi Prasad is unshaken and has rightly been relied by the courts below in recording conviction. **Devraj V. State Of Chhattisgarh 2016(6) Supreme 30 ; (Criminal Appeal No.423 Of 2015)**

Sec. 3 - Hostile Witness - statements under Section 161 of CrPC - not confronted - I.O. not spoken in his evidence - conviction is erroneous

Where the prosecution several witnesses have turned hostile, their alleged statements made to the police under Section 161 of CrPC were not confronted to them and marked as exhibits and further the I.O. has not spoken in his evidence anything about the alleged statements of the above hostile witnesses recorded under Section 161 as held by this Court in three Judge Bench in the case of V.K. Mishra v. State of Uttarakhand[(2015) 9 SCC 588]. Thus, placing reliance upon their statements under Section 161 to record the finding of conviction is erroneous in law. **Baby @ Sebastian & Anr. V. Circle Inspector Of Police, Adimaly 2016(6) Supreme 86 (Criminal Appeal No. 952 Of 2010)**

Sec. 3 - PARTISAN WITNESS Relatives of the deceased - this factor cannot discredit them - consideration of the evidence as a whole

Though an attempt has been made to contend that the witnesses are all relatives of the deceased and, therefore, partisan having regard to the substance and the coherence of their testimony, we are of the

view that this factor perse cannot discredit them or adversely affect the probative worth of their statements on oath. The recovery of the personal belongings of Gurdip from the place as shown by Dharminder and that of the blood stained shirt of Suraj worn by him at the time of commission of the offence, at their instance, also in our opinion furnishes a fool proof evidence of nexus between the accused persons and the crime. There is no dispute with regard to the identity of the dead body as well. Not only the post mortem indicates that the body was identifiable as the face was not burnt which is also a fact supported by the findings recorded in the Inquest Report, the witnesses as referred to hereinabove on being shown the photographs of the dead body have identified the same to be that of Gurdip. There is no plea on behalf of the defence and rightly so, that accused No. 1 Dharminder is not alive. In that view of the matter on a consideration of the evidence as a whole, we are of the opinion that there is no room for any reasonable doubt about the culpability of the accused persons in a body to have conspired to murder Gurdip by first assaulting him with an iron rod in the leg and then set him ablaze alive by over powering him in the temple in the dead of light. The suits of the occurrence, being a temple of which accused No. 4 Rani was the Priestess, in our opinion, overwhelmingly prove her knowledge, collaboration and participation in the same. **State Of Punjab V. Suraj Prakash & Anr. 2016(4) Supreme 491 ; (Criminal Appeal No. 2056/2009)**

Sec. 8 - MOTIVE

If the prosecution has failed to prove the precise motive - corollary is not that no criminal offence would have been committed

No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no

criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.

Although prosecution is not very certain about the motive, upon taking into consideration the evidence of witness, a faint probability is created, regarding intentions of the accused to lay hands on the cash which could have been in possession of the victim, as against the initial story that the accused was enraged against the victim, because the victim used to tease him on the point of his marriage with a bar girl. Motive is a mental state, which is always locked in the inner compartment of the brain of the accused and inability of the prosecution to establish the motive need not necessarily cause entire failure of prosecution. **Praful Sudhakar Parab V. State Of Maharashtra AIR 2016 SC 3107 (Criminal Appeal No.261 Of 2008**)

Sec. 9 -Test Identification Parade - after a long period from incident – incident in broad daylight - but the time to see the accused was not sufficient – not reliable.

It is very clear that in the present case the incident of firing occurred in the circumstances wherein much time was not available for the eye-witnesses to clearly see the accused. In such a situation, it was of much more importance that the Test Identification Parades were to be conducted without any delay. The first Test Identification Parade

was held after about 1½ months of the incident. The second Test Identification Parade was conducted by after more than a year of the incident. Even if it is taken into account that Accused was arrested after a year and within one month thereafter the test Identification Parade was conducted, still it is highly doubtful whether the eye-witnesses could have remembered the faces of the accused after such a long period. Though the incident took place in broad daylight, the time for which the eye-witnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing. **State Of Maharashtra V. Syed Umar Sayed Abbas & Ors (2016) 2 SCC (Cri) 457 ; (2016) 4 SCC 735 (Criminal Appeal Nos. 345-346 Of 2012)**

Sec. 32 A - dying declaration is entitled to great weight - the statement must not be a result of tutoring, prompting or a product of imagination - recorded by the police officer as well as the Executive Magistrate are fully corroborated - oral dying declaration to the father of the deceased - not reliable

On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone

inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in-laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

State of Gujarat V. Jayrajbhai Punjabhai Varu AIR 2016 SC 3218 (Criminal Appeal No. 1236 Of 2010)

Sec. 32 - Discrepancy With Eye Witness - once the dying declaration is found reliable, trustworthy and consistent with circumstantial evidence - is adequate to bring home the guilt

It is true that in the dying declaration, the deceased had stated that he did not know the person who extinguished the fire by pouring water. It could be that while he was in flames, the deceased could not identify the person who tried to save him. The prompt lodging of the FIR and the fact that one of the eyewitnesses was having burn injuries establishes the presence of the eyewitnesses. In any case, even if the eyewitness account is taken to be inconsistent with this part of the

dying declaration, once the dying declaration is found reliable, trustworthy and consistent with circumstantial evidence on record, such dying declaration by itself is adequate to bring home the case against the accused.

Mumtaz@ Muntyaz; Dilshad @ Pappu V. State Of U P (NOW Uttarakhand) : 2016(4) Supreme 711 ; 2016 LawSuit(SC) 635 ; 2016 (6) JT 232, 2016 AIR(SC) 3151, 2016 (2) AllCriR 2221

Sec. 32 - SEVERAL DYING DECLARATION

Each dying declaration - on its own merit

Each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs.

Raju Devade V. State Of Maharashtra : 2016(5) Supreme 201 ; 2016 LawSuit(SC) 617 ; 2016 (6) JT 430, 2016 AIR(SC) 3209, 2016 CrLJ 3568

Sec. 106-Offence like murder committed inside a house - initial burden be upon the prosecution - but a corresponding burden on the inmates of the house - to give cogent explanation - When the accused not offer any explanation - strong circumstance against him.

When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the

house to give 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 its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of occurrence, when accused and his father were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

Gajanan Dashrath Kharate V. State Of Maharashtra (2016) 2 SCC (Cri) 436 ; (2016) 4 SCC 604 (Criminal Appeal No. 2057 Of 2010)

Offence committed in secrecy inside a house - the initial burden upon the prosecution - but the nature and amount of evidence - to be led by it - cannot be of the same degree as is required in other cases of circumstantial evidence - burden would be of a comparatively lighter character.

Where it is established that the deceased was murdered in the house of the appellants where blood stains were found ; The appellants have failed to disclose as to how deceased has died which was especially within their knowledge ; It is nobody's case that any outsider came in the house ; There is no report lodged to police by the appellants regarding homicidal death of the deceased who was wife of appellant Manoj and daughter-in-law of appellant Jamnadas as discussed above AND False explanation has been given by the appellants in their statements under Section 313 Cr.P.C. that the deceased had gone to her relative's place and that she was missing which is an additional link on the record against them, in the chain of

circumstances. Relying on Trimukh Maroti Kirkan v. State of Maharashtra, 2006 10 SCC 681 held that 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 of a comparatively lighter character. In view of Section 106 of the 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 its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."**Jamnadas; Manoj V. State Of M P : 2016 Law Suit(SC) 612 ; 2016(5) Supreme 164 ; 2016 (6) JT 189, 2016 AIR(SC) 3270, 2016 CrLJ 3668**

Guardian & Wards Act

Section 9 & 25— Custody of minor child—Jurisdiction of the court in the matter of custody of a minor child

The short question involved in this appeal is of jurisdiction of the court in the matter of custody of a minor child. This question is now pending before the District Judge, Alipore, South 24 Parganas, Kolkata.

Since Court propose to direct the District Judge to first go into the question of jurisdiction, Court refrain from referring to the factual or legal aspects of the matter. Therefore, this appeal is disposed of with a direction to the District Judge, Alipore, Kolkata to first decide

the question of jurisdiction of the Court in dealing with the matter under Section 25 of the Guardians and Wards Act, 1890.

It is made clear that while taking decision, as above, the contention raised by the appellant herein that the jurisdiction will have to be considered in terms of Section 9, will also be gone into. **Suzanne Farisha Syiem Dutt vs. Sabyasachi Dutt, 2016 (8) SCALE 115**

Hindu Marriage Act

Section 13—CPC—Section 25—Transfer petition

This is a transfer petition filed under section 25 of CPC for transfer of HMA NO. 268/2015 titled Sanjeev Kumar Juneja Vs. Akta Juneja from the Court of DJFC, Gurgaon, Haryana to the Family Court, Saket, Delhi.

The respondent-husband fairly submits that he is not actually against the transfer but he is aggrieved by the allegations leveled against him in the petition which are wholly baseless. He also submits that the petitioner is not cooperating with the visitation rights given to the respondent for the child 'Shubhan'.

The respondent-father assures that he will take proper care of the child. Therefore, while allowing this transfer petition, it is made clear that petitioner shall cooperate with the order for taking the minor child every Sunday for three hours. The respondent, in turn, shall ensure that he would take the child from the residence of the petitioner and after three hours he will drop back the child at the residence of the petitioner. He also assures that he will always be in the company of the child. **Akta Juneja V. Sanjeev Kumar Juneja, 2016 (8) SCALE 44**

Section 13-B—Constitution—Article 142—Divorce petition—Parties have arrived at an amicable settlement of the entire disputes—Monetary part of the settlement has been complied with—Pending criminal cases held, liable to be quashed—Marriage between the parties stands dissolved by decree of mutual consent in exercise of jurisdiction under Article 142.

In this matter, Aditi Vivek Kumar Wadhera, wife and Vivek Kumar Varinder Wadhera-husband are present before the Court. It is submitted that they have lived as husband and wife only for a few days in the year 2010. Both parties have exercised their free will and have taken a conscious decision to part and put an end to all other litigation as well. They have also filed a joint petition for dissolution of marriage by mutual consent under Section 13B of the Hindu Marriage Act before the District Court.

Having regard to the background of the several litigations between the parties over a period of five years, background of the parties living separately for more than five years, submission of Mr. Vivek Kumar Varinder Wadhera that he has to go back to his work place in U.S.A and also having regard to the submission of Aditi Vivek Kumar Wadhera that she has now to think of her future, Court is of the view that it is a fit case to invoke our jurisdiction under Article 142 of the Constitution of India and grant a decree of divorce by mutual consent by waiving the statutory period of waiting.

Therefore, the marriage between Aditi Vivek Kumar Wadhera and Vivek Kumar Wadhera stands dissolved by decree of mutual consent. **Aditi Wadhera V. Vivek Kumar Wadhera, 2016 (8) SCALE 145**

Section 13(1) & 24—Dissolution of marriage by compromise between the parties—It is agreed that by way of full and final settlement of all the claims due to the appellant, except the dispute with regard to Stridhan which is pending before the High Court, all other claims can be settled.

The appellant is before this Court, aggrieved by the order passed by the High Court of judicature at Jaipur dated 25.02.2011, whereby the appeal filed by the appellant herein, against the order dated 11.05.2007 passed by the District Judge, Dholpur, was dismissed, thereby confirming the dissolution of the marriage between the appellant and the respondent.

Today, both the parties are personally present in Court, assisted by their respective counsel. It is agreed before us by the parties and their respective counsel that by way of full and final settlement of all the claims due to the appellant, except the dispute with regard to Stridhan, which is the subject matter of Civil First Appeal No. 221 of 2014 pending before the High Court of judicature of Rajasthan at Jaipur, all other claims can be settled.

Therefore, this appeal is disposed of as compromised between the parties. **Mamta Goyal V. Ramgopal, 2016(6) SCALE 727**

<u>Indian Penal Code</u>

Sec. 197 - Offence committed in the course of official duty or not - color of office cannot be answered - would depend on relation to the duty - reasonable but not a pretended or fanciful claim - in the course of the performance of his duty - not the official duty - to fabricate the false records

The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If the said words are construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". The Court proceeded to observe that in the wider sense, the said words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed and the right approach to the import of these words lies between these two extremes.

While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. It is the quality of the act that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. The sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him. Whether an offence had been committed in the course of official duty or not, color of office cannot be answered hypothetically and would depend on the facts of each case. The act must bear such relation to the duty that the accused could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. **Punjab State Warehousing Corp V. Bhushan Chander & Anr : 2016(4) Supreme 680 ; 2016 Law Suit (SC) 605 ; 2016 (6) JT 149, 2016 AIR(SC) 3014, 2016 CrLJ 3579 (Criminal Appeal No: 159 of 2016)**

Sec. 420 - Where no ingredient of Section 420 IPC - is remotely attracted - the complainant has to take recourse to civil action.

As the facts would unveil, the informant, had sent an email to the company for purchase of machine Aura Cam, 6000, which is an Aura Imaging Equipment, in India and the concerned company sent an email to the informant making a reference to the accused. Thereafter, the said informant sent an email asking her to send the address where he could meet her and have details for making payment. He also expressed his interest to become a distributor.

The informant visited the accused at Pune and received a demo of Aura Cam 6000 and being satisfied decided to purchase a lesser price machine i.e. "Twinaura Pro" for a total sum of Rs.2,54,800/-. He paid a sum of Rs.2,50,000/- for which a hand written receipt was given as the proof of payment. During the course of the said meeting, the the informant expressed his desire to purchase a laptop of M/s. Progen of which the accused was the representative. In pursuance of the discussion, the laptop was given to him who acknowledged it by stating that he owed a sum of

Rs.4,800/- as balance consideration towards the Aura Cam and an amount of USD 350 towards the laptop. An assurance was given for remitting the money within a short time. As averred, the the informant had never raised any grievance relating either to the machine or the laptop. Certain transactions between the informant and the US company have been mentioned and the allegations have been made against the informant that he represented himself as the sole distributor in India which was brought to the notice of the concerned police in the State of M.P. by the competent authority of the company.

When the matter stood thus, the informant filed a complaint before the Inspector General of Police, Cyber Cell, Bhopal alleging that the accused and Mr. Guy Coggin had committed fraud of US 10,500. On the basis of the complaint made, FIR no. 24/2012 under Section 420 and 34 of the Indian Penal Code (IPC) and Section 66-D of the Information Technology Act, 2000 (for brevity, 'the Act') was registered against the accused by Cyber Police Headquarters.

In the present case, it can be stated with certitude that no ingredient of Section 420 IPC is remotely attracted. Even if it is a wrong, the complainant has to take recourse to civil action. The case in hand does not fall in the categories where cognizance of the offence can be taken by the court and the accused can be asked to face trial. In our considered opinion, the entire case projects a civil dispute and nothing else. **Dr. Rini Johar & Anr. V. State of M.P. & Ors. 2016(4) Supreme 397 ; AIR 2016 SC 2679 (Writ Petition (CRIMINAL) No. 30 Of 2015)**

Section 498-A - cruelty - explained

On a plain reading of Section 498-A it transpires that if a married woman is subjected to cruelty by the husband or his relative, the offender is liable to be punished with the sentence indicated in the Section. But cruelty can be of different types and therefore what kind of cruelty would constitute offence has been defined under the explanation. As per first definition contained in clause (a) it means a willful conduct of such a nature which is likely to drive the victim woman to commit suicide or to cause grave injuries to health and life, limb or health (mental or physical). The other definition of cruelty is in clause (b) and is attracted when a woman is harassed with a view to coercing her or any of her relation to meet any unlawful demand for any property or valuable security or is on account of failure to meet such demand. **Satish Shetty V. State Of Karnataka 2016(4) Supreme 412 ; 2016 (6) JT 10, 2016 AIR(SC) 2689, 2016 CrLJ 3147, 2016 (2) AllCriR 1840, (Criminal Appeal 1358 of 2008)**

Land Acquisition Act

Land Acquisition (Amendment) Act, 1984 under Land Acquisition Act, 1894

A two-Judge Bench of Supreme Court in Lilawati Agarwal, (2008) 15 SCC 464, after referring to Paras 31 to 34 of the pronouncement in Raghubir Singh, (1989) 2 SCC 754, expressed a doubt with regard to the correctness of the decision in K.S. Paripoornan (2) v. State of Kerala, (1995) 1 SCC 367 of the amending Act will be available to an award by the Collector or by the court made between 30-4-1982 and 24-9-1984 or to an appellate order of the High Court or the Supreme Court which arise out of an award of Collector or court made between the said two dates. K.S. Paripoornan

(2) case only clarifies the law in respect of awards that have been passed by the court after the amending Act has come into force which is in consonance with the ratio laid down in Raghubir Singh case. The three-Judge Bench has only observed that the restricted interpretation placed by the Constitution Bench in Raghubir Singh case on the pending appeals to which Section 30(2) of the 1984 Act applies, should not convey that Section 23(2) of the 1894 Act (as amended) would not apply to the awards of the civil court pending at the time when the 1984 Act came into force or thereafter. Thus, the controversy whith which the three-Judge Bench was dealing with the absolutely different and the view expressed by it is absolutely in accord with the principles laid down in in Raghubir Singh case. Additional it is also in consonance with the provisions contained in Section 23(2) of the 1894 Act. Therefore, threr is no reason to disagree with the view expressed in Paripoornan as it has appositely understood the rule exposited in Raghubir Singh case. **Lilawati Agarwal V. State of Jharkhand, (2016) 6 SCC 566.**

Section 4, 6 & 23—Compensation claims – Facts of this case are covered by the judgment delivered by this Court in the case of Impulse India P. Ltd. vs. Union of India.

It is submitted that the facts of the case on hand are covered by the judgment delivered by this Court in the case of Impulse India P. Ltd. vs. Union of India & Anr. in Civil Appeal No. 2091 of 2014 dated 13th February, 2014.

The land which has been referred to as Block ‘A’ in the afore-stated judgment is the land which is the subject matter of these appeals.

In the circumstances it is directed that compensation shall be paid to the appellants in terms of the judgment referred to above and respondents-authorities shall quantify the amount payable to the appellants and deposit the same with the Reference Court/Executing Court within four months from the date of receipt of the copy of this Court's order. **Ram Chander V. Union of India, 2016 (7) SCALE 574**

Section 23—Compensation claim—Amount paid under the Special Rehabilitation Grant (SRG) is over and above the compensation paid/payable under the Land Acquition Act—High Court had directed that the amount of Rs. 6,42,979/- under the SRG sanctioned in favour of the appellants-landowners should be deducted from the amount of compensation awarded under the Land Acquisition Act—Validity of

The SRG is payable to persons affected by acquisition of land in connection with the Indira Sagar Project. It is so payable under a Government Policy in force. It will not be necessary for Court to traverse the details of said policy, inasmuch as the nature and effect of the grant has received consideration of this Court in State of Madhya Pradesh versus Narmada Bachao Andolan and another, reported in (2011) 7 SCC 639. Though Narmada Bachao Andolan pertained to Omkareshwar Dam Project, paragraphs 54, 55 and 56 of the aforesaid judgment extracted below, highlights the cardinal issues dealt with by this Court.

The highlighted portion of paragraph 56 of the report in Narmada Bachao Andolan adequately explains the position that SRG is over and above the compensation paid/payable under the Land Acquisition Act, 1894.

In view of the aforesaid clear enunciation of the nature of the grant, Court cannot sustain the order of the High Court directing deduction of the SRG from the compensation paid/payable under the Act. **Lakhan Lal V. G.M. (R&R) Narmada Hydroelectric, 2016 (8) SCALE 60**

Limitation Act

Section 4 & 5—CPC—Order VII Rule 11—Limitation period for filing a suit—Expiry of prescribed period when court is closed—In case the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court reopens.

There is no case for anybody that even for part of the day, the Registry was closed. But Section 5 of the Act which deals with "Extension of prescribed period in certain cases", applies only to appeals or applications and not to suits. Therefore, no court or tribunal can extend the period of limitation for filing a suit. Even if any cause, beyond the control of the plaintiff is shown also, the only extension is what is permitted under Section 4 of the Act, the period coming under court holiday.

Thus, both the trial court and the High Court have gravely gone wrong on the first principles on the law of Limitation. Therefore, the impugned order is set aside. The application filed by the appellant under Order VII Rule 11 of The Code of Civil Procedure, 1908 is allowed. Recovery Suit No. 1/2011 on the file of the ADJ, Gwalior, Madhya Pradesh is dismissed. **Ajay Gupta V. Raju @ Rajendra Singh Yadav, 2016 (6) SCALE 72**

Sec. 60, and Hindu Minority and Guardianship Act, 1957, Sec. 8

Application of Article 60 indicate that it applies to Suits by a minor who has attained majority and further by his legal representatives when he dies after attaining majority or from the death of the minor. The broad spectrum of the nature of the Suit is for setting aside the transfer of immovable property made by the guardian and consequently, a Suit for possession by avoiding the transfer by the guardian in violation of Section 8(2) of the 1956 Act. In essence, it is nothing more than seeking to set aside the transfer and grant consequential relief of possession.

