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

Quarterly Digest

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

October –December, 2010

Volume: XXII **Issue No.: 4**

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► Administrative Tribunals Act

S. 19 – Powers of Tribunal – Delegation of Jurisdiction by Tribunal is not permissible.

If dispute is required to be decided exclusively by Tribunals, Tribunal by its own act cannot delegate its power to decide such dispute. Order passed by Executive authority on direction by Tribunal is void ab initio and cannot be given effect to. **(State of West Bengal v. Subhas Kumar Chatterjee; AIR 2010 SC 2927)**

S. 19 – Powers of Tribunal – It bounds to adjudicate matters coming before it but it cannot delegate its jurisdiction to extra constitutional authorities.

The Tribunal under the Administrative Tribunals Act possess jurisdiction and powers of every other Court in the country except the jurisdiction of the Supreme Court, in respect of all service related matters. The Administrative Tribunals are conferred with the jurisdiction to hear matters where even the vires of statutory provisions are in question. Their function, however, in this regard is only supplementary inasmuch as such decisions are subject to scrutiny of the High Court. Such is the extent of awesome powers and jurisdiction conferred upon the Tribunals. It is their bounden duty to adjudicate the matters coming before them but not delegated its jurisdiction to extra constitutional authorities. Such practice is fraught with undesirable consequences destroying the very purpose and scheme under which they are created and constituted to adjudicate disputes in specified areas. The Supreme Court expressed hope that the Tribunals in the country henceforth will not repeat such practice of sending the original applications filed before them to the Executive Authorities for their disposal. **(State of West Bengal v. Subha Kumar Chatterjee & ors.; AIR 2010 SC 2927)**

► Arms & Explosive Act

S. 14(2) – Refusal to grant Arms Licence – Validity of

The petitioner has stated that he has applied for gun license in the year 1997. Since 1997 the gun license to the petitioner was never

granted. The petitioner filed a writ petition in the year 2009 wherein an order was passed that the case of the petitioner may be considered in six months. In compliance of the court's order the District Magistrate has passed the impugned order.

The District Magistrate has given very strange reasoning for not granting the license to the petitioner. One reason given by the District Magistrate is that people of his locality already have five revolver, five rifle, five Double Barrel Ballistic License, five Single Barrel Ballistic License, hence the petitioner does not require a license. This reasoning is absolutely erroneous. Any number of gun license in a locality can have no bearing on the rights of the petitioner. This is an individual right which can not be tested in terms of the availability of license to the others. The petitioner has been guaranteed the rights of life and liberty under Article 21 of the Constitution of India individually and this cannot be said that if five people in a locality have exercised their right then the petitioner looses his right to approach the Government and get an arm license. What has been ensured in the Constitution of India and the Arms Act can not be diluted and taken away by this logic of the District Magistrate. Another reason which is more strange then the earlier one is that the petitioner is a teacher and if he owns a gun license a wrong message will go in students. Neither the Constitution of India nor the Arms Act makes out any such distinction. Arms license is given for protection of life and liberty of an individual. He may be a doctor, engineer, teacher, student, farmer or a politician no discrimination can be made on the ground of his profession and the nomenclauture for which he is known. There is procedure prescribed in the Arms Act. The District Magistrate has to get the necessary verification from the office of Superintendent of Police and then apply his mind for issuance of the license. Such an order is ipso-facts untenable and unsustainable by the Court. **(Abdul Wahid v. State of U.P. and Others; 2010(6) ALJ 155 (All HC, LB)**

S. 17(3) – Cancellation of Arms Licence on the ground (i) petitioner sold pistol without naming the manufacturer to other party (ii) and had not sent pistol to state Govt. for engraving of

distinguishing mark before sale of pistol would be proper. (Mohd. Nazim & Ors. V. District Magistrate & Anr.; 2010(6) ALJ (NOC) 706 (All HC)

S. 17(3) – Cancellation of Arms licence on account of pendency of several criminal cases against petitioner would not be interfered with.

It shall be prerogative of executive to take such a decision and threat perception that it obtains ought to be normally endorsed by Court, unless the basis of such perception was totally wrong or illusive and reasons given in cancellation order were sufficient to sustain it. So, order canceling the arms licence would not interfered with. (Anil Chhabil Dass Choudhar v. State of Punjab and Anr.; 2010 Cri.L.J. (NOC) 1146 (P & H)

► Central Administrative Tribunals Procedure Rules

R. 2(e) – Judge – There is definite restriction upon Judge from practicing law, expression 'Legal Practitioner' cannot include serving Judge.

A Judge may be law graduate holding a Bachelor Degree in Law from any University established by law in India but this by itself would not render him as a 'legal practitioner'. On the contrary, there is definite restriction upon the Judge from practicing law. Such an implied inclusion would not only lead to absurdity but would even offend laws in force in India. The expression 'legal practitioner' is a well defined and explained term. It, by any stretch of imagination, cannot include a serving Judge who might have been appointed as a presenting officer in the departmental proceedings. **(Dinesh Chandra Pandey v. High Court of Madhya Pradesh & Anr.; AIR 2010 SC 3055)**

► Civil Procedure Code

S. 9 – Jurisdiction of Civil Court – Scope of jurisdiction of Civil Court would not stand ousted by virtue of S. 331 of U.P.Z.A. & L.R. Act if land in dispute is not agriculture.

In view of the finding that the land is non agricultural in nature, the jurisdiction of the civil court does not stand ousted in any way by Section 331 of the Act. Last but not the least the defendant has failed to take objection regarding jurisdiction of the civil court in the court of first instance and when such objection is not permissible to be raised in the appellate court the very order allowing amendment in the written statement to that effect and framing an issue on it by the appellate court was patently illegal and without jurisdiction. Thus, such an amendment or the framing of issue would not benefit the defendant to contend that the provisions of Section 331 (1-A) of the Act would not be attracted. In any case if the ouster of jurisdiction is pleaded under Section 331 of the Act then it has to be considered in the light of Section 331 (1-A) of the Act and not independently. **(Ram Prakash Agrawal v. Rishi Kumar; 2010(6) ALJ 76 (All HC)**

S. 9 – Jurisdiction – Safeguards provided by CPC against frivolous suits.

Certain safeguards are built in Civil Procedure Code to prevent and discourage frivolous, speculative and vexatious suits. S. 35 provides for levy of costs. S. 35A provides for levy of compensatory costs in respect of any false or vexatious claim. O. 7, R. 11 provides for rejection plaint, if the plaint does not disclose a cause of action or is barred by any law. O. 14, R. 2 enables the Court to dispose of a suit by hearing any issue of law relating to jurisdiction or bar created by any law, as a preliminary issue. Even if a case has to be decided on all issues, the Court has the inherent power to expedite the trial/hearing in appropriate cases, if it is of the view that either party is abusing the process of Court or that the suit is vexatious. The Court can secure the evidence (examination-in-Chief) of witnesses by way of affidavits and where necessary, appoint a commissioner for recording the cross-examination so that it can dispose of the suit expeditiously. The Court can punish an erring plaintiff adopting delaying tactics, by levying costs under S. 35B or taking action under O. 17, Rules 2 & 3.

S. 95 provide for payment of compensation in a suit where arrest or attachment is effectual or temporary injunction is granted and the suit is found to be instituted without reasonable ground.

O. 25, R. 1 authorises Court to direct plaintiff to give security for payments of all costs incurred by defendant. **(Vinod Seth v. Devinder Bajaj; 2010 AIR SCW 4860)**

S. 11 – Res judicata – Applicability of – Administrative decisions by executive authorities do not bind courts and much less operate as res judicata.

Administrative decisions taken by executive authorities and do not bind courts and much less operate as res judicata. In this case, Chief Engineer did not acted in any judicial or quasi-judicial capacity. Thus, view taken by Chief Engineer in a matter directed to him by Administrative Tribunal that respondents were entitled to particular pay scale is not a decision, as there was no adjudication as such of any lis between parties by Chief Engineer. Hence it cannot operate as res judicata. **(State of West Bengal v. Subhas Kumar Chatterjee & Ors.; AIR 2010 SC 2927)**

S. 11 – Applicability of res-judicata – Filing on question of title recorded in earlier eviction suit would operate as res judicata in subsequent suit for declaration of title and recovery of possess in between same parties.

In the instant case the issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction Court. The question of title was directly and subsequently in issue between the parties in the earlier suit for eviction. Hence, the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession between the parties. **(Mohd. Nooman v. Mohd. Jabed Alam; 2010 AIR SCW 5979)**

S. 11 – Applicability of Res-judicata – Administrative decisions by Executive Authorities do not operate as res-judicata.

Chief Engineer not acting in any judicial or quasi-judicial capacity. Thus, view taken by Chief Engineer in a matter directed to him by Administrative Tribunal that respondents were entitled to particular pay scale is not a decision, as there was no adjudication as

such of any lis between parties by Chief Engineer – Cannot operate as res judicata. **(State of West Bengal v. Subhas Kumar Chatterjee; AIR 2010 SC 2927)**

S. 24 – Transfer of case – Consideration of

In this case, transfer of case has sought on ground that orderly of Civil Judge had taken bribe in front of presiding Officer and thus there was no hope of any justice from him. But history of case showed that applicant was in habit of filings such transfer applications on frivolous ground. Beside it application showed that allegations were filed on imaginary, concocted and frivolous grounds to scandalize Court. So, transfer application liable to be rejected. **(Akhtar v. Matura & Ors.; 2010(6) ALJ (DOC) 42 (All HC)**

S. 151 – Setting aside of compromise decree – Maintainability of – Application U/s. 151 for setting aside compromise decree would be maintainable.

If compromise decree obtained by playing fraud upon Court then application U/s. 151 for setting aside compromise decree would be maintainable. **(Ashok Kumar Gupta & Anr. V. Xth Addl. District Judge, Muzaffarnagar & Ors.; 2010(6) ALJ (DOC) 50 (All) (DB)**

O. 1, R. 10 – Necessary or proper party – Who is in suit for specific performance of contract

A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the Court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided

against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance. **(Mumbai International Airport Pvt. Ltd. V. Regency Convention Centre & Hotels Pvt. Ltd. & Ors.; AIR 2010 SC 3109)**

O. 1, R. 10(2) – Provision gives discretion to court for addition/deletion of parties.

The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the Court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose.

In exercising its judicial discretion under Order 1, Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice. **(Mumbai International Airport Pvt. Ltd. V. Regency Convention Centre & Hotels Pvt. Ltd. & Ors.; AIR 2010 SC 3109)**

O. 9, R. 7 – Application to recall ex parte proceedings – Ground for

It is very well settled that the application under O. IX, Rule, 7 CPC can be moved at any stage till such time the arguments have not been heard.

It is also well settled that a litigant is not liable to be penalized for the mistake committed by his counsel.

Order IX, Rule, 7 CPC only requires the defendant to assign good cause for his previous non-appearance. In the present case, the defendant-respondent did show good cause for his previous non-appearance that his counsel did not inform him about the proceedings.

In view of the above facts and circumstances, no illegality has been committed by the two courts below in allowing the application filed by the defendant-respondents and the impugned orders do not call for any interference. **(Aneja Hire Purchase Pvt. Ltd., Bareilly v. Addl. Distt. Judge, Court No. 7, Bareilly & Ors.; 2010 (6) ALJ 80 (All HC)**

O. 9, R. 13 – Application for setting aside ex parte decree for not accompanied by requisite deposit of amount due under decree – Effect of

The application for setting aside ex parte decree was not accompanied by requisite deposit of the amount due under the decree. Even after the order was passed by the court to deposit 50% of the decretal amount in cash and furnish security for rest of 50%, the order was not carried out in as much as neither half of the entire decretal amount was deposited nor security was furnished for the remaining half. It was only when the plaintiff-landlord pointed out, the applicant moved an application for furnishing security for the outstanding amount on the pretext that the entire amount could not be deposited due to miscalculation and mistake committed by the counsel.

The decree being very much clear, there could not be any possibility of any calculation mistake. Apart from above, it was the duty of the applicant to have calculated the amount as per decree. The applicant failed to do so. It appears that the applicant deliberately did not deposit the entire amount and it was only when an objection was raised by the plaintiff-landlord, an application was filed by the tenant to grant time which cannot be termed to be bona fide. Hon'ble single Judge of this Court in the case of Jai Prakash Pandey v. Baboo Lal Jaiswal; 2010(1) ALJ 455, in almost identical facts and circumstances, has held that such an application to be not maintainable. **(Dinesh Goyal v. Chimman Lal Agarwal; 2010(6) ALJ 47 (All HC)**

O. 9, R. 13 – Application for setting aside exparte decree – Limitation – Determination of

Out of Court settlement between parties that plaintiff would withdraw suit. Defendants did not attend further proceedings in view of such settlement. Plaintiff however, pursued matter and ex parte decree was passed, plea by defendants that they came to know about ex parte decree when they were served with execution notice – Application for setting aside ex parte decree filed within 30 days from knowledge of passing of decree cannot be dismissed by taking hyper technical view that no separate application was filed under S. 5 of Limitation Act. Art. 123 of Limitation Act also cannot be invoked. **(Bhagmal v. Kunwar Lal; AIR 2010 SC 2991)**

O. 22, R. 3 – When abatement of suit/appeal as whole – Principle regarding stated

Whether non-substitution of LRs of the defendants/respondents would abate the suit appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased defendant respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test. Thus, where in an appeal against decree declaring that plaintiff were co-owners of suit property along with defendants/appellants and in joint possession thereof, one of respondents a proforma defendant died and his LRs were not substituted the appeal would stand abated in toto. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of the other co-owner. Therefore, in theory, every co-owner has an interested in every infinitesimal portion of the subject-matter, each has a right irrespective of the quantity of its interest, to be in possession of every

part and parcel of the property jointly with others. A co-owner of property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. The deceased respondent though a proforma defendant in suit had a share in joint suit property. Possibility of contradictory decrees, one in favour of deceased respondent and other in favour of appellants getting passed if decree under appeal is reversed cannot be ruled out. **(Budh Ram v. Bansi; 2010 AIR SCW 5071)**

O. 22, R. 4 – Abatement of appeal consideration of

Fact regarding death of respondent brought to notice of appellant within reasonable time. Yet no application was submitted by appellant within period of limitation to substitute heirs and legal representative of respondent. As such period of limitation having been expired appeal had already stood abated. So, appeal liable to be dismissed. **(Smt. Krishna Dular and Ors. V. Kanhaiya Lal Verma & Ors.; 2010(6) ALJ (DOC) 56 (All)(DB)**

O. 22, R. 9 – Limitation Act, S. 5 – Condonation for delay of over two years for setting aside abatement application would not be liable to condoned.

It is clear from the bare reading of the application that the applicants were totally callous about pursuing their appeal. They have acted irresponsibly and even with negligence. Besides this, they have not approached the Court with clean hands. The applicant, who seeks aid of the Court for exercising its discretionary power for condoning the delay, is expected to state correct facts and not state lies before the Court. Approaching the Court with unclean hands itself, is a ground for rejection of such application.

The court feels that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom; AIR 2009 SC (Supp) 886. In this case, the Court, after discussing a number of judgments of the court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along

with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgement, the Court held as under:-

"13(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

On an analysis of the above principles, Court now reverts to the merits of the application in hand. As already noticed, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. The court has already held that the application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before the Court. It is the abnormal conduct on the part of the applicants.

The cumulative effect of all these circumstances is that the applicants have miserably failed in showing any 'sufficient cause' for condonation of delay of 778 days in filing the application in question. **(Balwant Singh (Dead) v. Jagdish Singh & Ors.; AIR 2010 SC 3043)**

O. 39, Rr. 1, 2 and O. 43, R. 1 – Temporary injunction – Appeal – Interference with discretion exercised by Trial not to be done only because different opinion is possible.

Once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a denovo consideration of the matter it is possible for the appellate court to

form a different opinion on the issues of prima facie case, balance of convenience irreparable injury and equity. Unless the appellate Court comes to the conclusion that the discretion exercised by trial court in refusing to entertain the prayer for temporary injunction is vitiated by an error apparent or perversity and manifest injustice has been done, there will be no warrant for exercise of power. **(Skyline Education Institute (Pvt.) Ltd. V. S.L. Vaswani & Anr.; AIR 2010 SC 3221)**

► Constitution of India

Art. 19(1)(a) – Unpopular remarks about social acceptance of pre-marital sex – Law should not be used to chill freedom of speech.

Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, there is need to tolerate unpopular views in the socio-cultural space. The framers of Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, the court must also promote a culture of open dialogue when it comes to societal attitudes. The appellant's remarks did provoke a controversy since the acceptance of pre-marital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, but there are certain individuals or groups who do not hold the same view. Even in the societal mainstream, there are a significant numbers of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the

'freedom of speech and expression'. **(S. Khushboo v. Kanniammal & Anr.; AIR 2010 SC 3196)**

Art. 32 & 226 – Powers of Court to direct to hand over investigation of case to CBI – Even after filing of charge-sheet against accused by State Police in order to do complete justice.

It is an admitted position in the instant case that the accusations are directed against the local Police Personnel in which High Police Officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the Police Personnel of State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local Police Authorities, all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local Police may carry out the investigation, particularly when the gross allegations have been made against the High Police Officials of the State of Gujarat and for which some High Police Officials have already been taken into custody. When Police Officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI Authorities would be an appropriate authority to investigate the case.