A Suit by quondam minor to set aside the alienation of his property by his guardian is governed by Article 60. To impeach the transfer of immovable property by the Guardian, the minor must file the Suit within the prescribed period of three years after attaining majority.

Limitation Act- Nature of the Limitation Act neither confers a right nor an obligation to file a Suit, if no such right exists under the substantive law. It only provides a period of limitation for filing the Suit. **Narayan V. Babasaheb, (2016) 6 SCC 725**

Article 54, Schedule 1—CPC—Section 96—Suit for specific performance—Period of limitation for filing the suit when no date fixed for performance of the agreement—Words 'date' and 'fixed' appearing in Article 54 of Schedule 1 to the Act—Meaning of

As far as the present appeal is concerned, the agreement between Gulab Bai and Madina Begum did not specify a calendar date as the date fixed for the performance of the agreement. Consequently, the view expressed in Ahmadsahab Abdul Mulla and Rathnavathi on the first part of Article 54 clearly applies to the facts of the case. In

taking and reversing the Trial Court, the High Court has fallen in error. **Madina Begum V. Shiv Murti Prasad Pandey, 2016 (7) SCALE 478**

Arts. 60, 109-For the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance.

The date of limitation had to be determined with reference to the date of incident and the date when the complaint was filed by the respondent. Since the complaint was filed by the respondent on 24-01-2008, with reference to an incident of 15.01.2008, we are of the view, that Section 468 of the Criminal Procedure Code would not stand in the way of the respondent, in prosecuting the complaint filed by him.**Darshan Singh Saini V. Sohan Singh and another (2016) 2 SCC (Cri) 418 ; (2015) 14 SCC 570 (Criminal Appeal No.1833 Of 2011)**

Section 468 of the Code of Criminal Procedure provides that for an offence which is punishable with imprisonment exceeding one year but not exceeding three years the period of limitation for taking cognizance of an offence is three years. In the present case, cognizance was taken by the Magistrate after more than 12 years. Which is beyond limitation. **Prem Lata & Anr. V. State Of Rajasthan & Anr (2016) 2 SCC (Cri) 430; (2015) 14 SCC 677 (Criminal Appeal No. 2033 Of 2010)**

N.D.P.S. Act

Sec. 42 - Gazetted officer himself acting - under Section 41 of the NDPS Act - not necessary to comply with the Section 42

Following the views endorsed in State of Haryana Vs. Jarnail Singh and Ors. [2004 SAR (Criminal) 535] and M. Prabbulal vs. Assistant Director, Directorate of Revenue Intelligence: (2003) 8 SCC 449, held that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. **Sekhar Suman Verma V. The Superintendent of N.C.B. & Anr. AIR 2016 SC 3193 ; 2016(6) Supreme 107 (Criminal Appeal No. 317 Of 2006)**

Sec. 42(1) proviso - search between sun set and sun rise - the warrant necessary - unless reasons to believe - that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender - which grounds be recorded.

Section 42 (1) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorization cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. **State Of Rajasthan V. Jag**

Raj Singh @ Hansa AIR 2016 SC 3041 ; 2016(6) Supreme 54 (Criminal Appeal No.1233 Of 2006)

Sec. 42(2) – for compliance there of - Information received from the informer - or recorded in the Rozanamacha – Infirmation sent to the Senior Officer – must be same.

From the above examination, it is not found that the information which is stated to be received from the informer under Section 42(2) of Act (Exh. P-14)or the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer (Exh. P-21), Rather, the letter which was sent (Exh. P-15), it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found that section 42 (2) of Act, 1985 is complied with." What Section 42(2) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The information sent to Circle Officer, Nohar (Exh. P-15) was not as per the secret information (recorded in Exh. P 14) and in Roznamacha (Exh. P-21). Thus, no error in coming to the conclusion that there was breach of Section 42(2). **State Of Rajasthan V. Jag Raj Singh @ Hansa AIR 2016 SC 3041 ; 2016(6) Supreme 54 (Criminal Appeal No.1233 Of 2006)**

Sec 43- Section 43 - public conveyance - Without obtaining a permit - under the Motor Vehicles Act, 1988, - no vehicle be used for transporting passengers – if no – Section not attracted

Explanation to Section 43 defines expression "public place" whichz includes any public conveyance. The word "public

conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers.

In the statement of Vira Ram, it was no where stated that he has any permit for running the vehicle as transport vehicle. He has stated that "..... I had given this jeep to Kartara Ram resident of ….. who is my relative to run it for transporting passengers" Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

State Of Rajasthan V. Jag Raj Singh @ Hansa AIR 2016 SC 3041 ; 2016(6) Supreme 54 (Criminal Appeal No.1233 Of 2006)

Sec. 50 - Offered in writing - to be searched - in presence of a Magistrate or a Gazetted Officer or a Gazetted Officer accompanying the raiding party - agreed to be searched before the accompanying Gazetted Officer - Prior to search - the offer given to him if he likes he can search the Gazetted Officer - But accused declined – Section complied with.

The accused was offered in writing whether he likely to be searched in presence of a Magistrate or a Gazetted Officer or a Gazetted Officer accompanying the raiding party. He agreed to be searched before the accompanying Gazetted Officer. Prior to search, The offer was also given to him if he likes he can search the Gazetted Officer, N.C.B. Officers etc. But he declined.

Findimng full application of the decision of Krishna Kanwar (SMT) Alias Thakuraeen AIR 2004 SC 2735, and considering Prabha Shankar Dubey Vs. State of M.P. [(2003) 8 Supreme 565 ; AIR 2004 SC 486, held that the Seizure List which discloses seizure of contraband articles from the place of occurrence on 21.5.98 at about 16-00 hours in presence of th witnesses and being signed by the Appellant himself. The said contraband articles in question, which was seized from the possession of the Appellant were found to be HEROIN on the basis of the Report submitted by Chemical Analyst and the other evidence on record is quite sufficient to prove the Charge against the Appellant. **Sekhar Suman Verma V. The Superintendent of N.C.B. & Anr. AIR 2016 SC 3193 ; 2016(6) Supreme 107 (Criminal Appeal No. 317 Of 2006)**

INVESTIGATION BY THE SUB-INSPECTOR WHO WAS PART OF RAIDING PARTY

Investigation By The Sub-Inspector - Who Was Part Of Raiding Party – not always vitiate trial

In **Megha Singh v. State of Haryana 1996(11) SCC 709**, the search was not conducted in the presence of a Gazetted Officer, as is required in a case under the Act. In the instant case the search of the appellant was conducted in the presence of and under the instructions of Gazetted Officer. The extracts of depositions of other prosecution

witnesses show that it was not S.I. Satbir Singh alone who was involved in the investigation. In our view the principle laid down in **Megha Singh v. State of Haryana[1996(11) SCC 709]** and followed in **State by Inspector of Police, Narcotic Intelligence Bureau, Madhurai, Tamil Nadu v. Rajangam[2010(15) SCC 369]** does not get attracted in the present matter. Relevant to note that this was not even a ground projected in support of the case of the appellant and does not find any reference in the judgment under appeal. We therefore reject the submission. **Surender @ Kala V. State of Haryana (2016) 2 SCC (Cri) 448 ; (2016) 4 SCC 617 (Criminal Appeal No. 50 Of 2016)**

SEARCH IN PRESENCE OF GAZETTED OFFICER

Appreciation of evidence in the matter of NDPD

The search was made in public place. It was carried out in the presence of gazetted officer and was done after giving an offer to the appellant as required under the NDPS Act. The quantity of the contraband recovered from the appellant was commercial in nature as prescribed in the Schedule to the NDPS Act. It is also not in dispute that the appellant failed to adduce any evidence in defence except to record his statement in Section 313 proceedings taking therein a plea of denial. It is also not in dispute that the affidavit relied upon by the appellant of one Maan Singh was not proved in evidence in as much as Maan Singh was neither examined nor cross-examined. **Mahiman Singh V. State Of Uttrakhand 2016(6) Supreme 152 (Criminal Appeal No. 957 Of 2015)**

<u>Partition Act</u>

Section 2—Family property—Dispute pertaining to the partition of residential property—Civil Court ordered the said

property to be sold in public auction—High Court gave one opportunity to have property to be sold in auction among the parties to the suit but it failed—Civil Revision Petition was dismissed as withdrawn with a further direction to conduct public auction as directed in the order passed by the trial court—Whether in the interest of justice, the trial Court is to be directed to make a further attempt to have the property auctioned among the members of the family—Held, Yes.

Having regard to the facts and circumstances of the case, Court is of the view that the interest of justice would be met in case the parties are directed to approach the Trial Court. The Trial Court is directed to make a further attempt in the true spirit of the Partition Act.

Court makes it clear that if once such an attempt to have the property auctioned among the members of the family fails, the Court shall take steps for a public auction. However, before such steps are taken, the property would be got valued by an independent valuer. In any case, the proceedings shall be completed by the Trial Court within six months. **Shivraj Reddy Died Through His LRs. V. S. Raghuraj Reddy, 2016 (7) SCALE 436**

<u>Prevention of Corruption Act</u>

PUBLIC SERVANT:

Sec. 2(c)(ix) - Registered cooperative society - received financial aid from the Central Government or the State Government or any other institution mentioned in Section 2(c)(ix) – is public servant

Section 2(c)(ix) on which immense thrust has been given by the learned counsel for the State on the basis of certain authorities of this Court, reads as follows :-

"(ix) any person who is the president, secretary or other office-bearer of a registered cooperative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);"

On a perusal of the decisions of this Court, it is manifest that stress has always been laid on Section 2(c)(ix) of the 1988 Act as a consequence of which the fall out is that the registered cooperative society must have received financial aid from the Central Government or the State Government or any other institution mentioned therein. **State Of Maharashtra And Ors V. Brijlal Sadasukh Modani 2016(4) Supreme 563 ; 2015 Law Suit (SC) 1288 ; 2015 (13) Scale 839, 2016 (92) AllCriC 1003, 2016 (4) SCC 417, 2016 AIR(SC) 1377, 2016 AIR(SCW) 1377, 2016 (2) SCC(Cri) 296, 2016 CrLJ 2031, (Criminal Appeal No: 1329 of 2009)**

Sec. 13(1) (e) - Known sources of income – includes – return of his service - share in ancestral property - bequest under a will - advances from close relations – provided such receipts were duly intimated to the authorities as prescribed.

The expression "known sources of income" in Section 13(1) (e) of the Act has two elements, first the income must be received from a lawful source and secondly the receipt of such income must

have been intimated in accordance with the provisions of law, rules or orders for the time being applicable to the public servant. For the public servant, whatever return he gets of his service, will be the primary item of his income. Other income which can conceivably be income qua the public servant will be in the regular receipt from (1) his property, or (b) his investment. The categories so enumerated are illustrative. Receipt by way of share in the partition of ancestral property or bequest under a will or advances from close relations would come within the expression "known sources of income" provided the second condition stands fulfilled that is to say, such receipts were duly intimated to the authorities as prescribed.

In the instant case, every single amount received by the appellant has been proved on record through the testimony of the witnesses and is also supported by contemporaneous documents and intimations to the Government. It is not the case that the receipts so projected were bogus or was part of a calculated device. The fact that these amounts were actually received from the sources so named is not in dispute. Furthermore, these amounts are well reflected in the Income Tax Returns filed by the appellant.

In our view there is no violation of Section 13(1)(e) read with Section 13(2) of the Act. We, therefore, set aside the judgment and order in appeal and acquit the appellant of the charges leveled against him. The appeal thus succeeds and is allowed. The appellant is already on bail. **Kedari Lal V. State Of M.P. And Ors. (2016) 2 SCC (Cri) 399 ; (2015) 14 SCC 505 (Criminal Appeal No.782 Of 2011)**

Sec. 19 -Once cognizance deferred for want of sanction under Section 19 of the PC Act – it was not final order – brought to notice - on the subsequent date - no such sanction was required

- finding it to be correct - the Trial Court took cognizance - it was not reviewing order

The Section 362 Cr. P.C. debars the Court from altering or reviewing the judgment only in those cases when it has signed its judgment or when it has passed final order disposing of a case. In the instant case, as mentioned above, the Trial Court on the earlier occasion had simply deferred taking cognizance under the impression that the sanction under Section 19 of the PC Act is required. There was no final order passed disposing of the case inasmuch as had the sanction been brought, (cognizance would have been taken in any case), the Trial Court is authorized to take cognizance which is not disputed by the learned counsel for the respondent as well. The question whether a sanction is required or not would be a different matter. We may point out here that the Trial Court was not oblivious of the aforesaid aspect while taking cognizance of offences under the PC Act against the respondent and others. It specifically recorded that it does not amount to reviewing its own decision. Vide order dated 13.09.2012 passed by the Trial Court earlier, it had merely asked the Investigation Officer to file sanction orders against A4 to A8 and deferred the order of cognizance against them. There was no decision much less conclusive decision taken by the Court. The Trial Court rightly pointed out that it was only in the nature of reminding the duty of the Investigation Officer to meet certain requirements for taking cognizance of offence under the PC Act. However, when the Investigation Officer brought to its notice, on the subsequent date, that no such sanction was required, the Trial Court finding it to be correct position in law took cognizance. By this, the Trial Court was not reviewing any order. According to us order dated 13.09.2012 could not be construed as final order, more so, when there was no final determination of the issue regarding requirement of

sanction for prosecution against the respondent herein. **State Through CBI/ACB, Hyderabad A.P V. Dharmana Prased Rao AIR 2016 SC 2582 ; 2016 (4) Supreme 479 (Criminal Appeal No(S).398/2016)**

SANCTION

Sec. 19 - Grant of sanction - detailed reasoned judgment - not required

While granting sanction a detailed reasoned judgment is not required to be passed. The authority had applied its mind. Nothing has been brought on record to substantiate that the sanction was granted in an absolutely mechanical manner. In view of the aforesaid premised reasons, we are of the considered view that the sanction granted in this case does not suffer from any infirmity so as to declare it as illegal. **Balbhadra Parashar V. State Of Madhya Pradesh : 2016(4) Supreme 572; 2015 LawSuit(SC) 1322 2016 AIR(SC) 1554, 2016 AIR(SCW) 1554, 2016 (1) RCR(Cri) 850 (Criminal Appeal No: 2431 of 2014)**

CHEMICAL EXAMINATION OF PHENOLPHTHALEIN POWDER

Chemical examination of phenolphthalein powder – not necessary – if demand, payment and acceptance of gratification - established

Relying on State of U.P. vs. Zakaullah, 1998 1 SCC 557 held that the objection regarding reliability of the trap as the solution collected in the phial was not sent to the Chemical Examiner is too puerile for acceptance. The said solution is always used not because

there is any such direction by the statutory provision, but for the satisfaction of the officials that the suspected public servant would have really handled the bribe money. Even otherwise, the recovery of the tainted currency notes from the custody of the appellant-accused has been proved by direct evidence.

The premise to be established on the facts for drawing the presumption is that there was demand, payment and acceptance of gratification. Once the said premise is established, the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. **Mukhtiar Singh V. State Of Punjab : 2016(4) Supreme 719 ; 2016 LawSuit(SC) 650 ; 2016 (6) JT 290, 2016 AIR(SC) 3100, 2016 (3) AllCriR 2565 (Criminal Appeal No: 618 of 2012)**

<u>Protection of Women From Domestic Violence Act</u>

Under DV Act – The court has power and/or jurisdiction - to allow the amendment of the application.

It cannot be said that the Court dealing with the application under DV Act has no power and/or jurisdiction to allow the amendment of the said application. If the amendment becomes necessary in view of subsequent events [escalation of prices in the instant case] or to avoid multiplicity of litigation, Court will the have power to permit such an amendment. It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that respondent no. 1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment. If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate

application. It is not that there is a complete ban/bar of amendment in the complaints in criminal Courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances.

In the instant case, the amendment application was filed on 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly, the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application. Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India. **Kunapareddy @ Nookala Shanka Balaji V. Kunapareddy Swarna Kumari & Anr 2016(4) Supreme 481 ; 2016 LawSuit(SC) 579 ; 2016 AIR(SC) 2519, 2016 (5) JT 365, 2016 AIR(SCW) 2519, 2016 (2) Crimes(SC) 277, 2016 CrLR 600, 2016 (5) Scale 703**

Public Interest Litigation

Education—Constitution—Article 32 & 51A—Writ petition—Maintainability—Invoking jurisdiction of this Court seeking a mandamus for introduction of moral science as a separate subject in the school curriculum—A mandamus of this nature cannot be issued by the Court in exercise of its jurisdiction in the public interest—Whether mandamus of this nature can be issued by the Court in exercise of its jurisdiction in the public interest—Held, No.

This petition is illustrative of matters which lie beyond the province of judicial review. Whether children pursuing their education from classes I to XII should be saddled with a separate course of moral science is not for the court to decide. Whether a value based educational system would best be subserved by including a separate subject on moral science or whether value based teaching should traverse the entire gamut of a prescribed curriculum is a matter which cannot be resolved by applying Page 11 11 settled norms of judicial review. These are matters which cannot be determined in the exercise of the jurisdiction of the court under Article 32.

It is unrealistic for the court to assume that it can provide solutions to vexed issues which involve drawing balances between conflicting dimensions that travel beyond the legal plane. Courts are concerned with issues of constitutionality and legality. It is difficult to perceive how matters to which solutions may traverse the fields of ideology, social theory, policy making and experimentation can be regulated by this court such as by issuing a mandamus to enforce a scheme of instruction in a particular subject in school education. Should a subject be taught at all? Should a set of values or a line of enquiry and knowledge be incorporated as a separate subject of discourse in an

educational system? Would a horizontal integration of a given set of values across existing subjects better achieve a desirable result? Is it at all desirable to impose another subject of study upon the already burdened school curriculum? 23 These are vexed issues to which more than one solution may appear just. That is exactly the reason why a resolution of such matters must rest with those who have the responsibility to teach and govern over matters of Page 13 13 education. Every good that is perceived to be in the interest of society cannot be mandated by the court. Nor is the judicial process an answer to every social ill which a public interest petitioner perceives. A matter such as the present to which a solution does not rest in a legal or constitutional framework is incapable of being dealt with in terms of judicially manageable standards. 24 In any event, Court has adverted at some length to the response which has been filed by CBSE, which has also been adopted by the Union of India, as reflective of its position. The issue whether an alternative approach would better subserve the concern for providing value based education is not a matter for the court to evaluate. **Mrs. Santosh Singh V. Union of India, 2016 (7) SCALE 287**

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

Section 24(2)—Lapse of acquisitions—Validity of

It is not in dispute that in this appeal, the award is dated 07.01.1999 and that there was no stay operating and yet, possession has not been taken. Therefore, Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquition, Rehabilitation and Resettlement Act, 2013 has to apply and the acquition is to be declared as lapsed. **Delhi Development Authority V. Archana Khanna, 2016 (8) SCALE 148**

S.C. / S.T. ACT

Neither indicate incomplaint nor in the statement made, before the Judicial Magistrate – that the accused belongs to an upper caste - not framung charge Under SCST Act – Justified.

The High Court was fully justified in rejecting the prayer to frame charges against Darshan Singh Saini and his father Beli Ram, under the provisions of the Scheduled Castes and Scheduled Tribes (Atrocities and Prevention) Act,, on account of the fact that Sohan Singh did not indicate in his complaint dated 24-01-2008, and also in the statement made by him, before the Judicial Magistrate, First Class, Nalagarh, that the appellant Darshan Singh Saini belongs to an upper caste. **Darshan Singh Saini V. Sohan Singh and another (2016) 2 SCC (Cri) 418; (2015) 14 SCC 570 (Criminal Appeal No.1833 Of 2011)**

Service Law

Service Law: Right to appointment

It is fairly well-settled that merely because the name of a candidate finds place in the select list, it would not give him indefeasible right to get an appointment as well. The name of a candidate may appear in the merit list but he has no indefeasible right to an appointment (vide Food Corporation of India and Ors. v. Bhanu Lodh, All India SC & ST Employees Assn. v. A. Arthur Jeen and UPSC v. Gaurav Dwivedi.

This Court again in State of Orissa v.Rajkishore Nana, held as under (SCC p. 783, paras 14 & 17)

> "14. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.
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> * * * * *
>
> 16. A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required..."

In Manoj Manu and Anr. v. Union of India, it was held that (SCC p. 176, Para 10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the court would not issue any mandamus to government to fill up the vacancies. As noticed earlier, because twenty two other candidates were declared successful by the Supreme Court pertaining to the selection of the years 1998, 1999, 2000 and 2001 as Civil Judges (Junior Division), they were to be accommodated, as rightly resolved by the Administrative Committee in the meeting dated 06.07.2011. The three resultant vacancies of the year 2007-2008 stood consumed with the joining of the said seventeen candidates and the same could not be filled up from the select list of that year. The decision of the Administrative Committee observing that the three resultant vacancies stood consumed is based on factual situation arising there and cannot be said to be arbitrary. **Kulwinder Pal Singh v. State of Punjab, (2016) 6 SCC 532**

Judicial Services—Selections—Constitution—Article 233(2)—Post of District Judge—Mandate of Article 233(2)—Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person

Unfortunately, it was neither argued nor did the High Court examine the true meaning and purport of Article 233(2). The appellants' argument before the High Court appears to be that notwithstanding the fact that they are the members of the judicial service, the eligibility for competing for the post of District Judges should be considered on the basis of the facts as they existed on the "cut off date", and the subsequent events are not be taken into consideration for determining the 3 Page 4 question whether the appellants are barred from appearing in the interview.

Court is afraid that the entire enquiry before the High Court was misdirected. The real question which arises in the case on hand is whether the bar under Article 233(2) is only for the appointment or even for the participation in the selection process.

The High Court believed in its administrative facet that Article 233(2) would not permit the participation of the appellant in the selection process because of his existing employment. The High Court came out with a 'brilliant' solution to the problem of the appellant i.e., the appellant may resign his membership of the subordinate judicial service if he aspires to become a district judge. But the trouble is the tantalizing caveat. If the appellant tenders resignation, he would not be permitted to withdraw the same at a later stage.

It is well settled in service law that there is a distinction between selection and appointment.4 Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically.5 Textually, Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed under Art. 14 and 16 of the Constitution.

The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment. Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in Court's opinion, is not permitted either by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose. **Vijay Kumar Mishra V. High Court of Judicature at Patna, 2016 (7) SCALE 646**

Services—Voluntary retirement—Right to withdraw offer from the Scheme—Permissibility of

Where the Scheme is contractual in nature (and not statutory in character as was seen in State Bank of India's case), provisions of the

Indian Contract Act would apply. The VRS Scheme floated by the employer would be treated as invitation to offer and the application submitted by the employees pursuant thereto is an offer which does not amount to resignation in praesenti and the offer can be withdrawn during the validity period. This would be the position even when there is a clause in the Scheme that offer once given cannot be withdrawn at all. However, exception to this principle is that in such cases offer is to be withdrawn during the validity period of the Scheme and not thereafter even when if it is not accepted during the period of the Scheme.

Services—Reinstatement—Back wages—Reinstatement does not necessarily result in payment of back wages—Payment of back wages is a discretionary power which has to be exercised by a court considering the facts in their entirety and the principles of justice, equity and good conscience.

Court is fully satisfied that in the facts and circumstances of the case, back wages should not have been awarded to the appellant herein. In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised by a court keeping in view the facts in their entirety and neither straitjacket formula can be evolved nor a rule of universal application can be laid down in such cases. Thus, reinstatement does not necessarily result in payment of back wages which would be independent of reinstatement. While dealing with the prayer of back wages, factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate court.

In view of the foregoing discussion, Court is of the considered opinion that the concurrent finding of the courts below that the appellant herein is not entitled to back wages in the absence of any

material on record that he remained unemployed during the entire period from 23.05.1998 to 16.08.1999 is correct. Even learned counsel for the appellant herein has admitted before this Court that he was not allowed to perform his duties after obtaining his signature on 22.05.1998.

In the present facts and circumstances of the case, the appellant has not produced any material on record to prove that he being unemployed during that period and has not made out a case for grant of back wages for the aforesaid period. The appellant herein did not attend the school during that period and back wages cannot be granted to him for that period. **Mulin Sharma V. State of Assam, 2016 (6) SCALE 732**

Taxation

Sales Tax and Vat-
Section 7(a) and (c)

Point for consideration- which is the movement of goods by way of imparts or by way of inter- State trade, was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC and whether transaction was covered by S.3(a) and 5(2) respectively of the CST 1956.

Held-

The salient features flowing out 05 conditions is the contract and the entire conspectus of law on the issues as noticed earlier leave no option Section 5(2) of the CST Act does not prescribe any condition that before the sale could be said to have occasioned import, it is necessary that the sale should precede the import. The sale is only required to be incidental to the contract.

The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as notice earlier, leave no option but to hold that the movement of goods by way of imports or by way of inter-state trade in this case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC.The goods were of specific quality and description for being used in the works contract awarded on turnkey basis to the assessee and there was no possibility of such goods being diverted by the assessee for any other purpose any other purpose. **Commissioner, Delhi Value Added Tax V. ABB Limited, (2016) 6 SCC 791.**

Trust Act

Public Trust and suit under Section 92 Civil Procedure Code-Ambit and Scope. The purpose for which the suit is filed is decisive factor.

Charitable and religious Trust in question (i.e. Appellant 1) - Created in name of Sri Aurobindo, a famous Indian philosopher, yogi and spiritual guru, for promotion of tenets and philosophy of Sri Aurobindo and benefit of followers of said guru - One PH, an inmate of Sri Aurobindo Ashram, allegedly wrote a book containing deliberate and baseless distortions relating to life and character of Sri Aurobindo which hurt the religious beliefs of followers and devotees of Sri Aurobindo - Suit under S. 92 CPC for removal of existing trustees of Appellant 1 trust and appointment of new ones, with a prayer for settling a scheme for administration of that trust - Filed (by certain residents of Aurobindo Ashram) primarily on grounds that: (i) firstly, trustees failed to take any positive action to prohibit availability of said objectionable book or dissociate themselves from that book; (ii) secondly, instead of taking some coercive action against PH (such as removing him from Ashram) the

trustees assisted him in getting a visa for his continued stay in India by standing as guarantors for him, and thus (iii) the trustees disobeyed and declined to carry out directions of settler of trust, failed to execute the Trust in accordance with its object and, consequently, acted in gross dereliction of their duty as trustees. Considering that appellant trustees of Ashram had nothing to do with publication of objectionable book, held, failure of trustees to take steps to ban the book which was critical of philosophical and spiritual guru of Trust might be an omission of exercise of proper discretion by trustees, but certainly not an omission touching upon administration of Trust - Hence, view taken by High Court that failure of appellant trustees to take initiative in banning the objectionable book gave rise to a cause of action for removal of appellant trustees and settling a scheme for administration of Trust, held, was not justified. More so when the appellant trustees had already expressed their mild reaction to contents of objectionable book by expressing their displeasure to it, which was the only act reasonably expected of them in relation to that book where the issue as to whether the said book was objectionable enough as not to be made available to readers, was pending adjudication in a writ petition before High Court. Thus, in view of the above, the application filed by appellant trustees for revocation of leave granted by trial court to respondents to initiate proceedings under S. 92 CPC, held, should have been allowed by High Court. High Court erred in not doing so.

Held:

It was further held in deciding whether the suit falls within the ambit of Section 92 of the CPC, the Court must consider the purpose of the suit filed by the respondents, it is quite clear that it was to highlight the failure of the appellants to take action against the

availability of the objectionable book and against the author. The issue whether the book is objectionable or not, whether it deserves to be proscribed or not, whether it violates the provisions of Section 153-A or Section 295-A of the Penal Code, 1860 has yet to be determined by the Orissa High Court. The said matter is very much alive before the Orissa High Court and it is for that Court to take a final call on the legality or otherwise of the action taken by the authorities concerned in the State in prohibiting the availability of the objectionable book. Until that decision is taken by the High Court, it would be premature to hold that the book is objectionable enough as not to be made available to readers and to expect the appellants to take any precipitate action in the matter against the author. **Aurobindo Ashram Trust and others V. R. Ramanathan and others, (2016) 6 SCC 126**

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PART – 2 (HIGH COURT)

Administrative Law

Natural Justice- Denial of- Not acceptable in a modern society

It is well settled/position of law that denial of natural justice in a modern society is not acceptable. India has a progressive society and a modern constitution. Natural justice is a parameter of all the modern constitution of the world. **Ajai Prakash V. State of U.P. through Principal Secretary, Revenue Department and others, 2016 (117) ALR 71**

Plea of malafides- Entertainability

It is well settled that plea of mala fide shall not be entertained by the Court if a person against whom mala fide is alleged has not been impleaded eo nominee . **Board of trustee of Martyrs memorial Trust and another V. Union of India and others, 2016 (34) LCD 1780**

Advocate Act

Provisions-Misconduct- Scope of- Reckless drafting with un-malicious motive and unbecoming behavior of a legal practitioner tantamount to misconduct

In this case, court constrained to take notice of the fact that Sri Pande, a practicing lawyer of this Court, who has a standing at the Bar, however, since long has been indulging in reckless drafting, which is not only malicious and motivated but the conduct of the counsel is unbecoming of a legal practitioner which ultimately tantamounts to misconduct under the Advocates Act, 1961 (Act 1961). A professional duty includes the counseling to client, legal opinions, drafting, affidavits, pleading and participating in law conferences. The duty requires, the counsel to maintain the decorum of judicial proceedings,

take great care and caution while drafting a petition without tarnishing the image of any institution, office, Judge or the Constitution. The averments made in para 19, which has been extracted hereinabove, would clearly indicate the reckless and causal approach of the learned counsel.

The conduct of Sri Asok Pande in filing and drafting reckless petitions containing scandalous pleadings and being motivated by personal agenda to malign the persons holding constitutional positions tantamounts to misconduct unbecoming of a responsible legal practitioner which is violative of the provisions of Advocates Act, 1961 and the Rules framed thereunder. **Indra Pal Singh (I.P. Singh) V. State of U.P. and others, 2016 (34) LCD 2063**

Civil Procedure Code

S.9 – Jurisdiction of Civil Court relating to dispute of acquisition under Land Acquisition Act is barred

The only question which has been raised and need be considered is "Whether civil court was right in holding that it has no jurisdiction in the matter, when dispute of acquisition under Land Acquisition Act, 1894, is raised?

This question is now concluded in Laxmi Chand and Others Vs. Gram Panchayat Kararia and Others [AIR (1996) SC 523], wherein Apex Court, in paragraph no. 3, has said :

"It would thus be clear that the scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take cognizance of the cases arising under the Act, by necessary implication, stood barred. The Civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. The only right an aggrieved person has is to approach the constitutional Courts, viz., the High Court and the Supreme Court under their plenary power under Articles 226 and 136

respectively with self-imposed restrictions on their exercise of extraordinary power. Barring thereof, there is no power to the Civil Court."

Again, same question has been answered in Commissioner, Bangalore Development Authority Vs. K.S. Narayan [AIR (2006) SC 3379], wherein Apex Court reiterated its view and relying on earlier decision in Laxmi Chand and Others Vs. Gram Panchayat Kararia and Others (AIR 1996 SC 523), held that jurisdiction of Civil Court is barred. **Ramesh Chandra Sharma and another V. U.P. Awas Evam Vikas Parishad, 2016 (5) ALJ 249**

S. 10 –Scope of –Ingredients for its applicability –Explained

Under Section 10 C.P.C., no court could proceed with trial of any suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit between the same parties. Thus, for application of Section 10 C.P.C. it is necessary that there has to be a duly instituted previous suit between the same parties in which the issue is directly and substantially the same. In the instant matter, admittedly, as per the assertions made in paragraph 13 of the affidavit, the plaint of Original Suit No.721 of 2005 was rejected on ground of nonpayment of court fee. In para 14, it is stated that First Appeal No.330 of 2008 is pending before this Court against the order rejecting the plaint for nonpayment of court fee. Even if for argument sake it is assumed that an appeal arising out of a suit being continuation of the proceedings would attract Section 10 C.P.C., still this Court finds that in the instant matter, there is no previously instituted suit at all in the eyes of law. A suit gets instituted in civil court on presentation of plaint accompanied by payment of requisite court fees. In case the court fee is not paid, then in the eyes of law the suit never came to be instituted and thus, the plea raised by the revisionist that there being a previously instituted suit now pending

before this Court by way of an appeal, is wholly misconceived. **Smt. Pratibha Tiwari V. Satish Chandra Tiwari And 3 Ors., 2016 (132) RD 499**

S. 92- Object of

The object of Section 92 CPC is to protect the public trust of a charitable and religious nature from being subjected to harassment by suit filed against them. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. If the persons in management of the trusts are subjected to multiplicity of legal proceedings, funds which are to be used for charitable or religious purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of public trusts. **Jai Guru Deo Dharam Pracharak Sansthan and Others V. Ram Pratap and others, 2016 (34) LCD 1943**

S. 96 –Appeal –Sitting as a Court of first appeal- High Court is duty found to deal with all issues and evidence led by the parties

On relying upon Madhukar V. Sangram (2001) 4 SCC 756, decided by a Bench of three learned Judges of this Court that sitting as a Court of first appeal it is the duty of the High Court to deal with all the issues and evidence led by the parties before recording its findings.

In so far as the present appeal is concerned, the High Court only considered the issue of limitation and did not consider the other issues in the appeal. This was impermissible. The result is that since court does not agree with the view taken by the High Court on the issue of limitation, there is no option but to set aside the view expressed by the High Court and following the decisions of this Court, remand the matter to the High Court to decide the remaining issues in the first appeal filed under section 96 of the Code of Civil Procedure. **Madina**

Begum and another V. Shiv Murti Prasad Pandey and others, 2016 (118) ALR 465

S. 100 –condition precedent for hearing- Second appeal- Second appellate cannot proceed to hear a second appeal without formulating the substantial question of Law is the appeal

The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended section 100 of the Code.

In the case of (Miss) Louiza D'souza V. John Claudis 2001 (92) RD 64. Andrews and others, Hon'ble the Supreme Court held that deciding the second appeal without framing substantial question of law by a Court is contrary to the provisions as provided under Section 100, CPC and on the said ground set aside the order under challenge passed in second appeal and remanded the matter to decide afresh. **Gandhi Nagar Sahkari Awas Samiti through Secretary V. Rajendra Pras, 2016 (132) RD 377**

S. 100- Substantial question of law- Scope of- An entirely new paint raised for the first line before the High Court is not substantial question involved in the case unless it goes to the root of the matter

The Apex Court has consistently held that an entirely new point raised for the first time before the High Court is not a substantial question involved in the case unless it goes to the root of the matter.

In the case of Govindaraju Vs. Mariamman (Supra), the Apex Court has observed as under:

"As to which would constitute a substantial question of law, it was observed:-

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case'there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a sustainable one and involved in the case, or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life any lis."

In the case of Boodireddy Chandraiah & others V. Arigela Laxmi & another (Supra), the Apex Court while dealing with the question of substantial law has observed as under:

"To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it

goes to the root of the matter. It will therefore, depend on the facts and circumstances of each case whether a question of law is a sustainable one and involved in this case, or not: the paramount overall consideration being the need for striking a judicious balance between the indispensable oblitigation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

The court did not find the pleading raised with respect to the commission of fraud goes to the root of the case and, as such, it does not involve any substantial question of law.

In view of above, this second appeal does not involve any substantial question of law. **Rajendra Kumar and Another V. Smt. Meenakshi Gaur and another, 2016 (34) LCD 2020**

Sec. 100- Scope of- findings of fact cannot be interfered in 2nd appeal

There has been concurrent finding of fact of two courts below that plaintiff had been ready and willing to perform his part of contract in question, and was ready to pay remaining consideration of Rs. 25,000/- in get the sale-deed executed. Such plaint case was not specially denied. Apart from it there is concurrent finding of two lower courts in this regard in favour of plaintiff-respondent and against defendant-appellant, which are based on proper appreciation of evidences available on records. Such findings are apparently without any infirmity or perversity.

The disputes between the parties in this case was as to whether the registered agreement of sale dated 04.07.2010 was executed between the parties as pleaded in the plaint, and whether the plaintiff has been ready and willing to perform his part of said contract. These are questions of fact and not a question of law. Such questions of facts can be decided on the basis of evidences, as has been done by the lower courts. The findings given by the lower courts apparently are

correct and acceptable. Such findings cannot be interfered in second appeal by re-appreciation of evidences. **Smt. Srimani Verma V. Chandrabali, 2016 (132) RD 602**

S. 114 and Order XLVII, Rule 1- Review Statutory grounds for-Applicability for Considering review

At the very outset, I may refer to the statutory grounds as provided under Order XLVII, Rule 1 of the Code of Civil Procedure 1908, for seeking review of a judgment or order passed by this Court. They are: (a) that there is discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) that some important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made, and (c) that there was some mistake or error apparent on the face of record or there is nay other sufficient reason.

It is also settled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

Moreover, the scope of the review is very limited as per the ration laid down by Hon'ble the Suprme Court in the cases of:-

(i) Meera Bhanja V. Nirmala Kumari Chaudhary, (1995) 1 SCC 170

(ii) Prsion Devi and others V. Sumitri Devi, (1997) 8 SCC 175

In view of all the aforesaid, there is no error/mistake apparent on the face of record not any question of law of great public importance involved in the present review petition exists. **Mohd. Fazle Haque and others V. U.P. Power Corporation Ltd., Lucknow and others, 2016 (117) ALR 85**

S. 115- Payment of Court Fee is suit for permanent injunction – Objection of defendant that suit is undervalued- Validity of

So far as the payment of Court-Fee is concerned, it is settled legal position that it is always a matter between the Court and plaintiff, and the defendants have no legal right to challenge the insufficiently of the court fees. Apart from it on merits, the maximum payable court-fee for the relief of permanent injunction is Rs. 500/- which has already been paid by the plaintiffs. So this finding of trial court in impugned order is not erroneous that proper court-fee had been paid in this matter. **A.V. Ampoules & Vials Pvt. Ltd. (M/s) V. Abdul Rasheed and 5 Ors., 2016 (2) ARC 853**

Order VI and R. 17 – Amendment of plaint when can be allowed- Conditions Stated

All amendments should be allowed which satisfy the following conditions:

(a) of not working injustice to the other side; and

(b) of being necessary for the purpose of determining the real question in controversy between the parties. They should be refused only when the other party cannot be placed in the same position as if the pleading had originally been correct but the amendment would cause him an injury which cannot be compensated by costs.

However, under the cover of seeking amendment it is not open to any party to substitute a new cause of action or to change the nature of the suit or to substitute the subject matter of the suit except when the Court thinks it just and necessary. And no amendment of plaint can be allowed if because of lapse of time some right has vested in the other party and the effect of allowing amendment would tantamount to the taking away of that right. Allowing such amendment cannot be compensated for by costs. **Mahajan Singh V. 1st Additional District Judge Gonda & others, 2016 (5) ALJ 45**

Order VI, Rule 17- Amendment of written statement –Rejection 0f- Validity of- Admission once made cannot be permitted to be withdrawn by way of amendments, hence rejection was proper

Originally the petitioner pleaded in the written statement that Krishna Prasad did not participate in the Panchayat and Panchayat was dissolved without making any award but now, this admission is sought to be withdrawn from the written statement and a contradictory plea is being introduced that Panches have given their award. The written statement was filed on 2.7.2004 in the suit and also oral statement of Virendra Kumar was recorded as DW-1. Thus, at not point of time this fact relating to award was introduced before the trial court.