It cannot be said that after the charge-sheet is submitted in Court in the criminal proceeding it was not open for the court or even for the High Court to direct investigation of the case to be handed over to the CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the Police Authorities is not in the proper direction

and in order to do complete justice in the case and as the High Police Officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI. **(Rubabbuddin Sheikh v. State of Gujarat & Ors.; AIR 2010 SC 3175)**

Art. 225 – Special Appeal against order passed in contempt proceeding – Maintainability of

Order passed by contempt Judge on prima facie view that there was contempt of Court and proceedings be initiated against alleged contemnor. Such Order passed by Court had trappings of finality even though passed during interlocutory stage of proceedings. So, special appeal against said order would be maintainable. **(S.M.A. Abdi & Anr. V. Pvt. Secretaries Brotherhood Office of the U.P. & Anr.; 2010 Cri.L.J. (NOC) 1203 (All)**

Art. 226 – Second writ application – When can be maintainable.

The bar under Chapter 22, Rule 7 of the Allahabad High Court Rules, 1952 is on filing of second application on the same facts. In the instant case the relevant facts, which had been pleaded in the writ petition, were the facts which had come in the knowledge of the petitioner, after receiving the caveat and copies of the orders under Right to Information Act, 2005.The petitioner was not aware of any action of the State authorities, which had been complained in the second writ petitioner. In the earlier writ petition, the petitioner had stated about filing of suit and the fact that interim injunction application has been fixed. The second writ petition was filed praying for staying the dispossession on the ground that interim injunction application pending in the suit hence status quo be directed to be maintained.

Thus, petitioner was not precluded from filing second writ petition when in that writ petition action of the State showed that the petitioner was dispossessed without drawing any proceeding and only by administrative action. Second writ petition would be maintainable.

(Bheekam Chandra v. State of U.P. & Ors.; 2010(6) ALJ 328 (All HC)

► Consumer Protection Act

S. 2(1)(r) – Unfair trade practice – What it constitutes

In the present case, the grievance of the complainant was that he was being overcharged for a catalytic converter which he neither demanded nor was it actually fitted in his car purchased from the appellant. In the opinion, of the court, the complaint filed by respondent No. 1 is justified as the aforesaid act amounts to an unfair trade practice as defined in Section 2(1)(r) of the Consumer Protection Act, 1986. It may be noted that the definition in Section 2(1)(r) is an inclusive one, and is not exhaustive of sub-clauses (i) to (x) therein. **(Maruti Suzuki India Ltd. V. Rajiv Kumar Loomba & Anr. Etc.; AIR 2010 SC 3141)**

► Contempt of Courts Act

Ss. 15, 2(c), 23 – Calcutta High Court – Contempt of Court Rules (1975), Rr. 19 & 20 – Contempt petition filed by advocate with consent of Advocate General would not be maintainable.

Petition alleging criminal contempt filed by practicing advocate without consent of Advocate General – Petition not styled as information placed before Court for consideration – No prayer in petition to initiate suo motu action – Order passed and rule nisi issued in model Form 1 of Appendix to Rules showing that averments made in petition, their affidavit of verification and arguments of petitioner's counsel constituted foundation for action – Advocate continued to be shown as petitioner in contempt proceedings – Proceedings cannot be said to be initiated by Court suo motu – Petition filed without consent of Advocate General, therefore, was not tenable. **(Basu v. Kallol Guha Thakurta; 2010 AIR SCW 5037)**

► Criminal Procedure Code

S. 1 – Nature of provisions – Are Procedural.

By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well-recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated, as directory notwithstanding the use of word 'shall'. **(Shivjee Singh v. Nagendra Tiwary; 2010 Cri.L.J. 3827 (SC)**

S. 154 – Omission to state motive for crime in FIR – Effect of – Much importance cannot be attached to it when FIR has filed by villager.

Non-mentioning of motive in the FIR cannot be regarded as omission to state important and material fact. As a principle, it has been ruled by the Court that omission to give details in the FIR as to manner in which weapon was used by accused is not material omission amounting to contradiction. Further, this is a case wherein FIR was filed by a rustic man and, therefore, non-mentioning of motive in the FIR cannot be attached much importance. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 154 – Electricity Act Ss. 151, 151-A, 151-B – Theft of Electricity – Complaint/FIR – Who can file

Section 151 of Act 2003 does not prohibit lodging of FIR by individual person. Merely because cognizance can be taken on basis of charge sheet under Section 173 of Cr.P.C. or on the basis of complaint lodged by the persons mentioned under section 151 of the Act, does not divest power of individual citizen to lodge a FIR regarding electricity theft.

Intention of legislature is very clear that in matter of theft of electricity anybody can lodge an FIR. Even otherwise, also if a cognizable offence is disclosed, every individual has a right to lodge an FIR under S. 154 of the Cr.P.C. S. 155 of the Act provides applicability of the provision of the Code, so far as it is not inconsistent with the provisions of the Act.

Additionally taking cognizance of offence and lodging of FIR are different legal formalities altogether U/s. 154 of Code, FIR can be lodged by individual but cognizance of offence U/s. 190 has to be taken by court of competent jurisdiction. Both cannot be clubbed and hence U/s. 157 of Act cannot be impediment to override S. 154 of Code. **(Mahendra Kumar Verma & anr. V. State of U.P. & Anr.; 2010(6) ALJ 687 (All HC)**

Ss. 156(1) – Territorial Jurisdiction regarding investigation – Determination of

The petitioner was an accused, it was argued by the learned counsel for the petitioner that the FIR lodged by Smt. Bala Devi alias Rajbala alleged that the abductee Jaiveer had telephoned her from his mobile and at that time, he was at Rampur along with accused persons, which included the petitioner. Ravindra, Mahipal, Rajendra and Dharmendra. After that she could not contact her husband on his mobile and she suspected that her husband has been done to death by the aforesaid four persons. It was further argued that as the informant had mentioned that she has received the telephone calls when her husband was at Rampur, hence FIR at case crime No. 151 of 2001 could not have been registered at P.S. Kandhla, District Muzaffarnagar.

In this connection, learned counsel for the petitioner tried to draw the court's attention of the court to section 156(1) or Cr.P.C., wherein it is provided that any Officer incharge of a police station may, without the order of a Magistrate, investigate any cognizable case which is a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

He also drew the attention of the Court to section 177 Cr.P.C. which provides that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

On this basis, the Investigating Officer of any local areas between Lakhimpur and Muzaffarnagar including Rampur are

empowered to investigate the offence. **(Ravindra v. State of U.P. & Ors.; 2010(6) ALJ 665 (All HC)**

S. 156(3) – Order for registering application as complaint case – Validity of

Order registering application as complaint case for offence of dacoity. Earlier on report of applicant has already case was registered under section 395, IPC and charge sheet was submitted against accused in that case and eye-witnesses of occurrence was also cited in application. Thus, order registering matter as complaint case was not improper. **(Nawal Kishore Sahu v. State of U.P.; 2010 Cri.L.J. (NOC) 1221 (All HC)**

S. 161 – Recording of statement of witness – Whether IO who took over investigation can record fresh statement of witness on transferring investigation to CID – Held, "Yes"

In this case the appellants, with some emphasis, contended that the Investigating Officer (PW-30), who took over the investigation at the subsequent stage upon transfer of investigation to the CID, ought to have relied and referred only to the statements recorded under Section 161 of Cr.P.C. by the earlier Investigating Officer. In other words, he had no jurisdiction to record fresh statement of the witnesses. The Court do not find any force even in this argument. Firstly, for the reason that it is settled principle of law that the statements under Section 161 of Cr.P.C. recorded during the investigation are not substantive piece of evidence but can be used primarily for a very limited purpose that is for confronting the witnesses. If some earlier statements were recorded under Section 161, Cr.P.C. then they must be on the police file and would continue to be part of police file. However, if they have been filed on judicial record they would always be available to the accused and as such no prejudice is caused to anyone. Secondly, when the case was transferred to CID for investigation, it obviously meant that in the normal course, the authorities were not satisfied with the conduct of the investigation by PW-31 and considered it appropriate to transfer the investigation to a specialized branch i.e. CID. Once, the direction

was given to PW-30 to conduct the investigation afresh and in accordance with law, the court see no error of jurisdiction or otherwise committed by PW-30 in examining the witnesses afresh and filing the charge-sheet under Section 173 of Cr.P.C. stating that the appellants and other accused had committed the offence and were liable to face trial under Sections 304-B and 498-A of IPC. **(Uday Chakraborty & Ors. V. State of West Bengal; 2010 Cri.L.J. 3862 (SC))**

S. 161 – Statement of witness under section 161 before I.O. can be used for purpose of contradiction but not for corroboration.

The statement of the witness before the I.O. recorded under Section 161, Cr.P.C. can be used for the purpose of contradiction, but, not for corroboration. The importance of the statement under Section 161, Cr.P.C. is circumscribed to the point of contradiction only and if the statement of the witness on material particulars or vital points differs from his testimony on oath before the Court, then it can be urged by the defence that his testimony being at variance with his earlier statement made before the I.O. cannot be believed because he is making statement for the first time at the time of trial and it is an after thought. So, that portion of statement made by P.W.5 to the I.O. cannot be taken into consideration being not permissible under the law. It cannot be used as substantive evidence. (Tarun Chakraborty v. State of West Bengal; 2010 Cri.L.J. 3745 (Cal HC)

S. 167(2) – Police remand can be made only during first 15 days of arrest and after that period Magistrate cannot order police remand.