In such circumstances, it has been consistently held that admission once made cannot be permitted to be withdrawn by way of amendment. The impugned orders do not require any interference. **Virendra Kumar V. Mahendra Kumar And 6 Others, 20167 (2) ARC 773**

Order VI, Rule 17- It empowers court to permit such amendments which are necessary for- final determination of issues in dispute or real point in dispute between parties

Order 6, Rule 17 empowers the Court to permit such amendments which are necessary for final determination of the issues in dispute or real point in dispute between the parties. Expression "new case" has been the subject matter of discussion and that expression has been defined to mean a new claim based on altogether new facts and new ideas. New case does not mean and include in itself where there is an additional approach to the same facts already in the pleadings as an alternative approach. So, in the context of the amendment application, an additional approach to same facts cannot

amount to making out a new case. The principles established by judicial decisions in respect of amendment of plaint are :

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit;

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject-matter of or controversy in the suit is not permissible; \

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment;

(iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs; and

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is out-weighed by the special circumstances of the case. Amendment can be refused in the following circumstances :

(i) where it is not necessary for the purpose of determining the real question in controversy between the parties;

(ii) where the plaintiff's suit would be wholly displaced by the proposed amendment;

(iii) where the effect of amendment would take away from the defendant a legal right which has accrued to him by lapse of time;

(iv) where the amendment would introduce totally different, new and inconsistent case and the application is made at a late stage to the proceeding; and

(v) where the application for amendment is not made in good faith. **Mahajan Singh V. 1st A.D.J., Gonda and others, 2016 (4) AWC 3509**

Order VII R. 11- Plaint cannot be rejected on basis of averments made in written statement

The suit could not have been dismissed by the trial courts under O. VII, R.11 on the basis of averments made in the written statement. When the allegation in the written statement and the application for dismissal of suit is that the suit itself is barred by virtue of S. 26 of the Act of 1985. The trial court, therefore, could have framed such preliminary issue in order to determine the question as to whether the suit itself was maintainable before the civil court. This, however, was not done. The courts therefore, could not have dismissed the suit on the basis of materials relied upon by the defendants, which were brought on record along with an affidavit, in support of application and also along with written statement. **Raj Kumar V. M/s. Modi Spinning and Weaving Company Limited, Ghaziabad and Anr., 2016 (4) ALJ 580**

Order VII, R. 11- Rejection of plaint without affording opportunity to defendant- Effect of- Impugned order is liable to be quashed

A perusal of impugned order reveals that although this contains dozens of rulings, but perhaps these rulings were not properly studied by learned Civil Judge, who had simply mentioned them and passed impugned order without understanding or discussing real law laid down in them. Such order was also erroneous exercise of jurisdiction when it had effect of disposing other issues for which hearing was not made, but finding was given by learned Civil Judge. Thus the trial court had acted in the exercise of its jurisdiction illegally or with material irregularity. In these circumstances, this is not a case where provisions of Section 115(3) CPC [as amended by U.P. Act No. 14 of

2003] are attracted as contended by learned counsel for the plaintiff-respondent. By impugned order, several rights were decided by the lower court without properly considering them and affording opportunity to defendant-respondent. Although, impugned order runs in several pages but in fact it is a superficial order, in which proper consideration of facts and law was not done. Thus, impugned order is erroneous exercise of jurisdiction, which attracts revisional jurisdiction of this Court for interference. Since preliminary issues no. 2 and 3 may have common points so it would be appropriate to decide those issues, if possible, together as preliminary issues.

Accordingly, this revision is allowed and the impugned order 14.8.2013 passed by Civil Judge (Senior Division), Hapur in original suit No. 29/2013, Smt. Puspa Rani & Anr. V. Shiv Kumar Tyagi & others, is hereby set aside. Matter is remanded to trial court with direction to afford fresh opportunity of hearing to parties on preliminary issues no. 2 and 3 and pass appropriate order in accordance with law. **Shiv Kumar Tyagi and others V. Smt. Puspa Rani and another, 2016 (117) ALR 619**

Order VII, Rule 11 (d) and Order XXXII, Rule 3- Suit for cancellation of Will and prohibitory injunction against minor is not barred by any Law

The question involved in the present appeal as to whether a suit against the minor is barred by any law so as to apply the law for rejection of plaint as provided under Order VII Rule 11 (d) CPC, which provides that the plaint can be rejected where the suit is to be barred by any law.

This provision clearly indicates that the suit against the minor is not barred and even a minor can apply for appointment of guardian who may pursue the suit before the Court on his behalf. The provision of sub-rule 4-A of Order XXXII Rule 3 CPC may also be taken into

account, which clearly provides that the Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also. This clearly indicates that the suit against the minor by itself is not barred but the provisions of Order XXXII Rule 3 CPC provides the manner in which the suit will proceed against the minor after the Court is satisfied about the minority and thereafter the steps to appoint guardian either on behalf of the plaintiff or even on behalf of the minor will proceed. Therefore, in my view, the suit against the minor could not have been dismissed under the provision of Order VII Rule 11 (d) CPC as the suit itself was not barred by any law but the provisions of Order XXXII Rule 3 CPC provides the manner in which the suit can proceed against the minor.

In such view of the matter, rejection of plaint under Order VII Rule 11 (D) CPC by the trial Court was illegal and the same was rightly set aside by the lower appellate Court. The reasons assigned for setting aside. **Ravindra Singh V. Ashish Mani Tripathi and another, 2016 (4) AWC 3313**

O. VII, Rule 11- Plea of bar of suit- when raised –It can be raised even before filing of written statement

It is settled legal position that the plea of Order VII, Rule 11 C.P.C. can be raised at any relevant time even before filing of the written statement. **Virendra Shanker Tiwari V. One Place Infrastructure Pvt. Ltd. 2016 (132) RD 200**

Order VIII, Rule 6-A(2) and Order XX, Rule 19 (1)- counter claim- Effect of- Counter claim has some effect as a cross suit and a plaint

Under Order 8, Rule 6-A (2) of the C.P.C. 1908, it is provided that a counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce final judgment in the same suit, both on

the original claim and the counter-claim and Order 8 Rule 6-A (3) entitles the plaintiff to file a written statement in answer to the counter-claim while Order 8 Rule 6-A (4) clearly provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Recognizing that a counter-claim is a cross-suit and not a separate suit, there is firstly, no registration of a counter-claim as a separate suit. Secondly, the Legislature has made a provision in Order 20, Rule 19(1) C.P.C., 1908 that whenever a set-off or counter-claim is allowed, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant and shall be for the recovery of any sum which appears to be due to either party. Therefore, essentially a setoff or counter-claim is allowed, then the provision of Order 20, Rule 19(1) of the C.P.C., 1908 comes into play.

There is no specific provision for drawing a separate decree for a counter-claim in as much as a counter-claim is not registered separately. What the law contemplates is treating the counter-claim as a cross-suit. **Ashok Kumar Singh Sengar V. Om Praskash Chaturvedi, 2016 (132) RD 66**

Order IX, Rule 13- Ex parte decree- Setting aside of- consideration of- Validity of ex parte decree cannot be challenged on merit by an application under order IX, Rule 13, CPC

In this respect, court only observe that even if the application dated 06.04.1981 moved by the petitioners no.1 and 2 along with late Ram Dutt under Order IX Rule 13, CPC was moved on wrong legal advice, the same would not entitle even to petitioners no.1 and 2 to challenge the decree after expiry of a period of 32 years. Once the said application was dismissed in default and if it is presumed that the application was moved on wrong legal advice that would not lead the

court to conclude that the petitioners no.1 and 2 did not have knowledge of the ex-parte decree dated 22.10.1980.

Court is afraid, since the validity of the said ex-parte decree dated 22.10.1980 could not be challenged on merit through an application under Order IX Rule 13, CPC before the learned trial court or the appellate court, the aforesaid submissions made by learned counsel for the petitioners in the context of the facts and circumstances of the case are highly misconceived. **Shripal Singh Chauhan and others V. Special Judge, C.B.I. , Court No. 4, Lucknow and others, 2016 (117) ALR 613**

Order IX, Rule 13- Application for setting aside exparte decree- Allowance of

This petition has been filed against the order of Additional District Judge dated 5.12.2015 allowing the appeal and condoning the delay in filing the application under Order 9, Rule 13 CPC and remanded the matter before the trial court to decide the application under Order 9, Rule 13 CPC on merit.

A perusal of the recall application shows that in the recall application, it has no where mentioned that petitioner has filed a Civil Suit in which ex parte decree dated 2.11.2006 has been passed. Thus merely appearance of the respondent in the recall application will not be sufficient to prove that he had knowledge about the ex parte decree passed in the year 2006. **Amar Singh V. Kishanpal Singh and Another, 2016 (2) ARC 779**

Order IX, Rule 1- Framing of Issue –Object and scope- Object of framing issues is to direct the attention of parties to lead evidence on specific issues framed

The object of framing issues is to direct the attention of the parties to lead evidence on that specific issue framed. **Ratan Lal V. Smt. Shanti Devi and another, 2016 (34) LCD 1964**

Order XII- Scope of –Explained

Order 22 of the Code deals with the effect of "Death, Marriage and Insolvency of parties" in pending suits. It distinguishes between cases in which "the right to sue" survives and those in which it does not. In the former class of cases, that is, where "the right to sue" survives, the suit is allowed to be continued by or against the legal representatives of the deceased provided they are brought on the record within the statutory period of limitation. In the latter class of cases, that is, where "the right to sue" does not survive, no question of continuance of the suit by any other person arises.

It will thus appear that Order 22 is really confined to questions of the continuance of the suit by virtue of the devolution of the deceased's 'right to sue' on other persons during the pendency of the suit; but there will be cases in which the suit can be continued by other persons who have independent 'right to sue' on the same cause of action. Order 22, therefore, contemplates cases of devolution of interest from some original party to the suit --whether plaintiff or defendant --upon someone else. The more ordinary cases are of death, marriage and insolvency, and then come the general provisions of Rule 10 for all other cases, but they are all cases of devolution. **Ram Sanehi V. D.D.C. and others, 2016 (132) RD 53**

Order XII, Rule 3- Applicability –Explained

The provisions of Rule 3, therefore, apply not only to the case of a deceased plaintiff, but also to the case, of a deceased appellant. Where, therefore, one of two or more appellants dies and the right to appeal does not survive to the surviving appellant or appellants alone,

as is the case here, or, where a sole appellant or sole surviving appellant dies, and, the right to appeal survives to his legal representative, who is not already on the record, the legal representative of the deceased appellant ought to be brought on the record by an application made under Rule 3, of Order 22, within the time allowed by law, and, if this is not done, the appeal shall abate so far as the deceased appellant is concerned. **Ram Sanehi V. D.D.C. and others, 2016 (132) RD 53**

Order XIV, Rule 2- Whether adjudication relating to bar on jurisdiction of Civil Court can be decided as preliminary issue? – Held 'No'

Thus, it is now well ingrained that the decision even on issue of law, dependent upon the decision of questions of fact, cannot be tried as a preliminary issue. In other words, only pure issues of law, which do not require consideration of any evidence or any enquiry into facts, can be tried and decided as preliminary issues.

Further, the question whether to decide an issue as a preliminary issue or not, is a matter of discretion of the trial court. The words "it (court) may try that issue" clearly suggests that since after the amendment of Order 14, Rule 2, by Act 104 of 1976, it is no more obligatory on the court to decide issues of law as preliminary issues. Thus, a court postponing decision on an issue of law, even if erroneously, does not commit any jurisdictional error. In Waryam Singh V. Amarnath and another AIR 1954 SC 215 a constitution bench of the Supreme Court has held that the supervisory jurisdiction under Article 227 of the Constitution is to be exercised sparingly and only in order to keep the subordinate courts within the bounds of their authority and it is not meant to correct errors of fact or even of law. Same view was taken in a subsequent constitution bench judgement in State of Gujarat V. Vakhatsinghji Vajesinghji Vaghela AIR 1968 SC 1481.

In view of the above, even otherwise, this Court refuses to interfere with the impugned order. **Yudhishthir Singh & Another V. Additional District Judge/Special Judge & 4 others, 2016 (132) RD 468**

Order XXI, Rule 5 and order XXI, Rule 10- Trans for of execution case- Court can directly transfer to other court

Order XXI, Rule 5 provides that the Court which passes the decree can send the decree for execution to other Court directly. Decree shall be executed by the Court to which it is sent. **Santosh Kumar V. State of U.P. and another, 2016 (132) RD 199**

Order XXI, Rule 54- Scope of- Property attached by Court in execution cannot be auctioned to recover dues

In this case, it is also not in dispute that objection so filed under Order XXI, Rule 58, C.P.C. was dismissed by the Court, vide Judgment dated 6.4.1973, holding that Muni Lal was not the owner and Sri Kashi Ram was the owner, therefore, property was rightly attached under Order XXI, Rule 54, C.P.C.

Since, Muni Lal was not held to be owner of the property vide judgment dated 6.4.1973, therefore, auction made by the Collector of the property in dispute for the recovery of certain dues outstanding against Muni Lal on 12.7.1973, on the face of it, was illegal and without jurisdiction. Moreover, since, property, in question was attached under Order XXI, Rule 54, C.P.C. on 12.7.1973, therefore, learned Collector was not competent to auction/sale the attached property by treating it property of Shri Muni Lal or his widow, thereafter on 12.7.1973 **Balwinder Singh V. Smt. Vidya Chabra and others, 2016 (132) RD 548**

Order XXI, Rules 98 and 99- Execution proceedings – Objection by third person/objector –Third person can contest proceeding for delivery of possession after execution of sale deed

The argument of the counsel for the petitioner is that third person namely Chakit Kumar Mishra is not a stranger but son of Akhilesh Kumar Mishra who was judgement debtor in the suit and issue relating to title of Akhilesh Kumar Mishra has been raised by Akhilesh Kumar Mishra in the suit itself and it has been finally decided that Akhilesh Kumar Mishra is the owner of the property in dispute and agreement to sell was rightly executed by him, therefore the suit for specific performance of contract has been decreed and appeal filed by Akhilesh Kumar Mishra has been dismissed by the lower appellate court by order dated 18.2.2008. Thereafter no second appeal has been filed. In the absence of decree of the trial court the proceeding relating to execution of decree has been taken by the trial court. Now in the execution proceeding son of Akhilesh Kumar Mishra namely Chakit Kumar Mishra filed an application under Order 22 Rule 98 CPC. Chakit Kumar Mishra being son of Akhilesh Kumar Mishra is bound by decree. He further submits that Chakit Kumar Mishra derived his title on the basis of Will dated 9.2.1995 allegedly executed by Smt. Kesar Devi wife of Nagendra Dutt Sharma, who was maternal grand mother. He submits that Smt. Kesar Devi was surviving up to the year 1997 and suit was filed in the year 1986 but she did not contest the matter during her life time. Now on the basis of Will, Chakit Kumar Mishra cannot be permitted to contest the matter. He further submits that it has been well settled by this Court as well as by the Supreme Court that if the record is complete, the appellate court should decide the appeal on merit instead of remanding the matter and by the impugned order the matter has been remanded as such it is liable to be set aside.

A perusal of the objection of Chakit Kumar Mishra shows that he has set up his independent title through the Will executed by Smt. Kesar Devi dated 9.2.1995. The contention that property in dispute belong to Sri Nagendra Dutt Sharma who had adopted Akhilesh Kumar Mishra on 28.6.1974 and the property in dispute was inherited by Akhilesh Kumar Mishra is not liable to be accepted as under Hindu Law, after death of husband son as well as widow both will jointly inherit the property in dispute. Since title dispute, set up by Chakit Kumar Mishra is independent from Akhilesh Kumar Mishra as such finding recorded in the suit as well as in the appeal is not binding upon him. It has been further stated that third person can contest proceeding for delivery of possession after execution of sale deed according to the provision under Order 21 Rule 98 and 99 CPC. **Bhupendra Kumar Jain V. Chakit Kumar Mishra and Another, 2016 (2) ARC 771**

Order XXII, Rules 3(2), (3) and (4) –Scope of suit against minor is not barred, Even a minor can apply for appointment of guardian who may pursue the suit before the court on his behalf

A perusal of Order XXXII Rule 3 clearly indicates that a suit can be filed against the minor and if the Court is satisfied that where the minor is defendant, shall appoint a person to be guardian for the suit for such minor. Sub-rule 2 of Order XXXII Rule 3 provides that an order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. Sub-rule 3 of Order XXXII Rule 3 provides that for appointment of guardian, an application can be made either on behalf of the minor or by the plaintiff and order can be obtained for appointment.

This provision clearly indicates that the suit against the minor is not barred and even a minor can apply for appointment of guardian

who may pursue the suit before the Court on his behalf. The provision of sub-rule 4-A of Order XXXII Rule 3 CPC may also be taken into account, which clearly provides that the Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also. This clearly indicates that the suit against the minor by itself is not barred but the provisions of Order XXXII Rule 3 CPC provides the manner in which the suit will proceed against the minor after the Court is satisfied about the minority and thereafter the steps to appoint guardian either on behalf of the plaintiff or even on behalf of the minor will proceed. **Ravindra Singh V. Ashish Mani Tripathi and another, 2016 (118) ALR 130**

Order XXXIX - Claim for interim injuction on basis of unregister will- Rejection application for –in this case, there was cantadiction between entry of Khatouni and Khasra- In such contradiction Khatauni was prevail and not Khasra

This petition has been filed against the order of Civil Judge, (Junior Division) dated 25.2.2016 by which the interim injunction application has been rejected and the order of District Judge dated 5.3.2016 dismissing the appeal filed against the aforesaid order.

So far as khasra is concerned, a perusal of khasra shows that name of Ram Khiladi was recorded in the owner's column and not in the column of occupier. The court below found that in khatauni name of defendant Munna Lal was recorded. Thus there has been contradiction between the entry of khatauni and khasra and in case of contradiction, the khatauni will prevail as there is presumption regarding the correctness of khatauni and not khasra. So far as the affidavit as well as school leaving certificate of Munna Lal are concerned, the court below found that it will be examined at the stage of suit. For the purposes of injunction, claim of Ram Khiladi is based upon an unregistered Will which has never seen in the light of the day till

today. The will is not admissible in evidence unless it is proved according to Section 68 of Evidence Act. Thus I do not find any justification to interfere in the impugned orders in exercise of powers under Article 227 of the Constitution. **Smt. Mithilesh Sharma V. Ram Khiladi and others, 2016 (4) AWC 3332**

Order XXXIX, Rule 3- Scope of- It empowers the Trail Court to grant injunction even without notice to defendant

A bare perusal of the Rule 3 of Order 39 shows that the learned trial court was empowered to pass an interim injunction even without notice to be defendant, where it appears that the object of granting injunction would be defeated by delay. **Smt. Shalini Verma V. Brijech Chand Sinha and others, 2016 (34) LCD 1747**

Order XLI, Rule 27- Additional evidence at appellate stage may be permitted in exceptional circumstance/ conditions laid down in Rule 27

The general principle is that the Appellate Court should not travel outside the record of the lower court and would not take any evidence in appeal. However, as an exception, Order 41 Rule 27 enables the appellate court to take additional evidence in exceptional circumstances. The Court may permit additional evidence only if the conditions laid down in Rule 27 are found to exist. The parties, therefore, are not entitled, as of right, to the admission of such evidence. The provision does not apply when on the basis of the evidence on record the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court and it must be used sparingly. The judicial discretion is circumscribed by the limitation specified in the Rule itself.

The provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it

can pronounce judgment in a case. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in 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. The inadvertence of the party or his inability to understand the legal issue involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realize the importance of a document does not constitute a "substantial cause". The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so, cannot have it admitted in appeal. **Markandey Singh & Another V. Awadhesh Narayan Singh & Another, 2016 (132) RD 483**

Order XLI, Rule 31, Section 100- Paint of determination –Non framing of- Mandatory provisions of XLI, Rule 31 not followed- Effect of

The 1st appellate Court in most of the cases refer the issues framed by the trial court and proceed to decide the appeal on each and every issue, as if, the judgment is being passed by the trial court. Such procedure adopted by the 1st Appellate Court, cannot be said to be substantial compliance of Order 41 Rule 31 C.P.C., inasmuch as, the appellate court is required to frame its own points of determination instead of taking up the issues framed by the trial court one after the other.

As in the present case, the first appellant court has passed the judgment and decree dated 26.02.2016 without following the mandatory provisions of Order 41 Rule 31 then in these circumstances without entering into the matter in question, the impugned judgment and decree dated 26.02.2016 passed by Additional District Judge,

Court No. 2, Faizabad in Civil Appeal No. 06 of 2006 (Ram Abhilakh and another Vs. Siyaram and others) is set aside and the matter is remanded back to the appellate court to decide the civil appeal afresh in view of the observations made hereinabove. **Ram Abhilakh and another V. Siyaram and others, 2016 (132) RD 361**

Constitution of India

Article 225- Allahabad High Court Rules, Chapter 12, R. 4- Effect of non-service of notice- Petition has to be dismissed as against the party who has not been served and no relief can be granted against that party

Once such a scheme is provided under Chapter XII, Rule 4 of the High Court Rules then in view of the this court is of the considered opinion that once the petitioner-appellant was not at all claiming any relief against Ramesh Chandra Verma and he was merely a pro forma opposite party then in case steps were not taken, the writ petition was to be accepted to be dismissed only as against him. Even otherwise before us petitioner is submitting that the petitioner has died and as there is no direct lies between the petitioner appellant and the aforementioned opposite party. Consequently, in our considered opinion, on account of non-taking of steps for effecting service upon the aforementioned opposite party no relief could have been granted against him. **Harish Chandra Verma V. State of U.P. Thru. Prin. Secy., Deptt. Of Go-operative & Ors., 2016 (5) ALJ 308**

Art. 226- Writ petition pending for approximately 13 to 14 years cannot be dismissed on ground of alternative remedy

Though the Apex court has directed that the writ petition be decided on merit and the order of dismissal on the ground of alternative remedy was set aside, however,the learned counsel for the respondent vehemently challenged the maintainability of the writ petition on the

ground that the statutory remedy of revision against the impugned order has not been availed by the petitioner. This argument of the learned counsel for the respondent is not acceptable in view of the direction of the Apex Court to decide the writ petition on merit, in the peculiar facts and circumstances of the case. Moreover the settled legal position is that in case a writ petition is entertained and an interim order has been passed or the writ petition is pending for a long time, it should not be dismissed on the ground of alternative remedy. The present writ petition can not be dismissed on the ground of alternative remedy after approximately 13 to 14 years of the pendency. **Kailash Chandra Saxena V. Rent Control and Eviction Officer, Shahjahanpur and others, 2016 (5) ALJ 98**

Criminal Procedure Code

S. 227, 228 - Only Prima facie evidence in sufficient for framing of charges

At the stage of framing a charge only a reasonable doubt in the mind of the Court concerned is sufficient and the Courts are not required to see whether the evidence available on record is sufficient to prove the case of prosecution beyond reasonable doubt. Only prima facie evidence as available on record is to be considered by the Court concerned at the initial stage of framing charges. So far as the instant case is concerned, there appears sufficient prima facie evidence to frame charges against the revisionist and only the basis of the fact that the Judge, Ghaziabad, was faxed to C.J.M., Ghaziabad, it cannot be said that there was no prima facie evidence against the revisionist.

As per settled legal position the Sessions Judge has the power to discharge the accused in the following circumstances;

A- Where the evidence produced is not sufficient;

B- Where there is not legal ground for proceeding against the accused,

C- Where the prosecution is clearly barred by limitation, or

D- Where he is precluded from proceeding because of a prior judgment of High Court

Surendra Sharma V. State of U.P. and another, 2016 (96) ACC 407

Criminal Trial

Every Order must be speaking and in brief and also reflect that judicial mind has been applied

That in this order neither facts of the case were considered nor any appreciation of evidence was given except the name of accused person. No fact relating to complaint or evidences was discussed and only it was mentioned that from perusal of evidences prima facie commission of offence under sections 380, 504 and 506 IPC is made out. From a perusal of this order reveals that it is non speaking order and has been passed against the earlier directions of Lower Revisional Court given in judgment dated 27.5.2014 in criminal revision No. 717 of 2913. This is a gross error and has been committed by learned Magistrate at the time of passing impugned order. Any summoning order, howsoever brief, must reflect that before passing it the Magistrate had understood the facts and had applied its judicial mind.

Raghuraj Singh V. State of U.P. and others, 2016 (96) ACC 238

Defective Investigation is not a good ground for acquitting the accused

It may also be appreciated that there is laches on the part of the investigating agency, however, if we look at the law as laid down by the Apex Court in the case of State of MP V. Brij 2005 (2) Crimes 300 (DB) (MP) with regard to the defective investigation, if any, wherein it has been held as follows:

"In the presence of sufficient ocular and medical evidence, acquittal is not proper only if the investigation is defective. In the matter of defective investigation, the Court should be circumspect in evaluation the evidence but the prosecution case cannot be rejected on that ground."

Similarly in the case of Allarakha K. Mansuri V. State of Gujarat, 2002(1) Crimes 322, AIR 2002 SC 1051 wherein it has been held by the Hon'ble Apex Court that "Defective investigation by itself cannot be made a ground for acquitting the accused." The same view has been expressed in the case of Ram Bali V. State of U.P. 2004(2) Crimes 493; AIR 2004 SC 2329 wherein it has been held that "in a case of defective investigation, Court has to be circumspect in evaluating the evidence."

The Court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casually for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case." The said judgment has been relied upon in the case of V.K. Mishra V. State of Uttarakhand 2015 (9) SCC 606. **Amar Singh V. State of Uttar Pradesh, 2016 (96) ACC 140**

When corroboration is necessary in Criminal Trial

In the present case, learned counsel for the defence has submitted that the witnesses who have come on the spot were not examined which causes a dent in the prosecution case. I do not think so because the statement of victim is intact and trustworthy, hence there is no necessity of any corroboration so far as the factual aspect of the matter is concerned since the medical evidence corroborates the

brutal rape on the victim who has specifically stated in her statement that she did not give consent to the act of rape.

In (2015) 4 SCC 762 Deepak Vs. State of Haryana, the Apex Court in para - 24 has observed as follows:-

"In order to enable the court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix and second, it should be proved that it was done without the consent of the prosecutrix. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused on her which, as per her statement, was committed by the accused against her will and the accused failed to give any satisfactory explanation in his defence evidence on this issue, the court will be entitled to draw the presumption under Section 114-A of the Indian Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent. The question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of Section 114-A of the Indian Evidence Act."

The reason for not getting the victim examined by government doctor has been very well plausibly explained in as much as the victim was bleeding profusely and if the attendants would have taken her to the government hospital there were chances that she would have collapsed due to excessive bleeding. Besides this, another reason why I am inclined to rely on the prosecution case is the forensic lab report, according to which on Salwar, underwear, baniyan, Kurta and Chunni blood stains were found. On the underwear sperms were found and on the underwear semen was also found. This clearly supports the prosecution case. The reference slip of the doctor of government hospital is Ext. Ka-2 to whom the victim was taken but

she referred the victim to the Higher Centre. **Ravindra Kumar V. State of U.P., 2016 (95) ACC 773**

Evidence Act

Sec. 3 - Appreciation of Evidence in Criminal Trial –What is basis of reasonable doubt

The division bench of Hon'ble High Court held that that factual chain of circumstances is broken and the version of the prosecution has not been established as was required of it. In the absence of complete chain, the guilt of the accused cannot be inferred and suspicion howsoever grave it may be, cannot take place of proof as that would be miscarriage of justice, which must be avoided by us. The facts and circumstances, lead us to conclude that the prosecution has failed to prove its case beyond reasonable doubt against the appellant and the appellant should be given benefit of doubt. We have to keep in mind that reasonable doubt is not an imaginary, petty or more probable doubt but doubt becomes a fair doubt and it is based upon reasons and common sense vis-a-vis the testimony on record. Even Hon'ble Apex Court, in the matter of Sujit Biswas Vs. State of Assam-2013 Cri. L.J. 3140 (SC) has expressed its view on the same line that suspicion howsoever strong cannot assume form of proof and a doubt is not a trivial or mere a probable doubt but a fair doubt based upon reasons and common sense. **Akhilesh Kumar V. State of U.P. 2016 (95) ACC 170**

Sec. 8 - Whether Motive is always necessary in every Criminal Act

The division bench of Hon'ble High Court held that It is settled principle of law that normally motive remains behind every criminal act but where occular evidence against accused is clear, cogent and reliable, the question of motive is of no importance and looses its

importance.

In the case of Shivraj Bapurey Jadhav vs. State of Karnataka 2003 (47) Allahabad Criminal Cases 408 SC the Apex Court has held that "if direct ocular evidence is there on record, law of motive becomes insignificant."

In the case of Bipin Kumar Mondal vs. State of West Bengal AIR 2010 SC 3638, Apex Court held that "proof of motive is not essential where direct evidence establishes crime. In a case based on circumstantial evidence, motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story, is giving this one factor an undue importance. The motive is in the mind of accused and can seldom be fathomed with any degree of accuracy."

Since in this case the motive has been stated and established by the prosecution and the happening of occurrence in question at the instance of accused persons is proved by the eye witness account of two eye witnesses which is duly corroborated with medical evidence on record, I find that the argument of appellants with regard to lack of motive of appellants and their false implication due to alleged enmity, have no force. **Om Prakash & Others V. State, 2016 (95) ACC 93**

S. 120- Scope of –Husband /wife of spouse can be a competent witness on behalf of has/her spouse

Section 120 of Indian Evidence Act reds that “in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses”. It is settled legal position that for the facts within his personal knowledge, the husband/ wife or spouse can be a competent witness on behalf of his/her spouse, provided his testimony is found believable and had passes the test of cross-examination, as well as the scrutiny of the Court **Smt. Siddh Sri Devi V. Satish Chandra Tripathi and others, 2016 (117) ALR 811**

Family Law

Will- Oral- Acceptance of

It is an established principle of law that the Will may be even oral, if proved sufficiently, as contemplated under the law and not shrouded by any mysterious or suspicious circumstances, then it can be accepted, but here, the appellant is striving to grab the property on the basis of entirely forged Will , which has not least evidentiary value, much less, it has not been proved by any attesting witnesses not even by scribe.

Will- Probate was granted by Competent Court and never Challenged anywhere- Effect of- Probate granted is conclusive unless it revoked

There was Will in favour of Sri Shankar Lal Ladia, which was executed in Kolkata and as per requirement of law prevailing Kolkata, the probate was granted by the competent Court and that probate was never challenged anywhere. Hon'ble Apex Court in the case of "Chiranjilal Shrilal Goenka V. Jasjit Singh and others (1993) 2 SCC 507" has laid down as under:

"The grant of a probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the Will unless it is duly revoked as per law. It binds not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the probate Court, therefore, is the judgment in rem. The probate granted by the Competent Court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken

for revoking the probate. **Shri Munishwar Vedang Vidyalaya, Rishikesh V. Smt. Luxmi Devi and others, 2016 (132) RD 567**

Forest Act

S. 4 – U.P. Consolidation of Holding Act, S. 9A (2) –Proceedings before consolidation courts started subsequent to the notification u/s 4 of the Forest Act were wholly without jurisdiction

It is not in issue that the consolidation operations started subsequent to the notification under Section 4 of the Forest Act. The petitioner in the writ petition has admitted that the objection before the Consolidation Courts was filed by him sometime in the year 1955-56. Therefore, the proceedings before the Consolidation Courts were wholly without jurisdiction. This view is fortified by the view taken by the Apex Court in State of U.P. Vs. Deputy Director of Consolidation, AIR 1996 Supreme Court 2432 which lays down as follows –

" Forest Act is a complete Code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest is published, then all the rights in the said land claimed by any person come to an end and are no longer available. The notification is binding on the Consolidation Authorities in the same way as a decree of a Civil Court."

Therefore and especially in view of the pronouncement of the Apex Court noticed above, this Court is constrained to hold that the proceedings before the Consolidation Officer were, without jurisdiction. **Raman Das V. State of U.P. and others, 2016 (34) LCD 2004**

Hindu Law

(i) Will- Oral-Acceptance of –It proved sufficiently as contemplated under Law and not shrouded by any mysterious or suspicious circumstances, then it can be accepted

It is an established principle of law that the Will may be even oral, if proved sufficiently, as contemplated under the law and not shrouded by any mysterious or suspicious circumstances, then it can be accepted, but here, the appellant is striving to grab the properly on the basis of entirely forged Will, which has not least evidentiary value much less, it has not been proved by any attesting witnesses not even by scribe. **Shri Munishwar Vedant Vidyalaya, Rishikesh V. Smt. Luxmi Devi and others, 2016 (117) ALR 305**

(ii) Will- Probate granted by the competent court is conclusive unless it is revoked

The probate was granted by the competent Court and that probate was never challenged anyshere. Hon'ble Apex Court in the case of "Chiranjilal Shrila Goenka V. Jasjit Singh and others, (1993) 2 SCC 507" has laid down as under:

" the grant of a probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the Will unless it is duly revoked as per law. It binas not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the probate Court, therefore, is the judgment in rem. The probate granted by the competent Court is conclusive of the validity of the Will until it is revoked and not evidence can be admitted to impeach it except in a proceeding taken for

revoking the probate. **Shri Munishwar Vedant Vidyalaya, Rishikesh V. Smt. Luxmi Devi and others, 2016 (117) ALR 305**

Hindu Marriage Act

S. 13- Cruelty –Meaning of –Mental cruelty and its effect cannot be stated with arthematical accuracy, it various from individual to individual from society to society and also depends on the status of the persons

Mental cruelty and its effect cannot be stated with arithmetical accuracy. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be mental cruelty in the life of two individuals belonging to a particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. **Manish Gautam V. Smt. Shikha Gautam, 2016 (2) ARC 800**

S. 13- Divorce- Mere allegation of cruelty without evidence cannot justify decree of divorce

There are allegations and denial. There is no other evidence on record to prove aforesaid allegations alleged by plaintiff. It cannot be doubted, had the allegations made by plaintiff, if correct and proved by adducing any evidence or credible evidence, it would have been a serious thing and could have justified a decree of divorce. However, mere allegation without evidence and that too such a serious allegation, cannot be taken lightly. Court below has observed that in cross-examination DW1- defendant admitted that she used to go to her maternal uncle at Rajpura, Punjab sometimes and she is doing

pairvi of case residing at Rajpura, the place of her maternal uncle, and there is no reason that plaintiff shall make a false allegation against his wife. We find these observations contrary to record and based on assumption. Defendant has categorically denied that plaintiff has seen her in an objectionable position with her maternal uncle and her deposition in cross-examination.

In matrimonial disputes, wild and untrue allegations are levelled on both sides frequently and that is a common experience of courts dealing with such matters. Still court below, in present case, without appreciating the fact that such plea for the first time was taken by way of replication, has believed and that too without any evidence. This finding of Court below is patently perverse and illegal.

Cruelty is a ground, prima facie, under law to justify decree of divorce, but mere allegation without evidence cannot justify decree of divorce. In the present case, plaintiff-respondent though has made allegations against her wife regarding her mental ailment and misbehaviour, but failed to prove the same by adducing credible evidence whatsoever. Court below has relied upon certain documents which were never proved and exhibited hence are inadmissible in evidence. Thus, finding recorded by Court below holding that there was cruelty on the part of wife towards her husband so as to justify decree of divorce is perverse, based on no evidence, and cannot be sustained. **Daljeet Kaur V. Tejindar Mohan Singh, 2016 (117) ALR 728**

Ss. 13 and 13 B –Whether rule of estopel has application in a petition U/S 13-B of the Act?- Held, "No"

In the present cae, no petition under Section 13-B of the Act has been filed. The petitioner wants for a decree in divorce suit under Section 13 of the Act, in view of compromise dated 10.10.2014,as this compromise would operate as estoppel against the respondents. Rule

of estoppel is a rule of evidence. There can be no estoppel against statute. Supreme Court in State of Bihar V. Project Uchcha Vidya, Sikshak Sangh, (2006) 2 SCC 545, held that it is now well known, the rule of estoppels has no application where contention as regards a constitutional provision or a statute is raised. Section 13-B itself gives liberty for second thought to the parties. The consent must continue during the interregnum period and after this period the parties should again confirm their consent before the Court. As held by Supreme Court in various cases cited above, the parties can withdraw their consent during this period. As such rule of estoppels has not application in a petition under Section 13-B of the Act. **Ashish Kumar Srivastava V. Smt. Ankita Srivastav, 2016 (2) ARC 780**

S. 13-B- Petition for grant of divorce by mutual consent by power of attorney holder can be entertained

Recently a Full Bench of this Court in the case of Syed Wasif Husain Rizvi vs Hasan Raza Khan and six others in Writ Petition No.534 (Consolidation) of 2002 has dealt with the issue relating to attorneys at some length. After elucidating the meaning of power of attorney, the Court taking into account the provisions of Allahabad High Court Rules and the provisions contained in Code of Civil Procedure, particularly those contained in Order III thereof, has inter alia observed that it is evident from the provisions of Order III Rule 1 of CPC that an appearance, application or act in or to any Court which is required to be made or done by a party in the Court can be effectively made or done by the party in person or by a recognized agent.

Thus, from the authorities as discussed above and also taking into account the facts and circumstances which the instant case has presented, I find it appropriate to dispose of this petition with the following observations and directions:-

1. In case a petition under Section 13-B of Hindu Marriage Act for divorce by mutual consent is presented by the petitioner and the respondent no.2, then pleading of such petition may be permitted to be signed and verified by the holder of power of attorney of the petitioner in terms of the Special Power of Attorney executed by the petitioner on 11.04.2016 before notary public in California, Santa Clara County.

2. Along with the petition to be presented under Section 13-B of Hindu Marriage Act, a draft settlement agreement, which is a part of record of this case before this Court and has duly been signed by learned counsel for parties before this Court will also be annexed.

3. That for verifying and attesting the contents of the joint petition which may be presented under Section 13-B of Hindu Marriage Act by the parties, an affidavit of the petitioner shall also be required to be filed which can be sworn in before the notary public or before any other lawful authority in United States of America where the petitioner is presently living. The said affidavit shall also contain duly self-attested photograph of the petitioner.

4. On presentation of the joint petition seeking divorce by mutual consent under Section 13-B of Hindu Marriage Act, the learned court below will proceed with the said application in accordance with law after permitting the power of attorney authorized by the petitioner to appear before it. The Court will also make such inquiries as are deemed fit in respect of the averments made in the petition for divorce by mutual consent and it is only on being satisfied that contents of the petition are true, the court will proceed to pass appropriate orders.

5. However, it is made clear that in case at any stage of the proceedings of Section 13-B of Hindu Marriage Act, if instituted, the court below finds any doubt about the averments made in the petition, it would be lawful for the Court to summon the petitioner for his

personal appearance. **Kanwalijeet Sachdev V. State of U.P. Thru Additional Prin. Judge Family Court & Anr. , 2016 (2) ARC 789**

House and Rent

Ejectment suit- Question of title cannot be decided in such a summary proceedings

The rent control proceedings are summery proceeding and the question of title cannot be decided therein as it requires appreciation of oral and documentary evidences which is not permissible in a summery proceeding. Prima facie, title to the disputed accommodation can be seen by the Rent controller only with a view to look as to whether the applicant is landlord or the accommodation, release of which is sought by him. **Sajal Kumr Jauhari V. Distruct Judge, ballia and others, 2016 (117) ALR 413**

Declaration o f Vacancy – Non- service of notice of occupant – Effect of- Non compliance of rule of Rules framed under Act would not vitiate proceedings for declaration

In view of the legal position spelled out therein, non-compliance of Rule 8 of the Rules framed under Act would not vitiate the proceedings for declaration of vacancy if occupant had opportunity to participate in the proceedings and to file affidavits etc.
In the instant case it is admitted on record that after the report was submitted by the Rent Control Inspector the petitioner had appeared in the proceedings and had filed his affidavit also. However, he failed to take any objection against the report of the Rent Control Inspector. Thus, in such a situation it cannot be said that any prejudice was caused to him on account of non-service of the notice about the inspection though in fact the report of the Rent Control Inspector reveals that a notice was actually issued and served upon him. **Kripa**

Shankar Gupta V. Adarsh Kumar Agrawal and another, 2016 (118) ALR 299

Interpretation of Statute

Rule of- Subordinate legislation will not regulate the provision of the Act

`In court's considered opinion, any subordinate legislation will not regulate the provisions of the Act or over ride the categorical provisions of the Act itself. Rules are framed to aid in the implementation of the provisions contained in the Act and are not meant to over ride the provisions of the Act itself. **Pradeep Kumar Dixit V. Addl. Commissioner (Admin.) Aligarh Division, Aligarh and others, 2016 (132) RD 255**

Definition clause- use of words 'means' and 'includes'- Interpretation of

It is well known principle of interpretation that the legislature uses the words "means" where it wants to exhaust the significance of the term defined and the word "includes" where it intends that while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. **Shakil Ahmad and another V. State of Uttar Pradesh and others, 2016 (5) ALJ 231**

Land Acquisition Act

Ss. 4(1) and 23- Market value of acquired land has to be assessed as on date of acquisition but market value has to be determined on principles stated in Sec. 23 (1) of the above Act

The market value of the acquired land has to be determined as on the date of acquisition, i.e., 16.09.1976. Even the High Court cannot determine the market value ignoring the principles of

determination as provided in section 23(1) of the Act. High Court can enhance the compensation but the enhancement must be within the four corners of provision of section 23 of the Act and based on evidences on record. **Jagmal and others V. State of U.P. and another, 2016 (117) ALR 331**

S. 54- Appeal against order of refusal to entertain the reference- Maintainability of

Now the last question is whether the present appeal under Section 54 of the Act against the order of the refusal to entertain reference is maintainable. In Bhagwan Das (supra), a question came up for consideration before the Apex Court as to whether an appeal would lie under Section 54 of the Act against the order or award refusing to make a reference. It was held that the orders of Collector are merely acts of a statutory authority in exercise of statutory functions and are not adjudicatory in nature. Such orders are not awards. The Land Acquisition Collector is not a Court nor his order, an award of the Court. Section 54 of the Land Acquisition Act does not provide for appeals against the awards or orders of the Collector. Thus the order of the Collector refusing to refer a claim for making reference is not appealable under Section 54 of the Act.

Considering this principle, it may be noted that in the present case the Collector in fact did not make reference after examination of the application on the question of limitation prescribed for making it under the Act. The reference was made subject to the question of limitation which was required to be examined by the Collector himself. The Civil Court on such a reference was required to be examined further as to whether the reference was made strictly applying the terms and conditions of Section 18. **Dhani Ram V. State of U.P. and another, 2016 (117) ALR 673**

Limitation Act

Limitation –Principles underlying provisions of

Legal position is explicitly clear that the principles underlying provisions of limitation are based on public policy aiming that justice should be furnished to all the parties and hardship or injustice may be relevant consideration in applying the discretion for condoning the delay. But such hardship of both the parties should be considered. In condoning the delay beyond period of limitation provided by the statute there must be cogent and satisfactory reasons. **Sukumar Mitra V. Smt. Kavita Gunnani, 2016 (132) RD 501**

S. 3- Bar of Limitation –Applicability of

In this case, the trial court has accordingly found that the suit, as instituted by the plaintiff, was barred by the provisions of the Limitation Act and more specifically section 3 thereof, the plaint was liable to be rejected under Order VII, Rule 11 of the Code of Civil Procedure.