In the case of Anupam J. Kulkarni's case; AIR 1992 SC 1768, police remand can only be made during the first period of remand after arrest and production before the Magistrate, but not after the expiry of the said period. Of course, the Court do not agree with the submissions made by Mr. Luthra that the second application for police remand is not maintainable even if made during the first 15 days period after arrest. The said point has also been considered and

decided in the above case. Within the first 15 days of arrest the Magistrate may remand the accused either to judicial custody or police custody for a given number of days, but once the period of 15 days expires, the Magistrate cannot pass orders for police remand. **(Devender Kumar & Anr., Etc. v. State of Haryana & Ors. Etc.; 2010 Cri.L.J. 3849 (SC)**

S. 174 – Panchanama – Purpose of – To show state of things found at place of incident.

It is common experience of one and all that site plan or panchanama of place of incident is being prepared to indicate the state of things found at the place of incident. In site plan, Investigating Officer is not supposed to note whether electric line had been taken in an unauthorized manner or not. That is not the purpose for which site plan is prepared in a criminal case. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 174 – Purpose of inquest memo – Inquest is only to ascertain nature of death.

Inquest memo – Purpose of inquest is only to ascertain nature of death. Mentioning of names of accused in inquest memo is not necessary. Merely because someone amongst witnesses to inquest had deliberately given wrong information, cannot be ground to reject prosecution version, which was established by reliable evidence of eyewitnesses. **(Saleem Pahalwan & Ors. V. State of U.P.; 2010 Cri.L.J. (NOC) 1214 (All HC)**

174 – Omission by Investigating Officer to mention names of assailants in inquest report is not fatal.

The first information report was available with Investigating Officer at time of preparation of inquest reports. The mere fact that injured witness who lodged FIR did not repeat names of all accused so as to be incorporated in inquest reports, is of no consequence. The purpose of preparation of inquest report is to ascertain whether a person has died in some suspicious circumstances or an unnatural death and as to the apparent cause of death. The inquest report need

not contain the details as to how the deceased were assaulted or who assaulted them. The omission of names of the accused and the minute details of assault in the inquest report itself is not enough to disbelieve the prosecution case. The purpose of holding an inquest is very limited, viz.; to ascertain as to whether a person has committed suicide or has been killed by any other or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. Section 174 does not mandate the Investigating Officer to mention the names of the assailants in the inquest report. There is no other provision in law or practice requiring the purpose to mention the names of the assailants and weapons possessed by them in the inquest report. The omission, therefore, does not lead to any inference to doubt the prosecution case. Such omissions are not fatal to the prosecution case. It is settled principle that merely because the witnesses on the inquest report who are also eyewitnesses did not give out the name of the accused persons while describing the cause of death in the inquest report does not render the presence of the eyewitnesses on the spot doubtful. **(Surendra Pal & Ors. V. State of U.P. & Anr.; 2010(6) ALJ 667 (SC)**

S. 190 – Cognizance of offence – Scope of interference by High Court.

In instant case, Hon'ble Supreme Court observed that it seems that accused persons approached the High Court for quashing of the charge-sheet even before any order was passed by the Magistrate in terms of Section 190 of the Code of Criminal Procedure. In the opinion, of the court, when a report is submitted to the Magistrate he is required to be prima facie satisfied that the facts disclosed therein constitute an offence. It is trite that the Magistrate is not bound by the conclusion of the investigating agency in the police report i.e.in the charge-sheet and it is open to him after exercise of judicial discretion to take the view that facts disclosed in the report do not constitute any offence for taking cognizance. Quashing of Sections 406 and 494 of Indian Penal Code from the charge-sheet even before the exercise of discretion by the Magistrate under Section 190 of the Code of Criminal Procedure is undesirable. In the opinion of the Court, in the

facts and circumstances of the case, quashing of the charge-sheet under Sections 406 and 494 of the Indian Penal Code at this stage in exercise of the power under Section 482 of the Code of Criminal Procedure was absolutely uncalled for. **(K. Neelaveni v. State rep. By Inspector of Police & Ors.; AIR 2010 SC 3191)**

Ss. 190, 173 – Refusal to accept charge-sheet by Magistrate – When would be improper

Magistrate has no power to interfere with pending investigation. His jurisdiction begins with submission of police report to him under Section 173, Cr.P.C. and not before that. No doubt, police has power to arrest accused of committing a cognizable offence and that power has been conferred on police under Section 41, Cr.P.C. but it is not always obligatory on police to arrest accused as and when any FIR is lodged against him or any investigation in pursuance of FIR is undertaken or before charge-sheet is filed. In case police does not consider it proper to arrest accused on the ground that his arrest is not necessary for conducting the investigation or otherwise, it has power to carry out the investigation and submit the report to the Magistrate under Section 173, Cr.P.C. without affecting arrest and in such situation, the Magistrate, on receipt of police report under Section 173, Cr.P.C., if decides to take cognizance of offence, has to issue a process under Section 204, Cr.P.C. for procuring attendance of accused. The police report submitted by investigating officer cannot be refused to be entertained by Magistrate for want of arrest of accused or otherwise. If police report is filed under Section 173, Cr.P.C., Magistrate has to entertain the same and pass appropriate order. Inview of these circumstances, refusal by Magistrate to entertain charge-sheet and issuing a direction to the police to submit explanations in regard to the in action on its part to arrest petitioner, without taking cognizance of the offence/offences under Section 190, Cr.P.C., would not be proper. **(Srawan Kumar Tiwari v. State of U.P. & Ors.; 2010 (5) ALJ 713 (All HC, LB)**

S. 190, 2(d), Explanation – Cognizance of offence in matter of non-cognizable report which filed against accused U/ss. 323, 504 and 506 of IPC – Validity of

In view of explanation to S. 2(d) of Cr.P.C. report of Police Officer after investigation, disclosing commission of non-cognizable offence is deemed to be a complaint and the police officer who submitted report has to be deemed to be a complainant. In other words, the charge-sheet submitted by police in non-cognizable offence shall be treated to be complaint and procedure prescribed for hearing of complaint case shall be applicable to that case. Therefore, where non-cognizable report was filed against accused U/ss. 323, 504 and 506 of Penal Code and charge-sheet submitted by Investigating Officer, instead of treating it as a complaint, Magistrate had taken cognizance of same as State Case, same would be not permissible and resultant summoning order passed by Magistrate against accused would liable to be quashed. **(Dhanveer & Ors. V. State of U.P. & Anr.; 2010(6) ALJ 639 (All HC)**

S. 202(2) Proviso – Taking of cognizance and issue of process – Examinations of all the witnesses cited in the complaint is not mandatory.

Examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to S. 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. The word 'all' appearing in proviso to S. 202 (2) is qualified by the word 'his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the

Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceedings against the accused. (Shivjee Singh v. Nagendra Tiwary & Ors.; 2010 Cri.L.J. 3827 (SC)

S. 215 – Error in framing charge – Principle for judging prejudice to accused.

The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge. In judging a question of prejudice, as of guilt, the Courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be

established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. **(Main Pal v. State of Haryana; AIR 2010 SC 3292)**

S. 245 – Power to discharge accused – Magistrate has no power to discharge accused if case is triable by Court of Session.

The petitioner was an accused in Criminal Case No. 1857 of 2009, Shilwanti Pasi v. Banwari Chauhan pending in the Court of Judicial Magistrate-IInd Bhadohi under Sections 394, 323, 504, 506 IPC and under section 3(1) (10) SC/ST Act. The order taking cognizance was challenged by the petitioner by means of criminal revision, which was disposed of by order.

Thereafter an application for discharge was moved by the petitioner before the Magistrate, which was rejected on the ground that the case was triable by Special Court of Sessions and the Magistrate had no jurisdiction to discharge the accused. The revision was filed by the petitioner has also been dismissed by the Sessions Judge.

In Smt. Shagufta Begum & Others v. State of U.P. & Others; 2010(1) U.P. Criminal Ruling 163: 2009 (6) All LJ (NOC) 1100 (All), where it was held by another Bench of the Court that in a case triable by Court of Sessions, the Magistrate has no jurisdiction to discharge the accused.

In this view of the aforesaid ruling, the orders passed by the Magistrate and the Sessions Judge cannot be faulted. **(Banwari Chauhan v. State of U.P. & Anr.; 2010 Cri.L.J. 3796 (All HC)**

Ss. 245, 244 – Discharge – Accused can make prayer for discharge before Magistrate after evidence U/s. 244, Cr.P.C.