But in the facts of the case, court find that from the plaint allegations, the suit as presented by the appellant could not be demonstrated to be within the period of limitation prescribed under the Limitation Act. **Sushant Kuamr and Anr. V. Rajeswar and Ors. 2016 (5) ALJ 174**

Ss. 5 and 29 (2)- Land Acquisition, Sec. 18- Reference- Limitation Act does not apply to proceeding U/s 18 (1) of the Land Acquisition Act

As the Limitation Act does not apply in a proceeding under Section 18(1) and, therefore, the plea of the appellant for condonation of delay in making the reference cannot be accepted. The reference court though has rejected the application for making reference being grossly beyond the time with the finding that there was no sufficient

reason to condone the delay by taking recourse to Sections 5 and 14 of the Limitation Act after detailed discussion of the material on record. However, in view of the above discussion the said finding was not required as the settled position is that the Limitation Act does not apply in such proceedings. **Sushant Kumar and Anr. V. Rajeswar and Ors. 2016 (5) ALJ 174**

S.5 –Delay condonation application filed in support of restoration application- Consideration of- In absence of any reasonable or sufficient ground the delay condonation application rejected

The legal position is explicitly clear that the principles underlying provisions of limitation are based on public policy aiming that justice should be furnished to all the parties and hardship or injustice may be relevant consideration in applying the discretion for condoing the dely. But such hardship of both the parties should be considered. In condoning the delay beyond period of limitation provided by the statute there must be cogent and satisfactory reasons. Such reasons are lacking in present matter. **Sukumar Mitra V. Smt. Kavita Gunnani, 2016 (2) ARC 817**

<u>Motor Vehicles Act</u>

Ss. 3, 14, 149- Central Motor Vehicles Rules- Rules 9 and 132- Driving Licence, -Validity of –Requirement of having valid licence is a statutory requirement and absence of a valid licence is a statutory defence available to the insurer

A conjoint reading of the aforesaid provisions definitely indicates that in case any vehicle is to be plied on a public place or any other place, to make the insurer liable to pay the compensation under the policy of insurance, statutory requirements have to be necessarily fulfilled, and these requirements are more strict in the case

of a transport vehicle. Needless to say, that requirement of having valid licence is a statutory requirement and absence of valid licence is a statutory defence available to the insurance company.

Thus, if the statutory requirements as noted above are ignored or diluted on the basis of fact of the case or the factum of accident, say that the driver of the vehicle was admittedly negligent and the insurance company is not permitted to raise the defence that such statutory requirements were not fulfilled, it would amount to nullifying the limited protection granted to the insurance company under Section 149 of the Act of 1988.

In such view of the matter, in my opinion, Section 149 provides for statutory protection available to the company, which clearly shows that no sum shall be payable by the insurer under sub-section (1) in respect of any judgement or award and the insurer can defend the action on the ground as provided under Section 149 which also includes that it can avoid its liability if the person driving the vehicle was not duly licensed. For this purpose, needless to say that the requirement of Section 3 and Section 14 of the Act of 1988 and Rule 9 and Rule 132 (5) of the Central Motor Vehicles Rules, 1989, which have already been noted above and need no repetition, are to be fulfilled or complied with for holding a valid licence. **Gautam Filling Station V. Munnu Singh and another, 2016 (117) ALR 322**

<u>Negotiable Instruments Act</u>

S. 138-Ingrediants of section- Explained

When ingredients of Section 138 namely (a) accused drew the cheque on an account maintained by him (b) cheque issued for the discharge of debt/liability (c) cheques were presented within six months (d) cheques returned unpaid for insufficiency of funds and stop payment (e) notice was given but no payment was made, stood proved and defence having not led any evidence, conviction should

have been recorded. **Udai Shanker Mishra V. Om Prakash Shukla, 2016 (34) LCD 1691**

Payment of Gratuity Act

S. 4 (6)- Provision- Scope –Withholding of –factors to be considered

While examining the extract of the aforesaid section, it contemplates the following conditions on which Gratuity can be withheld (a) if the order of termination is based upon any act, willful omission or negligence causing any damage or loss to the property belonging to the employer; (b) if the services of an employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; (c) if the employee is found guilty of moral turpitude provided that said offence has been committed during tenure of his service career. These are the only conditions which empowers the respondents to withhold the Gratuity of the petitioner. **Uma Prasad Pandey V. State of U.P. and others, 2016 (34) LCD 2094**

Practice and Procedure

Plea of adverse possession between co-owners-Tenability

There must be evidence of open assertion of Hostile title coupled with exclusive passion and enjoyment by one of them to the knowledge of the other so as to constitute ouster. **Nagabhushanammal (D) by LRs V. Chandikeswaralingam, 2016 ARC 8**

Fraud and misrepresentation could not be assumed behind the lack of affected person

The case of the petitioners was not an absolute defenceless case and was a statable one. It is quite possible that the authority capable of exercising jurisdiction in such matters would have arrived

at a conclusion that the proceedings were voidable and not absolutely void ab initio. This was possible only if the parties to the transaction were put to notice. Thus, to treat the entire proceedings to be invalid or a complete nullity does not appear to be a correct line of reasoning without any enquiry by the competent authority. The presumption of the continuous possession and the revenue records standing in the name of the petitioners for 20 years long was sufficient to at least have a bearing on the issue for which the petitioners were entitled to a notice. There is a distinction between invalid or irregular proceedings and fake proceedings. The Sub-Divisional Magistrate who passed the impugned order does not appear to have appreciated this distinction and consequently, the learned Single Judge does not appear to be correct in treating the said order to be a valid exercise of power. If it was a case of fraud or misrepresentation or fake documents, then fraud and misrepresentation are not phrases of ornament. They entail serious consequences and they take away certain rights which a person claims to have vested in him by virtue of any statutory act. It is not the case of the State that fraud was practiced by the petitioners to their advantage nor there is any evidence indicated in the impugned orders to that effect. It is also not the case established that the petitioners had misrepresented any fact before the Sub-Divisional Magistrate or were otherwise guilty of any constructive fraud in obtaining the approval on 2.7.1984. Such an issue at a belated stage of 20 years therefore could not have been treated to be an established case of fraud so as to treat the entire proceedings to be a nullity or non est. The documents evidencing the allotment namely the resolution, the approval and the forms have been indicated as doubtful (lafnX+/k) by the State.

In the present case, the petitioners were claiming their Bhumidhari tenure rights which they claim to have acquired under the 1950 Act on the basis of such proceedings which they allege to be

valid. Thus, fraud and misrepresentation could not have been assumed behind their back. The learned Single Judge was therefore not right in treating the proceedings to be a nullity on the mere assumption that the entire proceedings were fraudulent. Court may put on record that even the Sub-Divisional Magistrate while accepting the report dated 11.5.2016 has used the word 'doubtful' (lafnX+/k). In such circumstances, to treat the entire proceedings to be a nullity was not the correct approach and court does not find ourselves in agreement with the opinion of the learned Single on this issue. **Noor Mohd. V. Addl. Commissioner, Meerut Division, Meerut and others, 2016 (132) RD 126**

Constitution of India , Art 311- Disciplinary proceedings –when vitiated?

From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii)If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii)In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv)On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all concerned materials relied on by the enquiry officer to enable him to offer his views, if any."

On the parameters of the aforesaid provision and the judgments cited above the facts of the present case clearly reflect that this is a case of virtually no enquiry, inasmuch as, accepted position is that charge-sheet in question has been served upon petitioner on 31st March, 1994 and petitioner submitted his reply on 30th April, 1994 and the Enquiry Officer has submitted his report on 5th December, 1994 and in between at no point of time Enquiry Officer has ever fixed any date, time or place for holding of the enquiry. The report of the Enquiry Officer dated 5th December, 1994 clearly reflects that he has taken into account the charges, which have been so leveled against the petitioner, the reply submitted by him to the charge-sheet, and then based on the reply so submitted, has formed opinion that petitioner is guilty.

On the parameter of the judgement quoted above would go to show that entire proceeding initiated in the present case is perse, and vitiated on account of the fact that charge sheet has been issued and detailed reply has been submitted and thereafter enquiry officer without fixing date, time and place, unilaterally submitted enquiry report. Case in hand is a case wherein no enquiry has been conducted virtually by Enquiry Officer.

Consequently, in the facts of the case, the order dated 18.07.2012 and the order dated 13.12.2012 of its affirmance in Appeal are hereby quashed and set-aside on the ground that enquiry was not at all conducted in the present case. Passing of this order will not at all come in the way of Respondents to enquire into the charges after providing opportunity of hearing to petitioner. **Harikesh Rai V. State of U.P. and Ors. 2016 (4) ALJ 484**

Mere quoting a wrong section would not by itself vitiate the order passed by competent authority

Merely because a wrong section has been mention in my considered opinion, the same would not, by itself, vitiated the order passed by the Sub-Divisional Magistrate. **Baijanath (Dead) and others V. State of U.P. and others, 2016 (132) RD 294**

Finding on no evidence is not sustainable

In this case, having gone through the record, Court find that there is nothing to show that Smt. Koshili was minor in 1950. Neither her date of birth has been stated in any of the documents or in the pleadings before revenue authorities not there is otherwise any material on record to show that the she was minor in 1950. When enquired from learned counsel appearing for respondents 3 to 5 as to how CO and DDC could record a finding that Smt. Koshili was minor in 1950, when she deposited ten times lagan, he could place nothing before this Court to support the aforesaid finding. Apparently, observations and findings of CO as well as DDC in this regard are based on no material and no evidence, hence cannot sustain. **Jangal Singh (Dead) Through L.Rs. V. Deputy Director of Consolidation, Deoria and others, 2016 (132) RD 39**

<u>Provincial Small Cause Courts Act</u>

S. 15- Eviction suit- Consideration for taking cognizance

In this case, court has held that before taking cognizance of a suit the Court of Small Causes for any other Court for that matter is required to satisfy itself regarding its jurisdiction even without there being an objection of the defendant in this regard. The defendant who is petitioner herein, however, has specifically raised an objection regarding the jurisdiction of the Court of Small Causes to entertain the

suit for eviction for the plea taken in the plaint and the relief sought therein. It is obligatory upon the Court of Small Causes to examine whether it has jurisdiction to entertain the said suit. **M/s. Fair Growth Exports Private Ltd. V. Sanjeev Kandhari and others, 2016 (5) ALJ 109**

S. 25- Limitation Act, Section 5- Revision filed after 4 and half year by landlord- Tenant never disputed such delay and contested petition on merits –Resultant order for condoning delay held proper

The revision under Section 25 of Provincial Small Causes Act was filed in the year 2015 with an application under Section 5 of the Limitation Act. The said application was allowed by order Dated 4.5.2015 and ultimately the revision was allowed on 17.11.2015. The judgment and order dated 13.5.2009 passed by the Judge, Small Causes Court in Original Suit No. 67 of 1993 was set aside and the matter was remanded back to the court below with the direction to decide afresh.

The order dated 4.5.2015 in allowing Section 5 application and in entertaining Revision against the judgment and decree dated 13.5.2009 though challenged in the present petition but there is no explanation as to why the petitioner did not challenge this order earlier. A perusal of the order dated 17-11-2015 goes to show that the revision was contested on merits by the petitioner.

In view thereof, this Court in its supervisory jurisdiction under Article 227 of the Constitution of India is not inclined to enter into the validity of the order dated 4.5.2015 in allowing section 5 application to entertain the revision for decision on merits. **Jugal Kishore Pandey V. Additional District Judge, Court No. 5, Gorakhpur and others, 2016 (4) ALJ 115**

S. 25- Ejectment suit- Arrears of rent, Rent Act not applicable etc.- Suit decreed –Validity of

The opposite party / landlord filed a suit for eviction, arrears of rent etc against the revisionist/ tenant in respect of the shop in dispute alleging the same to be a new construction of 1987; the revisionist is a tenant @ Rs. 3300/- per month, the provisions of the U.P. Act XIII of 1972 are not applicable; rent stands paid only upto February 2011, whereas rental amounting to Rs.13,200/-, i.e, of four months from 1.3.2011 to 30.6.2011 remains unpaid despite repeated demands, followed by a quit notice dated 4.7.2011, which stood served upon the revisionist on 5.7.2011, pursuant thereto, the revisionist on 22.7.2011 deposited the rent for the period 1.3.2011 to 31.7.2011, which was received by the opposite party/ landlord under protest. He thus alleged that there was no waiver of the notice dated 4.7.2011 sent by him. It was finally alleged that the said shop can easily earn a rental of Rs.6000/- per month, i.e, he also claimed damages @ Rs.200/- per day.

The court below after considering the pleadings/ evidence held that the shop in question being assessed to first municipal assessment in the year 1987 and also in view of the fact that the rate of rent being more than Rs.2000/-, i.e, Rs.3300/- would make the building go outside the purview of the U.P. Act XIII of 1972, decreed the suit as above. It further held that in view of the admitted position in the written statement the service of the quit notice stood admitted to the revisionist/tenant. **Mukesh Kant Chaturvedi V. Anil Kumar Gupta, 2016 (2) ARC 893**

S. 25- Non- recording of any specific finding with regard to service of notice –Effect of

It is true that the plaintiff respondent pleaded issuance of the aforesaid notice and its service but the service was denied by the

defendant revisionist in the written statement. The mere filing of the copy of the notice, its receipt of dispatched and acknowledgement is not sufficient to prove that the notice was served upon the defendant revisionist.

The court below has not recorded any finding regarding the service of notice.

In the absence of any finding in this regard the court below committed jurisdictional error in decreeing the suit by holding that the tenancy of the defendant revisionist stood determined by the said notice. **Babloo Pandit @ Ajay Sharma V. Manohar Lal Gera, 2016 (3) ARC 149**

Registration Act

Ss. 17 and 49 –Registration of Document –Consideration of

Under section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered, Under Section 49 or the Registration Act no document required by section 17 or by any provision or the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under section 91 of the Evidence Act. **Subrya M.N. V. Vittala M.N. and others, 2016 (118) ALR 245**

Right to fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

S. 105 (3)- Fourth Schedule- Right to claim compensation and its quantum under the above Act

The petitioners, therefore, have a full right to contest their claim with regard to their entitlement of a free and fair compensation

in accordance with the provisions of 2013 Act keeping in view the ordinances and the notifications referred to herein above. It is open to the petitioners, therefore, to raise their plea with regard to any such claim which may be admissible and permissible under the aforesaid provisions before the competent authority or the Court where any such issue of enhancement of compensation or claim of fair compensation has been raised or is pending consideration in relation to the acquisition of the land of the petitioners. This issue, therefore, will have to be decided by the appropriate forum and the petitioners will have full right to raise this issue appropriately which the competent forum is obliged to decide in law. **Triveni Prasad & 6 Ors. V. Union Of India Thru. Secy. Ministry Of Surface Transport,, 2016 (132) RD 458**

Service Law

Employment- Withholding of gratuity due to pendency of criminal case Legality of

The legal position which emerges is that there is a specific provision contained in Regulation 919-A (3) under which payment of gratuity is inadmissible until the conclusion of a departmental or judicial proceeding or as the case may be, an inquiry by the Administrative Tribunal. This is a temporary non payment of gratuity which cannot be termed as a final withholding or withdrawing the gratuity as is permissible under Regulation 351-A. Thus, the provisions of Regulation 351-A apply where such proceedings have been concluded and a determination has been made therein, whereas, the Regulation 351-AA and Regulation 919-A apply where such proceedings are pending. While under the former provision there is a final withholding or withdrawing of pension or gratuity, there is only a temporary non payment of the said amounts under the latter provisions. However, the fact that there is a provision as aforesaid

contained in Regulation 315-A and 919-A does not mean that in every case the authority competent has to necessarily refuse payment of gratuity till the conclusion of such proceedings blindly i.e. without applying his mind to the facts of the case and seriousness of the offence and role of the employee therein, as, has been held in Faini Singh's case (supra). In a given case a minor offence may not form a valid ground for non payment of regular pension or gratuity under the said provisions.

As there is a provision for non payment of gratuity during pendency of a criminal case, it can not be said that the impugned action has been taken without due process of law nor any violation for Article 300-A of the Constitution of India can be said to have occurred.

As far as the contention of the petitioner that the Superintendent of Police has passed the order mechanically without considering the facts of the case, is concerned, the seriousness of an offence under Section 7/13 of the Prevention of Corruption, Act with which he has been charged, is self evident. The petitioner who is a government servant is alleged to have demanded/accepted illegal gratification, therefore, even if the impugned order does not contain detailed reasons, the offence being a grave one, the impugned order cannot be set-aside on this ground considering the facts of the present case. **Surendra Pal V. State of U.P. and others, 2016 (4) AWC 3746**

Promotion –Challenge to promotion order on belated stage – Challenge to appointment and promotion cannot be entertained at belated stage and applicability of constructive res-judicata.

The principles of constructive res-judicata will apply in the present case, the controversy has been set at rest in the earlier judgment, therefore, the same cannot be reopened by means of these

writ petitions. Apart from it, challenge to the appointment and promotion cannot be entertained at such a belated stage.

A person should approach the Court well within time and if he does not come to the court well within time and at the earliest reasonable possible opportunity and if there is inordinate delay in making the motion for a writ, the Court will be justified in not exercising the discretionary jurisdiction

Court, therefore, find that on both the counts, either in respect of challenging the seniority or in respect of challenging the appointment, petitioners have failed to approach the Court promptly as contemplated under law and, therefore, their claims at such a belated stage cannot be considered and neither the seniority, which has been settled, can be unsettled at such a bleated stage. **Ram Avadh and another V. State of U.P. through SECY. Dept. of Culture, Lucknow and others, 2016 (118) ALR 317**

Constitution of India, Art. 16- withholding of retiral dues on ground of pendency of criminal proceedings would be improper

Right to receive pension was recognized as right to property by the Constitution Bench Judgment of Hon'ble Supreme Court in Deokinandan Prasad vs. State of Bihar, 1971 2 SCC 330 :AIR 1971 SC 1409, paras 28 to 34

The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh V. Union of India, 1962 AIR(P&H) 503 It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension.

In State of West Bengal Vs. Haresh C. Banerjee and Ors., 2006 7 SCC 651, Apex Court recognized that even when, after the repeal of

Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty -Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum- Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by the Supreme Court.

In this matter the petitioner retired on 30.9.2000. His retiral dues were not paid on the ground that a criminal case was pending against him. He is receiving provisional pension with effect from January, 2003. On 13.8.2009 the petitioner was acquitted from the said criminal case. The said acquittal order was challenged in appeal which was dismissed on 17.5.2012. By the order dated 27.7.2011 the Additional Director (Treasury and Pension), Gorakhpur released certain amounts and withheld the gratuity in question. The District Magistrate, Gorakhpur issued an order dated 15.10.2011 for payment of provident fund. The petitioner challenged the aforesaid order dated 27.7.2011 in Writ A No.19693 of 2013 and this Court vide order dated 1.8.2014 allowed the writ petition and quashed the order dated 27.7.2011. The respondent no.1 was directed for payment of gratuity amount alongwith interest @ 9% from 1.1.2011. The respondents did not comply the said order and the petitioner has not been paid gratuity amount till date.

Accordingly, in view of the analysis and discussions made hereinabove, the writ petition is disposed of with direction to the respondents for payment of gratuity amount of the petitioner alongwith 9% interest with effect from 1.1.2011, as already directed by this Court vide order dated 1.8.2014 passed in Writ A No.19693 of

2012, **Amrit Lal V. Chief Elecation Officer, State of U.P. and others, 2016 (4) ALJ 30**

Constitution of India, Art. 16- Retiral benefit –Entitlement of – When not warranted

The Supreme Court in Vijay S. Sathaye V. Indian Airlines Ltd. AIR 2014 SC (supp) 514 held that in the case of abandonment, the employee ceases to be in service and is liable to be relinquished from his post. Fundamental Rule 18 in fact indicates that the services of a Government servant would come to an end in case of continuous absence of five year.