Accused can make prayer for discharge before Magistrate after evidence, under Section 244, Cr.P.C. Thus, summoning order not liable to be interfered with. **(Raj Kishore & Ors. V. State of U.P.; 2010(5) ALJ (NOC) 666 (All HC)**

S. 313 – Object of examination of accused by Court – To establish direct dialogue between court and accused.

The answers by an accused under Section 313 of the Cr.P.C. are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 of the Cr.P.C. is wide and is not a mere formality. The Court examined the essential features of this section and the principles of law as enunciated by judgements, which are the guiding factors for proper application and consequences, which shall flow from the provisions of Section 313 of the Cr.P.C. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and, besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. **(Sanatan Naskar & Anr. V. State of West Bengal; 2010 Cri.L.J. 3871 (SC)**

S. 313 – Statement of accused recorded U/s. 313 – Extent to use in evidence.

> The primary purpose of S. 313 is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain.

Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) of Cr.P.C.

explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for, any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.P.C. as it cannot be regarded as a substantive piece of evidence. **(Sanatan Naskar & Anr. V. State of West Bengal; 2010 Cri.L.J. 3871 (SC)**

S. 313 – Scope of – This section can be utilized by prosecution only for a limited purpose to lend credence to its evidence.

The statement of the accused can only be utilized to lend credence or negate the prosecution version. If the prosecution fails to prove its case, then statement under Section 313 Cr.P.C. cannot be resorted to nor Section 106 Evidence Act can be had to convict an accused. Section 313 of the Code can be utilized by the prosecution only for a limited purpose to lend credence to its evidence. **(Dharmendra v. State of U.P.; 2010(6) ALJ (NOC) 703 (All HC)**

S. 313 – Statement of accused before court – Significance of

It is a settled principle of law that the statement made by the accused under Section 313 of the Cr.P.C. can be used by the Court to the extent that it is in line with the case of the prosecution. The same cannot be the sole basis for convicting an accused. In the present case, the statement of accused before the Court, to some extent, falls in line with the case of the prosecution and to that extent, the case of the prosecution can be substantiated and treated as correct by the Court. The legislative intent behind this section appears to have twin objects. Firstly, to provide an opportunity to the accused to explain the circumstances appearing against him. Secondly, for the Court to have an opportunity to examine the accused and to elicit an explanation from him, which may be free from the fear of being trapped for an embarrassing admission or statement. The proper methodology to be adopted by the Court while recording the statement of the accused under Section 313 of the Cr.P.C. is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. **(Dharnidhar v. State of Uttar Pradesh; 2010(6) ALJ 403 (SC)**

S. 320 & 482 – Quashing of complaint – Consideration of

In this case, dispute between parties was personal in nature. Both parties have entered into compromise. Public at large was not being affected on account of offence in question. Thus, complaint held liable to be quashed in terms of compromise arrived at between parties. **(Sardar Avtar Singh Chabara & ors. V. State of Uttar Pradesh & Anr.; 2010 Cri.L.J. (NOC) 1227 (All HC)**

S. 354 – Rarest of Rerest case – Meaning of

The rarest of rare dictum breathes life in "special reasons" under section 354(3). In this context, Bachan Singh v. State of Punjab; 1980(2) SCC 684, laid down a fundamental threshold in the following terms:

A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality.

That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

An analytical reading of this formulation would reveal it to be an authoritative negative precept. "Rarest of rare cases" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in form of "when the alternative option is unquestionably foreclosed".

Thus, in essence, rarest of rare dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the rarest of rare category.
2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

The rarest of rare dictum serves as a guideline in enforcing section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the Court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.

The background analysis leading to the conclusion that the case belongs to rarest of rare category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context notced:

"The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal".

The Rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation canbe said to be unachievable. Therefore, for satisfying the second exception to the rearest of rare doctrine, the Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the Court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh's case sets the bar very high by introduction of Rarest of rare doctrine.

In Bachan Singh's case it was stated that Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

1. That the offence was committed under the influence of extreme mental or emotional disturbance.
2. The age of the accused. If the accused is young or old, he shall not be sentenced to death.
3. The probability that the accused would not commit criminal acts of violence as would a continuing threat to society.
4. The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not the conditions (3) and (4) above.
5. That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

6. That the accused acted under the duress or domination of another person.
7. That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.
8. The Court will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

(State of U.P. v. Akhlaq; 2010(71) ACC 764 (All HC, LB)

S. 362 – Recall of order – After signing of judgment or final order disposing of case is not permissible.

Under the provisions of Cr.P.C. no court can alter or review its own judgment or order except to extent of correcting clerical or arithmetical error. No power under Section 482, Cr.P.C. can be exercised by the High Court to review or alter its own order. The court becomes functus officio, the moment official order disposing off a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. **(Ram Sewak Rai v. State of U.P. & Ors.; 2010(6) ALJ 54 (All HC)**

S. 378 – Ground for Appeal against acquittal – Paramount consideration of the court is to ensure that miscarriage of justice is prevented.

For disposal of appeal against acquittal, paramount consideration of the Court is to ensure that miscarriage of justice is prevented. **(The State of Triputa v. Haradhan Majumder & Anr.; 2010 Cri.L.J. [(NOC) 1126 (Gau. HC) (DB)**

S. 378 – Interference with appeal against acquittal by appellate court without considering question of law and fact after critical scrutiny of evidence cannot be allowed.

The appellants herein were charged and tried for the commission of offences punishable under Sections 427, 324, 504, 506 and 307 read with Section 34 of the Indian Penal Code. On careful

examination of the oral and documentary evidence on record and the case properties, the Trial Court acquitted all the appellants.

On an appeal filed by the State, the High Court by the impugned judgment set aside the order of acquittal and convicted the appellants for commission of offence punishable under Section 324 read with Section 34 of the Indian Penal Code and sentenced them to pay a fine of Rs. 5,000 each, in default of payment of fine they were directed to undergo simple imprisonment for four months.

In view of the facts and circumstances of this case, the Court of the opinion that the High Court being the appellate Court in this case, has not considered the questions of law and facts after critical scrutiny of the evidence on record. The impugned judgment, therefore, cannot be sustained which is accordingly set aside and the matter is remitted to the High Court for deciding the criminal appeal afresh after hearing the parties and considering the evidence adduced by them. **(Syed Akbar Irfan & Ors. V. State of Karnataka; 2010 Cri.L.J. 3826 (SC)**

S. 437 – Application for grant of bail for offence U/s. 113(d)(e)/114/104 of Customs Act – Bail can be grant on the ground that accused was in jail for 11 months and he had no previous criminal history. (Kamlesh Chandra v. Union of India; 2010(6) ALJ (NOC) 702 (All HC)

S. 438 & 439 – Grant of bail/anticipatory bail – Each case has to be considered its own merits.

The principles, which are normally required to be followed while granting regular bail or anticipatory bail, but the same have to be applied according to the facts and circumstances of each case. Except for indicating the broad outlines for grant of bail and/or anticipatory bail, no strait-jacket formula canbe prescribed for universal application, as each case for grant of bail has to be considered on its own merits and in the facts and circumstances of each case. Infact, the principles laid down by the Court in State of U.P. v. Amarmani Tripathi; (2005) 8 SCC 211 = AIR 2005 SC 3490, broadly covers the matters to be considered in an application for grant

of bail, but even then the same may not fully cover the fact-situation of each case. **(Pravinbhai Kashirambhai Patel v. State of Gujarat & Ors.; 2010 Cri.L.J. 3867 (SC)**

S. 439(2) – Cancellation of bail – Bail application allowed by Sessions Judge can be cancelled by High Court as per provisions of S. 439(2) and plea that it has to be cancelled by same Judge only is not tenable.

If the bail application is allowed by the Sessions Judge or by the High Court, the same can be cancelled by the Sessions Judge who has granted bail or by the High Court in view of the provision of Section 439(2), Cr.P.C. If the bail application was allowed by the Sessions Judge that can be cancelled by the Sessions Judge as well as by the High Court. If bail was granted by the High Court that can be cancelled by the High Court preferably by the same Judge. Hence, this contention of the applicant is misconceived. (Tufail Ahmad v. State of U.P..; 2010 Cri.L.J. 3797 (All HC)

S. 451 – Disposal of seized property (i.e. wheat) if property is perishable – Mode of

Property seized by authorities was perishable item and it has kept in godown of Mandi Samiti. Possibility cannot be ruled out that by lapse of time, it may perish so authorities directed to make arrangements for selling same in open market or by selling same in Government shops and money collected to be deposited in Court concerned or with the authority concerned subject to result of case. **(Anshu & Ors. V. State of U.P. & Anr.; 2010 Cri.L.J. (NOC) 1224 (All HC)**

S. 482 – Inherent powers – Exercise of – It to be sparing for preventing abuse of process of court or to secure ends of justice.

It is true that Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, otherwise, it would be an instrument in the hands of a private complainant to

unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and brings about its closure without full-fledged enquiry. Though High Court may exercise its power relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice the power should be exercised sparingly.