As the above extracts from the judgment would indicate the Division Bench has proceeded to hold that if the absence is continuous and for gice year or more abandonment of service and consequent cessation of employment has to be accepted. The rule clearly seems to indicate that in case of absence of five years or more, the cessation of employment is automatic and the presumption of abandonment is immediately attracted. At this stage, as the Division Bench has held, the holding of an enquiry is not necessary. Fundamental Rule 18, in the submission of the learned counsel for the appellant, would clearly be attracted to the services of the original petitioner. If the appellant be correct in this submission then and in that case the requirement of a separate provision in the service rules for automatic termination would not arise. **Dy. Director of Educatin (Secondary) and others V. Smt. Jyoti Yadav and another, 2016 (4) ALJ 27**

Article, 235- Removal from service- Allegations against Judicial Officer of granting bail in double murder case in violation of all judicial norms and propriety- Judicial officer afforded reasonable opportunity of hearing- conduct of judicial officer has much high standards of integrity, hence removal was proper

Disciplinary matters against Higher Judicial Officers by virtue of Rule 34 of the Higher Judicial Service Rules, 1975 are dealt with under U.P. Government Servants Discipline and Appeal Rules, 1999. Rule 3 of the said rules contemplates punishments which are inflicted on a delinquent officer who is found to have indulged into any misconduct. There is no dispute that the alleged charges do not constitute a misconduct. Once the misconduct was found to be proved, whether the doctrine of proportionality comes to the aid of delinquent officer or not is the question that requires consideration in the context of argument raised by the petitioner's counsel. The statutory rules authorise the disciplinary authority to inflict any major or minor punishment which are enumerated under Rule 3 of the Discipline and Appeal Rules, 1999. It is perhaps the variety of punishments enumerated in the rule that has led to the emergence of the doctrine of proportionality and the courts have opined that where the punishment is shockingly disproportionate to the gravity of the charges, a lenient view may be taken.

The case before us is of a judicial officer whose conduct is bound to match the highest standards of integrity in normal course. The duty of a judge is like holding a torch in the dark which has to glow not only to show path to others but must be utilised to find one's own path as well. The first charge levelled in the first charge sheet is seriously grave which stood proved against the charged officer. In the light of material placed on record we find that the charged officer has taken conflicting stands in his reply to the findings on the first enquiry report and he has attempted to justify the bail order to have been passed in normal course. In court view, decision taken by the Full Court does not suffer from any perversity. **Satya Pal Narang V. State of U.P. & Ors. 2016 (4) ALJ 607**

Constitution of India, Arts, 311, 309 Civil Services Regulation …… 351, 351A –Recovery of dues- in absence of sanction from Governor recovery cannot be made from retiral dues of Civil servant

Admittedly, on the record, there is no denial of the fact that no sanction of the Governor was obtained in terms of the proviso to Regulation 351-A. It is therefore, not the case of the respondents that the departmental proceedings were continued or were instituted with the sanction of the Governor either before retirement or during re-employment. The sequence of the events including the issuance of show cause notice on 29 January 2005, the remit by this Court and the final order passed by the respondents on 27 January 2006 clearly establish that till 31 January 2005 no finding of guilt or grave misconduct stood finally recorded against the petitioner. As noticed above, the communication dated 29 January 2005 was only a show cause notice and not a determination of misconduct if any committed by the petitioner.

In the above state of the record, this Court finds that the petitioner having retired on 31 January 2005 there was complete absence of any sanction for continuation of proceedings against him. The recovery of the alleged loss of Rs. 8 lacs approximately could have been effected only if a finding of guilt and grave misconduct had come to be recorded against the petitioner prior to 31 January 2005. In absence thereof, the orders of recovery and the notice issued in this regard cannot be sustained. **Satya Narayan Vishwakarma V. State Of U.P. And Others 2016 (4) ALJ 497**

<u>Specific Relief Act</u>

S. 20 –Discretion- To decree suit for specific performance- Condition enumerated

Section 20(2) of the Specific Relief Act had provided certain conditions, as quoted above, in which court may properly exercise discretion not to decree specific performance. Considering those conditions in light of present case it is found that (a) the terms of the contract or the conduct of the parties at the time of entering into the contract was not such could give the plaintiff an unfair advantage over the defendant, because the plaintiff had already received about 41% of sale consideration, and it would be the defendant whould get unfair advantage over plaintiff-respondent if no relief of specific performance is granted; (b) in present matter there appeared nothing which the defendant-respondent could not foresee, and instead of defendant it would be the plaintiff- respondent who would suffer hardship by non-performance who had paid big chunk the price of property, and when in present age of boom of property prices would get meager amount of actual price of said land, even if the money is refunded with interest; and (c) the defendant-appellant, after receiving of almost 40% of sale consideration, had not entered into the contract under any circumstances which makes it inequitable to enforce specific performance. **Kedar Nath Singh (Since Deceased) Thru' His L.Rs. 2016 (3) ARC 110**

<u>Statutory Provisions</u>

English translation of Nyaya Anubhag-2 (Adhinastha Nyayalay), Noti. No. 09/2016/1004/VII-Nyaya-2-2016-202(24)-76, Dated July 4, 2016, published in the U.P. Gazette, Extra., Part 4, Section (Kha), Dated 4th July, 2016, pp.2-3

In exercise of the powers under Section 4, 13 and sub-section (1) of Section 14 of the Bengal, Agra and Assam Civil Courts Act, 1887 (Act No. IX of 1887) and Section 5 of the Provincial Small

Causes Courts Act, 1887 (Act No. IX of 1887) read with Section 21 of the General Clauses Act, 1897 (Act No. 10 of 1897), the Government is consultation with the High Court of Judicature at Allahabad is pleased to notify the court of Civil Judges (Senior Division) at Tehsil Bansgaon in district Gorakhpur with effect from the date of taking over charge by the Presiding Officer respective court and to fix the local limits of Jurisdiction and the place of sitting of such court and to make the following amendment in the Schedule appended to Notification No. A-1104/VII-710/53, Dated April 12, 1956 as amended from time to time.

Amendment.

In the Schedule to the aforesaid notification-

(1) for the existing entries at Serial No. 109, the following entries shall be substituted, namely-

Sl. No.	Name of Court	Revenue areas forming limits of Jurisdiction	Place or place of sittings	Combined Office	Title
1	2	3	4	5	6
109	Civil Judge (S.D.) Gorakhpur	Whole revenue area of district Gorakhpur excluding the revenue area of Tehsil	Gorakhpur Headquarter	-	Civil Judge (S.D.) Gorakhapur

		Bansgaon in the district Gorakhpur			

(2) after entries at Serial No. 109, the following new entries at Serial No. 109-A shall columnwise be inserted, namely-

Sl. No.	Name of Court	Revenue areas forming limits of Jurisdiction	Place or place of sittings	Combined Office	Title
1	2	3	4	5	6
109-A	Civil Judge (S.D.) Gorakhpur	Whole revenue area Tehsil Bansgaon of district Gorakhpur	Gorakhpur Headquarter	-	Civil Judge (S.D.) Bansgaon District Gorakhapur

<u>Transfer of Property Act</u>

Transfer- Void ab initio- No benefit can accrue in favour of the person by means of a transfer which is void ab ignition

In the case at hand, the finding is that the vendor, belonging to the Scheduled Caste, executed a sale deed in favour of the petitioner who belongs to the OBC Category, as already noticed above. Such a transfer made without the prior permission of the Collector is necessarily a void transfer in view of section 166 of the Act. A

transfer which is void, necessarily means that it was void ab-initio i.e. void from its inception. It is settled law that a void transaction can be ignored even in collateral proceedings. Besides, no benefit can accrue in favour of the petitioner by means of a transfer, which is void ab initio. **Chhotey Lal V. State of U.P. through Secretary revenue Department, Lucknow and others , 2016 (132) RD 8**

Fraud and misrepresentation could not be assumed behind the lack of affected person

The case of the petitioners was not an absolute defenceless case and was a statable one. It is quite possible that the authority capable of exercising jurisdiction in such matters would have arrived at a conclusion that the proceedings were voidable and not absolutely void ab initio. This was possible only if the parties to the transaction were put to notice. Thus, to treat the entire proceedings to be invalid or a complete nullity does not appear to be a correct line of reasoning without any enquiry by the competent authority. The presumption of the continuous possession and the revenue records standing in the name of the petitioners for 20 years long was sufficient to at least have a bearing on the issue for which the petitioners were entitled to a notice. There is a distinction between invalid or irregular proceedings and fake proceedings. The Sub-Divisional Magistrate who passed the impugned order does not appear to have appreciated this distinction and consequently, the learned Single Judge does not appear to be correct in treating the said order to be a valid exercise of power. If it was a case of fraud or misrepresentation or fake documents, then fraud and misrepresentation are not phrases of ornament. They entail serious consequences and they take away certain rights which a person claims to have vested in him by virtue of any statutory act. It is not the case of the State that fraud was practiced by the petitioners to their advantage nor there is any evidence indicated in the impugned

orders to that effect. It is also not the case established that the petitioners had misrepresented any fact before the Sub-Divisional Magistrate or were otherwise guilty of any constructive fraud in obtaining the approval on 2.7.1984. Such an issue at a belated stage of 20 years therefore could not have been treated to be an established case of fraud so as to treat the entire proceedings to be a nullity or non est. The documents evidencing the allotment namely the resolution, the approval and the forms have been indicated as doubtful (lafnX+/k) by the State.

In the present case, the petitioners were claiming their Bhumidhari tenure rights which they claim to have acquired under the 1950 Act on the basis of such proceedings which they allege to be valid. Thus, fraud and misrepresentation could not have been assumed behind their back. The learned Single Judge was therefore not right in treating the proceedings to be a nullity on the mere assumption that the entire proceedings were fraudulent. Court may put on record that even the Sub-Divisional Magistrate while accepting the report dated 11.5.2016 has used the word 'doubtful' (lafnX+/k). In such circumstances, to treat the entire proceedings to be a nullity was not the correct approach and court does not find ourselves in agreement with the opinion of the learned Single on this issue. **Noor Mohd. V. Addl. Commissioner, Meerut Division, Meerut and others, 2016 (132) RD 126**

S 52- Lis pendens transferee is necessary and proper party in suit for specific performance

What emerge from the aforesaid decisions of the Supreme Court are: (i) a subsequent purchaser is a necessary and proper party; (ii) after sale, the owner can lose interest in litigation, thus it can adversely affect the right of the subsequent purchaser; (iii) Section 52 of the Transfer of Property Act does not prohibit the bonafide transfer

of the property, it only puts a rider that the subsequent purchaser shall abide the result of the suit; and, (iv) the Court has to be prima facie satisfied while exercising its discretion to allow the application, and the other aspects can be considered at the time of hearing.

In view of the above principles, Court is of the view that the trial Court without considering the law on the subject has summarily rejected the application of the applicants for impleadment without due application of mind.

In view of the discussions made above, Court is of the considered view that the order of the trial Court dated 23rd April, 2003 rejecting the application of the applicants for their impleadment and recall of the order dated 02nd April, 2003 to proceed exparte is illegal and is liable to be set aside. Accordingly, it is set aside. **Smt. Jamila Khatoon V. Ram Niwas Gupta, Sharanpur 2016 (4) ALJ 673**

S. 54 –Unregistered agreement for sale does not create any interest on such property

As per section 54 of the Transfer of Property Act, 1882, contract for the sale of immovable property does not create any interest in or charge on such property agreed to sell or purchased and agreement to sell can be made only by a registered instrument.

Since alleged agreement to sell is not unregistered instrument and it does not create right or charge in favour of the petitioner over the property, in question, therefore, suit for permanent prohibitory injunction, on the basis of it, was not maintainable.

S. 55(1)- Advantage of- Advantage of section 55(1) of the Act is not available to the auction purchases

It is true that as per section 55 (1) of the Transfer of Property Act, the seller is bound to disclose to the buyer any material defect in

the property or in the seller's title thereto; and to produce to the buyer on his request for examination all documents of title relating to the property; and to answer to the best of his information all relevant questions put to him by the buyer.

In the present case, bidder/ buyer has not asked the bank to make available title deeds of the premises in question for inspection before submission of the bid; not has pointed out any irregularity before submitting the bid and before removing the plant and machinery there from and the property was sold by the bank on "AS IS WHERE IS" and "AS IS WHAT IS" basis. Therefore, the petitioner seems to have submitted his bid with open eyes.

In the peculiar facts, as narrated hereinabove, compliance of section 55 (1) of the Transfer of Property Act was made by the Bank. Since, the petitioner has failed to deposit balance Rs. Twenty Lakhs of the bid amount within time, therefore, bank has rightly forfeited the money deposited by the buyer/petitioner. **M/s. Seth Industries V. M/s. Vijaya Bank, 2016 (117) ALR 38**

S. 58- Limitation Act, S. 54- Period of Limitation to redeem or recover possession of immovable property- Determination of

Though the point of limitation can be raised at any stage and if the suit is barred by time no relief can be granted to the plaintiffs, but the arguments of learned counsel for the appellants that the period of limitation was 30 years from the date of execution of mortgage deed i.e., 20.2.1947 and expired on 19.2.1977 is again baseless, wrong and incorrect. Undisputedly, Article 61 of Limitation Act, 1963 prescribes that suit by a mortgagor to redeem or recover possession of immovable property mortgaged, may be filed within a period of 30 years, from the date when the right to redeem or recover possession accrues. From above provision it is crystal clear that period of limitation of 30 years shall commence from the date when right to redeem or recover possession accrues or cause of action to file suit

arises and not from the date of execution of mortgage deed. **M/s. Seth Industries V. M/s. Vijaya Bank, 2016 (117) ALR 38**

U.P. Consolidation of Holding Act

Consolidation operation- Any land which is forest land cannot be subject matter of consolidation proceeding

Any and which his forest land cannot be the subject-matter of consolidation operations and therefore a plot recorded as forest land cannot be allotted in the chak of the petitioner. For this reason alone, the mandamus that has been brought for by the petitioner is not liable to be granted. **Mahaveer Singh V. D.D.C. and others etc., 2016 (132) RD 305**

U.P. Land Revenue Act

Scope of- Explained

In the facts of the case in hand it is not being disputed that the parties were recorded in the revenue record during consolidation proceedings. Upon close of consolidation proceedings in terms of section 52, of Act, 1953, any proceedings in view of sub-section (2) of section 52, if not pending, then finality would be attached to the findings recorded during consolidation proceedings. A finding recorded by a Consolidation Court cannot be questioned either before the Civil Court or Revenue Court in view of section 49. Only clerical corrections are permissible, names recorded in revenue record, therefore, could not have been directed to be deleted under Rule 109, such an order is without jurisdiction, the revenue record attaining finality during consolidation proceedings, therefore, could not be corrected by the revenue authorities under Land Revenue Act, as long

as, the sale-deed subsists and is not declared void by the Competent Court. **Sanjay Sharma and others V. Kashi Prasad and others, 2016 (117) ALR, 211**

U.P. Municipalities Act

Ss. 141-B, 145 and 144- Power to pass assessment order of tax cannot be directly made by the chairman of the Nagar Panchayat

Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 31.12.2014 passed by District Magistrate, Kanpur Nagar and order dated 12.8.2011 passed by the Chairman, Nagar Panchayat, Bithoor, Kanpur Nagar. Vide order dated 12.8.2011, the Chairman, Nagar Panchayat has made assessment of a house; whereas vide order dated 31.12.2014, the appeal filed by the petitioner under section 160 of the U.P. Municipalities Act, 1916 (in short, 'the Act') against the order dated 12.8.2011 has been dismissed by the Collector.

While assailing the impugned orders, learned counsel for the petitioner submits that the Collector has erred in not considering the procedural part of the matter as the Chairman, Nagar Panchayat has no power to pass assessment order; that too, on the instance of Member of the Municipality (sabhasad). Learned counsel for the petitioner submits that the power of assessment of tax is vested with the Executive Officer or the Officer authorized by him in this behalf in accordance with the provisions contained under sections 141-B, 142, 145 and 144 of the Act, whereas in this case, the tax has been assessed only on an application by a unconcerned person, to the Chairman, Nagar Panchayat considering the report of member of the Nagar Panchayat.

So far as the legal submission of learned counsel for the petitioner regarding challenge to these orders is concerned, that appears to be correct as in view of the provisions contained under

sections 141-B, 142, 145 and 144 of the Act, the assessment of the tax cannot be directly made by the Chairman of the Nagar Panchayat and the Collector has erred in not considering the procedural part of the assessment of tax against respondent no. 4 while deciding the appeal. **Sazid Khan V. State of U.P. Through D.M. Kanpur Nagar and others, 2016 (118)ALR 142**

U.P. Panchayat Raj Rules

R. 47 (g)- Scope of –Explained

47. Duties of the Pradhan of Gaon Panchayat - Unless prevented by reasonable cause, it shall be the duty of the Pradhan.

A perusal of Rule 47 (g) extracted here-in-above would leave no room for doubt that the duty of the Pradhan is to file civil cases and launch prosecution on behalf of the Gram Panchayat and the Gram Sabha both which in our opinion cannot be delegated except to the extent of special provisions referred to here-in-above. This is equally true for all the other functions as prescribed in the above quoted rules. **Vinod Kumar Mishra V. State Of U.P. Thru. Secy. Food & Civil Supplies & Ors., 2016 (132) RD 277**

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

S. 2(2) Explanation 1- Date of construction- consideration of- The date of compilation of construct would be the date of occupation of the building by tenant, if no report or record of assessment

In the instant case, the landlord came out with the clear case that the building was constructed after the map was sanctioned on 04.08.1989. In respect of this fact, he filed a house tax assessment receipt wherein the date of construction was entered as 04.08.1989. Though there was nothing on record to establish the date of first

assessment of the shop in question, however, in view of the admission of the tenant that the shop in question was given to him on rent at the rate of the Rs.300/- on 05.11.1989, soon after its construction, it can be safely concluded that the shop in question was constructed in the year 1989. It is a case where there is no report or the record of assessment, the fourth date as provided in explanation 1 of section 2 (2), therefore, would come into play and the date of completion of construction would be the date of occupation of the building by the tenant which is 05.11.1989 as admitted to him. **Vinod Kumar V. Naresh Chandra Sharma (Since Deceased) and 2 Others, 2016 (3) ARC 146**

S. 2 (2) r/w proviso II explanation 1 (a)- Determination of date of construction of a building shall be the date on which its completion is represented or otherwise recorded by the local authority having jurisdiction

Under section 2(2) read with provision explanation (1) of Act no. 13 of 1972 a building which has been constructed after 26.4.1985 shall not be covered under the Act No. 13 of 1972 for a period of forty years. The building which has been constructed prior to 26. 4. 1985 shall be covered, if the construction 10 years old.

In view of the above provision, the word "Construction" has a very important bearing as the date of construction would be important in order to place a particular building within the purview of Act No 13 of 1972 or to keep it outside the purview of Act No. 13 of 1972. The Legislature in its wisdom, therefore, had given a definite and a clear cut provision regarding "construction" which is given in Explanation (1) to the proviso of section 2(2) of Act No. 13 of 1972 which has already referred above.

A bare reading of the aforesaid provision (referred above) shows that the date of construction of a building shall be the date on which its

completion is reported or otherwise recorded by the local authority having jurisdiction. But in case of a building is subject to assessment then the date of the first assessment would be the date of completion of the building.

But in case of a building which is subject to assessment then the date of first assessment would be the date of completion of the building

C.P. Mandal V. Ram Prakash Sharma, 2016 (117) ALR 277

S. 3 (e)- Prescribed Authority- Appointment of –Additional District and Session Judge as said office by cannot would can designate Prescribed Authority in exercise of his administrative powers

The use of words "any of the powers of the District Judge" makes the intention of the Legislature clear to include both judicial and administrative powers. The District Judge is the Prinicipal Civil Court and is having administrative control over the Civil and Criminal Courts in the district. In the absence of the District Judge, the designated Incharge District Judge was assigned the duties and powers of the District Judge as this office cannot be kept vacant. There is no Rule to the contrary. Hence there was no defect in the appointment/designation of the Judge, Small Causes Court as the "Prescribed Authority".

Moreover, the challenge is not on the ground of incompetence of the Judicial Officer, i.e. the Judge, Small causes Court, who was designated as the "Prescribed Authority" rather the challenge is to the powers of the Officer who had designated him and, therefore, the Judge, Small Causes Court/Prescribed Authority cannot be said to be lacking in its jurisdiction. The Appellate Court has rightly dealt with this issue. In view of the above discussion, the challenge to the order passed by the Prescribed Authority on the ground of alleged fault in his appointment/designation cannot be sustained. **Vijay Kumar**

Chaudhary Vs. A.D.J./Special Judge (S.C./S.T. Act), Gorakhpur And Others, 2016 (4) ALJ 204

S. 12- U.P. Urban Building (Reg. of Let. Rent and eviction) Rules, R 8- Declaration of vacancy without compliance of R. 8 of Rules, 1972- Effect of

No doubt that the Rent Control and Eviction Officer or the Rent Control Inspector is obliged to inspect the premises for the purposes of declaration of vacancy allotment as far as possible in the presence of the occupant in view of Rule 8(2) or the Rules but there are authorities to the effect that the order of vacancy would not be vitiated on account of non-service of notice under Rule 8(2) of the Rules framed under the Act once the occupant had participated in vacancy proceedings. **Kripa Shankar Gupta V. Adarsh Kumar Agrawal And Anr., 2016 (3) ARC 154**

S. 20 (1) r/w Sec. 2(1) (bbb)- U.P. Cantonments (Control of Rent and Eviction Act)-Whether Section 2(1) (bbb) Excluding the application of U.P. Act No. 13 of 1972 upon cantonments areas, inserted by U.P. Act No. 5 of 1995, would be applicable?- All subsequent amendments in Act no. 130 of 1972 would apply to cantonments areas.

Act 13 of 1972 was amended by Act 58 of 1995, inserting section 2 (bbb), whereby, excluding property belonging to waqf from the purview of Act 13 of 1972. As seen earlier Act 13 of 1972 is not just a legislation by reference but it is case where the entrie provision of Act 1`3 of 1972 have been extended and made applicable to the cantonments of the State, therefore, any amendment in the former legislation (Act 13 of 1972) brought about in 1995, inserting section 2(1)(bbb), would normally become applicable to the later Act. In my opinion, the principle of law underlying by incorporation or by

reference has not much relevance in the present case. It is in fact an extension of an Act to territory to which Act 13 of 1972, was previously not applicable, (Refer- Rakesh Vij V. Dr. Raminder Pal Singh Sethi and others, 2005 (8) SCC 504, I am, therefore not convinced to take a different view taken earlier in Jagannath Bhatia case (supra), that Act 13 of 1972 is an instance of legislation by reference and not by incorporation.

In this backdrop, the earlier notification issued under section 3 of Act 46 of 1957 made applicable Act 13 of 1972 limiting its operation "as in force don the date of notification", whereas, the subsequent notification issued in 1982 clarified, "as in force in State of Uttar Pradesh". It is evident, therefore, that in the State all subsequent amendments made, thereafter, in Act 13 of 1972 would apply to cantonment areas, therefore, in my view, the amendment brought about by Act No. 58 of 1995, inserting section 2(1) (bbb) excluding the waqf property from the jurisdiction of Act 13 of 1972 would be applicable to cantonment areas. The Courts below were justified in rejecting the application and holding that the provisions of Act No. 13 of 1972 would not apply. **Anees Uddin V. Wakf Alal Khair, Wakf No. 488, Meerut, 2016 (17) ALR 87**

S. 21 (1) (a) –Release application filed on behalf of owner and landlady of shop through Power of Attorney holder- Maintainability of -Held, "Yes"

No legal bar for power of attorney holder in representing a suit or filing a writ petition in name of principal, Application through power of attorney is as if it is by principal. No express prohibition under Rent Act debarring owner- landlord from applying for release through power of attorney holder. **Smt. Rashmi Batiya V. Smt. Geeta Sharma and another, 2016 (118) ALR 455**

S. 34 (1) (c)- Issuance of Commission- object of –To ascertain the use of premises for residential or commercial purpose

During pendency of appeal, an application was preferred by the petitioner stating therein that it is necessary to ascertain as to whether the premises in question is being used for residential or commercial purpose and for the said purpose the commission be issued.

Learned counsel for the petitioner has relied upon the provision of Section 34 which empowers the Prescribed Authority or the Appellate Authority to inspect a building or issue commission for examination of witnesses or documents or local investigation.

No doubt the said power is vested in the said authorities, however, it is the discretion of the authority concerned to take recourse to the provision of Section 34 (1) (c) of the Act. The appellate authority in the impugned order has clearly given a finding that the assertions for which the petitioner intends to get commission issued can be proved by the leading evidence before the court below. In my considered opinion, the aforesaid fact can be proved or established by leading evidence by the petitioner. In fact, issuing commission cannot be a substitute for leading evidence. **Mohammad Akram Khan V. Appeellate Authority/ADJ, Raebarely and others, 2016 (117) ALR 92**

<u>U.P. Urban Buildings (Registration of Letting, Rent and Eviction) Rules</u>

R. 18 Maintainability of second release application- A second release application is perfectly maintainable

In the light of provisions as contained in Rule 18 of the Uttar Pradesh Urban Building (Regulation, Letting, Rent& Eviction), Rules 1972, it is apparent that a second release application under Section 21 of the Act is perfectly maintainable and, in case, such application is moved after a period of one year from the date of decision the

findings recorded earlier will not be treated conclusive. **Shyam Pyari Devi (Smt.) V. Sanjay Kumar and 7 Others, 2016 (2) ARC 651**

U.P.Z.A. and L.R. Act

S. 117- Scope of- A pond or tank in holding of a person could not be vested in State/Gaon Sabha

The intention of Legislature in enacting section 117 of Act was to vest all such ponds and tanks which were on the barren covered with the water, as envisaged in Chapter A-VIII Para A124, Part I (6)of the U.P. Land Record Manual, and was meant for public utility or purpose. Meaning thereby, if any pond or tank is in the nature of holding of a person, may for the reason of cultivating the water chestnuts or fisheries, then it must not and could not have been vested in the State Government, much less in the Gaon Sabha, town area or the municipality, as the case may be.

If there is any pond or tank or any land covered with water, then it was not a Government land, but the land forming part of the holding or a particular individual and such land could not have been vested in the State Government. **Nagar Palika Parishad, Jaspur V. Sunder (Dead) Through L.Rs. and others, 2016 (132) RD 286**

S. 122-B- Scope of- An asami lease cannot be determined in proceeding U/s 122- B of the above Act

It is equally true that an Asami lease cannot be determined in proceedings under section 122-B of the U.P. Zamindari Abolition and Land Reforms Act which provision is meant for eviction of unauthorized occupants. A person recorded as an Asami cannot be said to be an unauthorized occupant especially when the entry is not alleged to be a forged or fraudulent entry. **Baijanath (Dead) and others V. State of U.P. and others, 2016 (132) RD 294**

S. 122-B (succeeded by S. 67 of the U.P. Revenue code, 2006)- U.P. Revenue Code Rules, 2006- Rule 67 (6) –Scope of explained.

The writ petition which has been filed in the public interest has highlighted the failure of the State to implement the judgment of the Division Bench of this Court dated 28 May, 2014 in Om Prakash Varma and others V. State of Uttar Pradesh and others, Misc. Bench No. 6472 of 2012. This judgment of the Division Bench dealt with the serious issue of encroachments on public utility lands, including among them lands which are reserved for parks, ponds and pasture lands which are being increasingly encroached upon in the absence of any remedial action by the State Government.

In court view, since the Division Bench has already laid down comprehensive guidelines and has issued directions to the State Government in Om Prakash Verma , the issue which now really remains is the lack of administrative will to secure enforcement of the directions. This is a serious matter which must necessarily be taken up by the Court. Court may note that the provisions of section 67 and 136 of the U.P. Revenue Code, 2006 sufficiently empower the respondents to rid public utility lands from encroachments. Rule 67 (6) of the U.P. Revenue Code Rules, 2006 mandates that the Assistant Collector shall conclude the enquiry under section 67 within 90 days of the issuance of the show cause notice and in case of failure to adhere to the time frame, the authority is obliged to record reasons. Yet this Court on a daily basis is deluged by petitions alleging failure to act against encroachments or apathy in implementing orders of eviction. The obligation to preserve land meant for public utility purposes rests upon the State. Action against encroachments cannot be left to depend upon individuals instituting legal proceedings to secure enforcement of the mandate cast by section 67 and 136.

In these circumstances, this Court would be constrained to reiterate the guidelines which were issued in Om Prakash Verma and to further direct the State to strengthen the procedure for enforcement so as to secure the interest of the public. **Dayaram Yadav and others V. State of U.P. through Chief Secretary, U.P. Govt., Lucknow 2016 (132) RD 11**

S. 331- Scope of –Doesn't expressly for a suit for cancellation of sale deed

Under section 331, jurisdiction of Civil Court is expressly barred for the suits mentioned in Column 3 of Schedule II of U.P. Act No. 1 of 1951 and impliedly barred for a suit based on a cause of action, in respect of which, relief could be obtained by Revenue Court (mentioned in column 4 of Schedule II). Column 3 of Schedule II of U.P. Act no. 1 of 1951 does not provide for a suit for cancellation of sale-deed of agricultural land as such section 331 (1) does not expressly bar a suit for cancellation of sale deeds. **Chandrika V. Shivnath and others, 2016 (132) RD 247**

S. 331- Suit for cancellation of sale-deed based on ownership and Bhumidhari right over disputed agricultural land is barred by S. 331, only court relief and civil Court had no jurisdiction to decide suit

The suit of plaintiff/respondent has been based on claim of his ownership and bhumidhari rights over disputed agricultural land, for which the plea of bar of suit under Section 331 of U.P.Z.A. & L.R. Act was taken by defendants in their written statement. Section- 331 of U.P. Zamindari Abolition & Land Reforms Act, 1950.

The present case of plaintiff-appellant is based on claim that they are owner and bhumidhar of disputed land. Admittedly the name of defendant-respondent are recorded as bhumidhar on disputed land

i.e. agricultural 'land' as defined in UPZA & LR Act. Even the alleged relief of permanent injunction regarding disputed land is also based on the relief of declaration of title of disputed agricultural 'land'. Therefore it is explicitly clear that only the court of Assistant Collector has jurisdiction to grant these reliefs, and Civil Court has no jurisdiction to decide the suit or other proceeding based on cause of action for declaration of ownership rights of such agricultural land. Therefore this finding of trial court as well as first appellate court are erroneous dispute between the parties. that civil court had jurisdiction to hear real

17. From above discussion, it is clear and proved that main relief sought by plaintiff-appellants are based on declaration of their alleged right of bhumidhari over disputed agricultural land but it cannot be granted to the appellants, and therefore, claim of plaintiff/respondent is barred by Section 331 of U.P.Z.A. & L.R. Act, so respondent is not entitled for any relief claimed in the original suit. **Onkar Singh and another V. Om Prakash (D) through his L.Rs., 2016 (4) AWC 3580**

S. 331- Scope of- Issue whether the land in dispute was agricultural or abadi in nature –Determination of- the proper cause for the court is to refer the matter u/S 331-A of the above Act

Section 331-A is clear in its terms that when the nature of the land has been pleaded to be agricultural and the same has been denied in the reval contention, being pleaded as an Abadi, the issue must have been referred to as envisaged under section 331-A of UPZA & LR Act and this view has well been propounded even by the Hon’ble Apex Court in Chandrika Prasad case.

That apart, even if the contention of learned counsel for the respondents is taken into consideration for a moment, then also the

settled proposition of law is that to seek the prohibitory injunction against anyone and granting of the relief to the plaintiff pre-supposes has possession over the land, in question, and the issue of possession on agricultural land could only be decided by the Revenue Court. Civil Court has not jurisdiction to give finding on possession over agricultural land and this view has been laid down in Kamla Prasad case.

So, both ways, when the issue was framed that whether the land, in question, was agricultural or Abadi in nature, then the proper course for both the Courts below must have been to refer the matter under section 331 of the UPZA & LR Act. **Bhim Bahadur V. Vikram Singh and another, 2016 (132) RD 33**

U.P.Z.A. and L.R. Rules

R. 33.. Appendix III, Entry 19- Scope of- It does not provide any limitation for invoking Section 166 of the 1950 Act

The provision which has been invoked in the instant case is section 166 of the Act which was incorporated by U.P. Act No. 20 of 1982 with effect from 3.6.1981. the section invoked, was introduced, later in time as compared to the entry at Sl. 19 in Appendix III, which in any case, does not pertain to section 166, but provides the limitation for proceedings under section 163 of the Act. Section 163 was omitted by U.P. Act No. 20 of 1982. Moreover, the Appendix III does not provide for any limitation for invoking section 166. **Pradeep Kumar Dixit V. Addl. Commissioner (Admin.) Aligarh Division, Aligarh and others, 2016 (132) RD 255**

R. 176-A- Asami lease cannot be for a period of more than five years

Rule 176-A of the U.P. Zamindari Abolition and Land Reforms Rules states that an Asami lease cannot be for a period of more than five years. Therefore, the lease in favour of Abdul Gafoor,, through whom the respondent No. 4 claims, has also expired long back.

Learned Standing Counsel is directed to remit a copy of this order to the Collector, Rampur to ensure that proper proceedings are initiated, as regards the land in question in this writ petition, which is in the possession of an Asami and the term of his Asami lease has, prima facie, expired. **Kifayat Husain etc. V. D.D.C. and others, 2016 (132) RD 298**

Wakf Act, 1995

S. 85 –Jurisdiction of the Tribunal – Jurisdiction of wakf Tribunal -Express bar of jurisdiction of the Civil Court not absolute

Express bar of Jurisdiction of the Civil Court not absolute, civil Court have jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred **Sahaj Ram V. Rajendra Prasad, 2016 (117) ALR 833**

Words and Phrases

'Arbitrary'- Meaning of

'Arbitrary' means, either non application of mind or absence of reasons. **M/s Radhey Lal Mahipal Sharan and another V. Pramod Kumar and others, 2016 (34) LCD 2172**

'First hearing'- Meaning of

'First hearing' means 'the first date of any step or proceeding mentioned in summons served on the defendant **Smt. Malti Rani Atal V. 6th Additional District Judge and others, 2016 (34) 2026**

Expossion "Gram Sabha" and "Gram Panchayat" Difference

The Gram Sabha is a Village comprising of the persons registered in the electoral rolls relating to the village within a Gram Panchayat. A Gram Panchayat can consist of different villages as well. It is this Gram Panchayat constituted at the village level that exercises authority in a panchayat area which may comprise of a single village or group of villages as per Section 11-F of the 1947 Act. The Gram Panchayat is to consist of a Pradhan as per Section 12 (1) (c) of the 1947 Act whose election is to be held under Section 12-A and who takes oath of office under Section 12-E. The Panchayat therefore is chaired by the Pradhan. The power and duties of the Pradhan are referred to in the U.P. Panchayat Raj Rules, 1947 that would be discussed here-in-after. Thus, a Gram Sabha is governed by the local body of Gram Panchayat. It is the Gram Panchayat which is constituted for the said purpose with the Pradhan as its head to discharge official duties. The functions and duties of the Gram Panchayat are separately defined under Chapter IV of the U.P. Panchayat Raj Act, 1947 and Section 15 (xxix) is the relevant provision pertaining to the present subject matter of public distribution system. It is to be noted that the grant of a license for distribution of a fair price shop is entrusted to a procedure under the Government Order dated 17.8.2002 to the Gram Sabha in its open meeting, and not to the Gram Panchayat, but Section 15 (xxix) of the 1947 Act thereafter requires that the promotion of public awareness and the monitoring of the public distribution system relating to essential commodities is within the functions of the Gram Panchayat. **Vinod Kumar Mishra V. State Of U.P. Thru. Secy. Food & Civil Supplies & Ors., 2016 (132) RD 277**

'Market Value'- Meaning of

‘Market Value’ would postulate price of land prevailing on the date of publication of the Notification under Section 4 (1) of the Act, 1894 **Kiran Singh V. State of U.P. and others, 2016 (34) LCD 2110**

“Person aggrieved”- Discuss and explained

The controversy as to who will be the person aggrieved is no more res integra as the Apex Court as well as this Court in a catena of decisions, while considering as to who could be said to be the "person aggrieved", observed that although the meaning of expression "person aggrieved" may vary according to the context of the Statute and facts of the case nevertheless normally, a person aggrieved must be a man who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongfully refused something, or wrongfully affected his title to someone.

The term "person aggrieved" was also considered and defined in Re: Sidebotham, (1880) 14 Ch. D. 458, wherein it has been observed as under :-

"The words "person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." **Sazid Khan V. State of U.P. Through D.M. Kanpur Nagar and others, 2016 (118)ALR 142**

Power of Attorney- Meaning of

In common parlance a “power of attorney” means a formal instrument by which one person empowers another to represent him or to act in his place for certain or all purposes. **Smt. Rashmi Batiya V. Smt. Geeta Sharma and another, 2016 (118) ALR 455**

"Sufficient Cause"- Meaning of

What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bonafide nature of the explanation. **Ashok Kumar Pandey and another V. Deputy Director of Consolidation, Varanasi and another, 2016(132) RD 625**

Unauthorized Occupants'- What it constitutes

'Unauthorised Occupants' must appreciate that their act of overstaying in the premise infringes the right of others' **Lok Prahari V. State of U.P. and others, 2016 (34) LCD 1972**

Legal Quiz

Q. 1 क्या भारतीय उत्तराधिकार अधिनियम के अन्तर्गत प्रोबेट प्रार्थना पत्र अपर जिला जज द्वारा या (उत्तर प्रदेष) में केवल जिला जज को ही , प्रोबेट प्रार्थना पत्र पर विचार करने एवं प्रोबेट देने का अधिकारी है?

Ans. S. 2(bb) of the Indian Succession Act 1925 says, "The District Judge means of Judge of Principal Civil Court of original jurisdiction".

Besides the above provisions of law Bengal, Agra & Assam Civil Courts Act, 1887 is also applicable to the State of U.P., S. 8 of Bengal, Agra & Assam Civil Courts Act 1887 provides-

(1) When business pending before any District Judge requires the aid of Additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge. Which the District Judge may assign to them and in the discharge of those functions they shall exercise the same power as the District Judge.

Full Bench of five Judges of Calcutta High Court in Rup Keshar lal V. Jaijaj Bebi : AIR 1916 Cal 561, after considering

S. 8(2) of Bengal Civil Courts Act, 1887 held that it is open to the District Judge to assign, to an additional District Judge a petition for grant of letter of administration.

Allahabad High Court also in Chander Kumar Jain V. Anand Kumar Jain, 1999 (4) AWC 2785, held that "the Additional District Judge is competent to dispose of the matter transferred to it, regarding issue of probate neither the definition of District Judge from exercising the powers of District Judge.

So, Keeping in view the above provision of Indian Succession Act and Bengal, Agra & Assam Civil Courts Act, 1887 an Additional District Judge is competent enough to decide the matter of Probate transferred to him by the District Judge.

Please also See:

1. AIR 1970 Assam 111- Sagar Chaudhary & others V. Nabin Chaudhary & Others
2. AIR 1956 Bhopal 69-Iftikharuddin V. Aisha bi

Q. 2 क्या धारा -**437** ए द.प्र.सं. की अनुपालन किया जाना आवष्यक है? यदि अभियुक्त नये जमानती, जैसा कि धारा-**437** क में उपबन्धित है, देने से इन्कार कर दें, तो न्यायालय के पास क्या विकल्प है।

Ans. In S. 437 (A) or Code of Criminal Procedure, 1973 the word used is "shall". This depicts the mandatory character of the provision. So far as th 1st part of the query is concerned the compliance of S. 437 (a) of Code of Criminal Procedure Code is mandatory

As far as the 2nd part of this query is concerned the Code of Criminal Procedure, 1973 is silent on this point. However, the 154th Report of Law Commission of India, in pursuance of which S. 437(a) Code of Criminal Procedure was enacted and which also contains the Aims and Objectives if incorporating this section.

Q.3 Is there any provision in which Sessions Judge can permit an under-trial to file nomination in Panchayat Election?

Ans. There is no such provision in Cr.PC Kindly see following rulings in this regard-

1. Shekhar Tiwari V. State of U.P., AIR 2009 (NOC) 2863 (All-DB)
2. Kalyan Chandra Sarkar V. Ranjan @ Pappy Yadav, (2005) 3 SCC 307 (Three Judge Bench)
3. K. Anandan Nambiar V. Chief Secretary, Government of Madras, AIR 1966 SC 657

Q.4 At the Stage of final agreements in a civil suit, if an important question as to jurisdiction of the court under the C.H. Act is raised through a document whether an issue can be hear on that basis?

Ans. The as answer his in the provision of Order 14 Rule 3 read with Rule 5 of C.P.C. issues can be framed even though matter raised by document O14 R. 3 (1) C.P.C.

Q.5 Whether a suit for cancellation of sale deed will abate if consolidation proceeding starts?

Ans. Civil suit for cancellation of voidable sale deed is not to abate u/s 5 of C.H. Act See-

1. Gorakh Nath V. H.N. Singh, 1973 RD 423 SC
2. Ram Nath V. Smt. Munna, 1976 RD 220 All F.B.
3. Brijendra Singh V. IIIrd ADJ, 2056 (99) RD 16 All.
4. Hawaldar Singh V. Aditya Singh, AIR 1978 All 266

Suit for cancellation of void sale deed is to abate u/s 5 of C.H. Act See-

1. Gorakh Nath V. H.N. Singh, 1973 RD 423 SC
2. Bhurey Lal V. District Judge, Badaun, 1997 (88) RD 149 All
3. Sri Niwa V. Sarwan, 1965 RD 310 (All)

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