Though the powers possessed by the High Court under Section 482 are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. The Court make it clear that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482. **(State of A.P. v. Gourishetty Mahesh & Ors.; 2010 Cri.L.J. 3844 (SC)**

S. 482 – Interim stay order – Staying further criminal proceeding pending before court which was granted for limited period would not continue to be effective in future, if it not specifically extended on future date.

Where respondent has filed application U/s. 482 of Cr.P.C. to challenge criminal proceedings pending before court and in such application interim stay order was granted by Court in favour of respondents and said interim stay order was extended till next date of listing out but thereafter interim stay order was not extended and petitioner thus, filed application before trial court with a prayer to proceed with that case further, as there was no stay order in existence in respect of proceedings pending before the court below, but trial court declined to proceed further with the trial pending before it, same would be improper, as once the interim stay order granted is discontinued on record, though, there is no specific mention that the stay order is not extended it has got the same force and it should be treated that thee is no interim stay order staying further proceedings pending before the court below. Interim stay order granted by Court for a limited period will not continue to be effective in future not

specifically extended on further dates. **(Karam Chand Thapar Brothers (C.S.) Ltd. V. Nandini Roofing System Pvt. Ltd. & Ors.; 2010(6) ALJ 215 (All HC)**

S. 482 – Inherent powers – Application U/s. 482 of the Code after the Trial Court has convicted the accused is not maintainable.

In this case, petition under Section 482 Code of Criminal Procedure (hereinafter referred to as Code) has been filed by the petitioner against the order dated 24.8.2010 passed by the learned Additional Sessions Judge, FTC-III, Court No. 13, District Sultanpur in Sessions Trial No. 238 of 1996, conviction under section 302, 323 and 324, IPC, Police Station Gosaiganj, District Sultanpur whereby the learned Additional Sessions Judge has ordered for issuance of non-bailable warrant against the accused.

At this stage, learned AGA raised preliminary objection that the petition moved by the petitioner under section 482 of the Code is not maintainable. In view of the preliminary objection raised by the learned AGA the only question that crops up for consideration before the court is "whether the present petition moved by the petitioner is maintainable?"

Learned AGA in support of his argument has placed reliance on the case of Arun Shanker Shukla v. State of U.P. and Others; 1999 (39) ACC 423 (SC), decided by the Hon'ble Apex Court.

The Hon'ble Apex Court disapproved the order passed by the High Court and held that the petition under section 482 of the Code at this stage was not maintainable as the accused had got statutory remedy to prefer an appeal against his conviction. The Hon'ble Apex Court has discussed the scope and limit of the inherent power of the High Court conferred under section 482 of the Code and held that the High Court while exercising the inherent power as conferred under section 482 of the Code may pass any order to prevent the abuse of process of law or otherwise to secure the ends of justice. But the "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in

accordance with law including procedural law and not otherwise. The inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in section 482 of the Code in cases where there is no express provision empowering the High Caourt to achieve the said object.

The Hon'ble Apex Court has further held that the petition under section 482 Cr.P.C. after the accused had been convicted was not maintainable as the accused had got efficacious alternative remedy to file an appeal against conviction.

The facts of the present case are squarely covered with the facts of case law referred above.

In view of the law laid down by the Hon'ble Apex Court, the petition filed by the accused-petitioner under section 482 of the Code after the Trial Court has recorded the finding of conviction against him is not maintainable as he has got efficacious statutory remedy to challenge his conviction in appeal before the Court and is liable to be dismissed. **(Kamalapati Verma v. State of U.P.; 2010 (71) ACC 699 (All HC, LB)**

S. 482 – Inherent powers – Exercise of this power by High Court even before Magistrate taking cognizance and examining whether accused deserves to be discharged would be improper.

It is relevant here to state that offences under Sections 406, 494 and 498-A are triable by a Magistrate, First Class and as all these offences are punishable with imprisonment for a term exceeding two years, the case has to be tried as a warrant case. The procedure for trial of warrant case by a Magistrate instituted on a police report is provided under Chapter XIX, Part A of the Code of Criminal Procedure, 1973. Section 239 inter alia provides that if upon considering the police report and the document sent with it under Section 173 and making such examination, if any, of the accused and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. It seems that the accused persons even before the case had

reached that stage filed an application for quashing of the charge-sheet under Sections 406 and 494 of the Indian Penal Code. In the opinion of the court, the High Court ought not to have interfered after the submission of the charge-sheet and even before the Magistrate examining as to whether the accused persons deserved to be discharged in terms of Section 239 of the Code of Criminal Procedure.

There is yet another reason which the High Court ought to have considered before quashing the charge-sheet under Sections 406 and 494 of the Indian Penal Code. All the offences are triable by Magistrate and quashing of the charge-sheet under Sections 406 and 494 of the Indian Penal Code had not resulted into exonerating the accused persons from facing the trial itself. Matter would have been different had the offences under Sections 406 and 494 of the Indian Penal Code been triable as sessions case. In matter like this the High Court ought to have allowed the provisions of the Code of Criminal Procedure referred to above its full play. **(K. Neelaveni v. State re. By Inspector of Police & Ors.; AIR 2010 SC 3191)**

► Criminal Trial

Non-examination of FIR witnesses not coming forward to support prosecution case – Effect of

In instant case, it is not disputed that shrieks and cries of Injured and the Deceased attracted Balvir Singh, Bheem Singh, Mathura Prasad and Ompal who are alleged to have arrived on the spot and challenged the assailants who fled away towards village abadi still they have not been examined by the prosecution on the ground that they were won over by the accused persons.

Importantly, the alleged witnesses arrived on the spot after the assault did not come forward to support the prosecution case, therefore, they could not be the eyewitnesses and no adverse inference can be drawn against the prosecution due to their non-examination. **(Netra Pal and others v. State; 2010(71) ACC 757 (All HC)**

► Easements Act

S. 61 – Revocation of licence – Notice U/s. 106 of T.P. Act is not required to be given to licensee before filing suit for his eviction, S. 106 is applicable in cases of lease and not licence.

Notice for termination of lease is contained under Chapter V of the Transfer of Property Act pertaining to lease of immovable property. It is, thus, clear that Section 106 of the Transfer of Property Act is applicable in cases of lease and not licence. Learned counsel for the petitioners has failed to point out any such provisions either in the Transfer of Property Act or in the Indian Easements Act, 1882 prescribing a notice for termination of a license.

In view of the above, the first argument advanced by the learned counsel for the petitioners is devoid of any force and not liable to be accepted and both the courts below have committed no illegality in rejecting the application filed by the defendant – petitioners for rejection of the plaint for want of notice under Section 106 of the Transfer of Property Act.

In view of the aforesaid facts and discussions, since the suit was filed on the allegation that defendant – petitioners were licensee for a fixed term and have not vacated the suit property despite expiry of the period of licence, no notice under Section 106 of the Transfer of Property Act was required to be given before filing of the suit. **(Nanhku & Ors. V. Brij Nath & Ors.; 2010(5) ALJ 538 (All HC)**

► Electricity Act

S. 42 – Arbitration and Conciliation Act – S. 34 – Whether challenge of award given by electricity ombudsman can be maintainable under writ petition? – Held, "No"

Where Electricity Ombudsman has succeeded in resolving the dispute by mediation and conciliation and has reached to a settlement, the proceedings and his conclusions are not subject to challenge except on the ground of jurisdictional error committed by him; violation of principles of natural justice, violation of any express provision of the Electricity Act, 2003; Electricity Supply Code,

Statutory Rules or Rate Schedule; fraud proved on record or the award being against public policy. The grounds for challenging award of Electricity Ombudsman are limited to the grounds such as or which may be taken under Section 34 of the Arbitration and Conciliation Act, 1996.

Where the award given by the electricity Ombudsman, has favour as of an award by an Arbitral Tribunal it can be challenged on limited grounds, such as provided under Section 34 of the Arbitration and Conciliation Act, 1996. Hence, where grounds taken to challenge award of electricity Ombudsman were not falling under any of the conditions akin to and provided under Section 34 of the Arbitration and Conciliation Act, 1996 and there was no challenge to the capacity, opportunity of hearing or exclusions of the dispute to be considered by the Electricity Ombudsman. Even petitioner has also not challenged the award on the ground of competency of the Electricity Ombudsman and it was also not opposed to any public policy; writ petition challenging award of Electricity Ombudsman would not be maintainable. **(Executive Engineer, Electricity Urban Distribution Division IInd v. Electricity Ombudsman, Lucknow & Ors.; 2010(6) ALJ 446 (All HC)**

► Essential Commodities Act

S. 3 – Cancellation of fair price shop dealership – When cannot be valid.

By way of an agreement entered between the petitioner and the respondent, a fair price shop was allotted in favour of the petitioner in the village Puremani Mazre, Vikas Khand Banikodar, Tehsil-Ramsanehighat, District Barabanki. On 24.2.2005 an inspection was done by the inspecting team and on the basis of the report submitted by the said inspecting team, the agreement of the petitioner for running the fair price shop was cancelled by order dated 13.5.2005 without providing any opportunity whatsoever to him.

The order dated 13.5.2005 passed by the District Supply Inspector, Ramsanehighat, Barabanki thereby terminating the agreement of the petitioner for running the fair price shop was

challenged by an appeal before the Commissioner, Faizabad Division, Faizabad i.e. respondent No. 2 which was dismissed by order dated 26.7.2006 hence the present writ petition.

It has been the constant view of Hon'ble Supreme Court and this Court that the principles of natural justice must be followed and nobody should be condemned unheard and if any order has been passed against any person without providing any opportunity then the same will be violation of principle of natural justice.

In view of the above said facts and circumstances as admittedly in the present case the order dated 13.5.2005 had been passed without providing any opportunity of hearing to the petitioner so the same cannot be sustained. **(Mohan Lal v. State of U.P.; 2010(5) ALJ 527 (All HC, LB)**

► Evidence Act

S. 3 – Oral evidence – Minor omissions in police statement is never considered to be fatal.

Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

The Hon'ble Supreme Court has further held that minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Relationship – Credibility of witness is not a factor to affect credibility of witness

In connection with the first submission that the witnesses should not be relied upon as they related to the deceased and also that they were partisan and interested witness and further they were imbued with powerful motive to falsely implicate the appellants in the case. First of all the Court shall deal with the contention regarding interestedness of the witnesses.

It is not a safe rule to reject merely on the basis of relationship of the witness with the deceased. In such a situation it only puts the Court with the solemn duty to make a deeper probe and scrutinize the evidence with more than ordinary care.

It is well settled that the relationship is not a factor to affect credibility of a witness. It is more often that a relation would not conceal let off the hook to the real culprit. It must be observed here that if plea of false implication is made, foundation has to be laid to prop it up. It brooks no dispute that the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

Hon'ble Supreme Court has further held that question of motive is not material where there is direct evidence of the acts of accused. **(State of U.P. v. Akhlaq; 2010(71) ACC 764 (All HC, LB)**

S. 3 – Rustic eye-witness – Cross-examination for days together to confuse him – Practice should be deprecated.

A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to grueling cross-examination should not be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit together accused who have perpetrated heinous crime. The basic principle

of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Child witness – Admissibility of

There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. It would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Testimony of eye-witness – Necessity of corroboration.

In the facts of the present case, a mob attacked the deceased in the crowded corridors of the court of the 2nd Additional District Judge and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the accused No. 1 (appellant) chasing the deceased with an axe and assaulting the deceased with axe on his neck. All these three eye witnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eye witnesses thus saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises. When an attack is made on the assailant by a mob in a crowded place and the eye witnesses had little time to see the accused,

the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. **(Siddanki Ram Reddy v. State of Andhra Pradesh; 2010 Cri.L.J. 3910 (SC)**

S. 3 – Circumstantial evidence – Basis of proof of – Chain of circumstances proved must be complete.

In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court

has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilty of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the Court. **(G. Parshwanath v. State of Karnataka; AIR 2010 SC 2914)**

S. 3 – Testimony of Hostile witness need not be rejected in entirety.

It is settled law that just because a witness turns hostile his entire evidence need not be rejected by Court. **(G. Parshwanath v. State of Karnataka; AIR 2010 SC 2914)**

S. 8 – Motive – Omission to state motive for crime in FIR is neither fatal the prosecution not an omission of important fact.

Non-mentioning of motive in the FIR cannot be regarded as omission to state important and material fact. As a principle, it has been ruled by the Court that omission to give details in the FIR as to manner in which weapon was used by accused is not material omission amounting to contradiction. Further, this is a case wherein FIR was filed by a rustic man and, therefore, non-mentioning of motive in the FIR cannot be attached much importance. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 9 – Test Identification parade – When it is not fair.

The test identification parade in this case has not been fair to the appellant. Although eight suspects were arrested, only the appellant and one other were produced before the witnesses at the Test Identification Parade. This gives room for a lot of doubt on the case of the prosecution that none other than the appellant was the assailant. In State of Maharashtra v. Suresh, on which reliance was placed by Mr. Reddy, the Court found that the suspect was permitted to stand anywhere among seven persons and the witnesses were then asked to identify the person whom they saw on the crucial day and on these facts the Court held that the test identification parade was conducted in a reasonably fool proof manner. This is not what has been done in the present case and, therefore, the corroboration of the substantive evidence of PWs 1, 5 and 6 on the identification of the suspect by the test identification parade is not trustworthy. **(Siddanki Ram Reddy v. State of Andhra Pradesh; 2010 Cri.L.J. 3910 (SC)**

S. 32 – Dying Declaration – Absence of certificate of fitness by the Doctor not sufficient to discard the dying declaration

The Supreme Court has held that the Trial Court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer form would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification by the Doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. The statement made by the injured is candid, coherent and consistent. The court sees no reason to disbelieve the same. **(Om Pal Singh v. State of U.P.; 2010(71) ACC 923 (SC)**

S. 35 – Document – Admissibility and probative value of document is different things.

A document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be

examined in the facts and circumstances of a particular case. The authenticity of the entries in the official record by an official or person authorized in performance of official duties would depend on whose information such entries stood recorded any what was his source of information. The entries in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. **(Madan Mohan Singh & Ors. V. Rajni Kant & Anr.; AIR 2010 SC 2933)**

S. 45 – Medical expert opinion vis-à-vis – Direct evidence – Which evidence given precedence – Direct and reliable evidence takes precedence over expert opinion. (Pankaj Kumar v. State of H.P.; 2010 Cri.L.J. (NOC) 1171 (HP)

S. 45 – Evidentiary value of expert opinion – Death by shot in head – Absence of tattooing and blackening of skin surrounding wound is rule out case of suicide as shot was not fired from blank range.

The deceased and the accused were working in the same organization. They were office bearers of the same Union. Two days before the incident, the deceased had left that Union and become the President of the rival union. They, therefore, resented the action of the deceased. They formed a common intention to eliminate the deceased. They went to the house of the deceased and invited him to accompany them to resolve the Union disputes. They took him to Hotel Genesis where they consumed liquor; they were also served food by the hotel staff. At some point of time the pistol of the deceased was taken by one of the appellants. It is wholly irrelevant whether it was voluntarily given by the deceased or taken by the assailant. Thereafter, one of the accused persons shot the deceased in the head with his own pistol. They then wiped the fingerprints on the pistol and threw the pistol down next to the body of the deceased. They tried to escape. This would tend to indicate towards the guilt rather the innocence of the appellants. Two of them were captured just outside the hotel, the other two managed to escape. The injury on the deceased does not indicate that he had shot himself. The injuries show that the shot has not been

fired at point blank range. There is no tattooing or blackening of the skin surrounding the entire wound. The consumption of liquor cannot be doubted in view of the evidence given by the waiter, who served the food.

All these circumstances taken together clearly form such a continuous and unbroken chain as to leave no manner of doubt that the deceased was shot dead by one of the appellants. The cleaning of the pistol to remove the fingerprints is a circumstance which is a strong pointer to the guilt of the appellants. **(Santokh Singh & Anr. V. State of Punjab; AIR 2010 SC 3274)**

S. 113-B – Cr.P.C. S. 227 – Dowry death – Presumption as to – Discharge of accused husband by ignoring legal provision of S. 113-B would be illegal.

In this case, the specific allegation was made by complainant Suraj Singh in its report as well as his statement recorded under section 161 Cr.P.C. that the respondent No. 2 made demand of Rs. 22,000/- for scooter and the deceased informed her parent by writing a letter dated 5.7.1994 about demand of dowry and cruelty committed by the respondent No. 2 due to non fulfillment of demand but the learned trial court did not consider this aspect of evidence. A strong circumstance was also found against respondent No. 2 that Sneh Lata died under unnatural circumstances soon after two months of her marriage in respect of which no information was sent to her parents and family members and soon after her death, her dead body was cremated. Under these circumstances, the learned trial court passed perverse order without considering above facts, circumstances and evidence on record as well as committed illegality in ignoring the legal provisions of section 304-B of IPC and section 113-B of Indian Evidence Act. **(Suraj Singh v. State of U.P. & Anr.; 2010(6) ALJ 43 (All HC)**

S. 114 – Presumption of marriage – Live-in-relationship between parties if continued for a long time cannot be termed in as "walk in and walkout" relationship but it shows clearly presumption of marriage.

The live-in-relationship if continued for such a long time, cannot be termed in as "walk in and walk out" relationship and there is a presumption of marriage between them which the appellants failed to rebut. **(Madan Mohan Singh & Ors. V. Rajni Kant & Anr.; AIR 2010 SC 2933)**

S. 134 – Solitary witness – Reliability of – Testimony if wholly reliable can be sufficient to convict accused.

In Sunil Kumar v. State Govt. of NCT of Delhi; (2003) 11 SCC 367=AIR 2004 SC 552, the Court repelled a similar submission observing that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

In another case of Namdeo v. State of Maharashtra; (2007) 14 SCC 150=AIR 2007 SC (Supp) 100, the Court reiterated the similar view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

Thus, in view of the above, the bald contention made by Shri Bagga that no conviction can be recorded in case of a solitary eye-witness has no force and is negatived accordingly. **(Bipin Kumar Mondal v. State of West Bengal; 2010 Cri.L.J. 3880 (SC)**

► Food Safety & Standards Act

S. 3(zw) – Substance – Definition and scope

In this case, Court observed that Court would like first to recapitulate the definition of word "food" and "substance" as defined under Section 3 of the Act, which reads as under:-

"'food' means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause (zk) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality."

"substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapor.

It is not the case of the State Counsel that the carbonated drinks or juice based beverages are not intended for human consumption or that they are not substances for the purposes of Section 3(zw). In PFA Act, standards were prescribed for various food articles in the Appendix B. In Appendix-B, carbonated water is defined in Entry A.01.01. By virtue of Section 98, the rules including Appendix B has been temporarily transported to FSSA till the regulations under the FSSA are notified. **(M/s. Pepsico India Holdings (Pvt.) Ltd. & Anr. V. State of U.P. & Ors.; 2010(6) ALJ 30 (All HC - LB)**

S. 89 – Adulteration of food stuff is covered by above special Act and Authority can take action only under FSSA and not under PFA Act because of previous is overriding effect over all food related law and invoking the Ss. 272 and 273 of IPC in this matter would not be proper.

In view of the statutory provisions crystal clear legal proposition and particular provisions under the FSSA the court is in agreement with the arguments advanced by the petitioner's Counsel that for adulteration of food or misbranding, after coming into force of the provisions of FSSA vide notification dated 29th July, 2010, the authorities can take action only under the FSSA as it postulates an overriding effects over all other food related laws including the PFA Act. In view of the specific provisions under the FSSA, the offences relating to adulteration of food that are governed under the FSSA after July 29, 2010 are to be treated as per the procedures to be followed for drawing and analysis of samples as have been provided for. The provisions of penalties and prosecution have also been provided therein. Therefore, before launching any prosecution against an alleged offence of food adulteration, it is necessary for the concerned authorities to follow the mandatory requirements as provided under Sections 41 and 42 of the FSSA and, therefore, the police have no authority or jurisdiction to investigate the matter under FSSA. Section 42 empowers the Food Safety Officer for inspection of food business, drawing samples and sending them to Food Analyst for analysis. The Designated Officer, after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations to the Commissioner of Food Safety for sanctioning prosecution. Therefore, invoking Sections 272 and 273 of the Indian Penal Code in the matter relating to adulteration of food pursuant to the impugned Government order is wholly unjustified and non est. Furthermore, it appears that the impugned government Order has been issued without application of proper mind and examining the matter minutely and thus the State Government traveled beyond the jurisdiction. **(M/s. Pepsico India**

Holdings (Pvt.) Ltd. & Anr. V. State of U.P. & Ors.; 2010(6) ALJ 30 (All HC - LB)

► Forest Act

S. 52 – Confiscation of vehicle – Validity of

In the instant case, Vehicle allegedly involved in forest offence, but there is no element of evidence, prima-facie showing that offence in question was committed with connivance or knowledge of petitioner owner of vehicle. So order of confiscation of vehicle was illegal and liable to be set aside. **(Kashmir Singh v. State of H.P.; 2010 Cri.L.J. (NOC) 1128 (HP)**

► Hindu Marriage Act

S. 13 – Whether grant of Divorce on irretrievable breakdown of marriage is valid? – Held, "Yes".

It is noted that the parties are not cohabiting together for almost 17 years. Since there has been a long period of continuous separation, it may fairly be concluded that in the facts and circumstances of this case that the matrimonial bond is beyond repair and the marriage has become a fiction as has been held by the Apex Court in (2007) 4 SCC 511. Samar Ghosh v. Java Ghosh. The Court in that case held that –

"The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty. In present case, trial Court had rightly concluded that the various instances in their matrimonial life, had led to grave mental cruelty to the appellant husband. Further, the High Court failed to take into consideration the most important aspect of the case that the parties had admittedly been living separately for more than 16-1/2 years. The entire substratum of marriage had already disappeared."

The law laid down by the Apex Court in the aforesaid cases squarely applies to the facts and circumstances of this case where the

spouse have been living separately for a long long period of time. It appears that their bond of marriage can not be repaired which has been extensively damaged by passage of separation. The parties are in their mid's 40. The wife is not ready to cohibit with the husband inspite repeated efforts made by him and their relatives. Every person has a right to live healthy sexual life; hence love and affection from his or her partner in the marriage which has completely vanished in the instant case. It appears that the lower appellate Court has lost sight of this important factor and the guide lines laid down by the Apex Court from time to time through their Lordships' judgments. The marriage in the instant case cannot continue. Ground realities have to be considered before allowing the parties to continue their relationship of married couple till they become too old to have any biological need. Parties are already in their mid forty's and if a new lease to their life is to be granted then matter has to be settled now. **(Dr. Vinod Kumar Gupta v. Smt. Deepa Gupta; 2010(5) ALJ 540 (All HC)**

S. 13(1)(ia) – Divorce on ground of cruelty – Proof of – Petitioner has to make out specific case that conduct alleged amount to cruelty

Cruelty has not been defined under the Act, it is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors in different set of circumstances. Therefore it is essential for the appellant who claims relief to prove that a particular, part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will under all circumstances amount to cruelty, vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty. It is true that even a single act of violence which is of grievous and inexcusable nature satisfies the test of cruelty. Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injuries the other spouse. The marital life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. The

ill-conduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty. **(Gurbux Singh v. Harminder Kaur; 2010 AIR SCW 6160 (A)**

S. 13-B(2) – Divorce Act, S. 10-A – Divorce by mutual consent – Waiver of waiting period of six months is mandatory under sub s. (2) of S. 13-B of above Act – No court can waive statutory period except Apex Court U/s Art. 142 of Constitution of India.

Sub-section (2) mandates unambiguously that after the decision under sub-sec. (1) is taken and the petition is filed the spouses have to wait for a minimum period of six months in contemplation. The anxiety of the system and the culture and civilization which the system represents to avoid the trauma of a divorce if possible is reflected eminently in sub-section (2). Sub-section (2) is mandatory and not merely directory.

No court can waive the statutory period except the Apex Court which under Art. 142 of the Constitution can act even beyond the ordinary law in order to achieve complete justice in the peculiar facts of a given case. **(M. Krishna Preetha v. Dr. Jayan Moorkkanatt & Anr.; IAR 2010 Kerala 157)**

S. 25 – Entitlement to permanent alimony – S. 25 is wide enough to enable court to grant permanent alimony to erring wife

Section 25 of the Hindu Marriage Act, 1955 is wide enough to enable the court to grant permanent alimony to the erring wife. There is nothing in law to prevent the court from making an order of permanent maintenance in favour of the wife even if she is unsuccessful in defending the suit for divorce.

In view of the above the cruelty or desertion on part of the wife leading to the decree of divorce alone would not be a relevant criterion for refusing alimony to her. After all wife is entitle to maintain herself and there is no statutory prohibition for her from

seeking maintenance from her husband or ex-husband. **(Sunil Kumar Sharma v. Smt. Meera Sharma; 2010(6) ALJ 209 (All HC)**

► Hindu Minority & Guardianship Act

Ss. 4(b)(ii) 8 and S. 9 – Testamentary Guardian – Father appointed his mother as guardian of his minor sons through will and died – Step mother of one of the minor son cannot object as to appointment of Grand Mother as guardian.

Step-mother of one of the minor son would have no right to raise objection as to appointment of grand mother as guardian and grand mother being only common factor whose genes were inherited by said two minors through wedlock of her son with two different ladies, she would be appropriate person in facts and circumstances of case be appointed as guardian under S. 4(b) (ii). **(Smt. Vinod Kumari v.Smt. Draupati Devi; AIR 2010 (NOC) 982 (All)**

► Hindu Succession Act

Ss. 57 and 213 – Requirement of obtaining probate – When not tenable.

When Will has made which covering immovable property situated outside territories falling U/s. 57(a),(b). Then Probate of Will is not required to be obtained. **(Rupinder Singh Anand v. Smt. Gajinder Pal Kaur & Ors.; AIR 2010 (NOC) 936 MP (Indore Bench))**

S. 114 – Transfer of Property Act – S. 40 – Restriction on alienation of property to strangers is values and not violative of rule against perpetuity.

The testator created life interest in favour of her two sisters with a stipulation in clause 11 that after their death, their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the condition that if either of them want to sell the property then they shall have to sell it to other sharers only as per the prevailing market value and not to strangers.

Held, that restriction which was meant to ensure that the property bequeathed by testator did not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English Courts or the one contained in Section 114 of the Succession Act, 1925. Therefore the appellant who purchased 'B' properly in violation of the aforesaid condition cannot be heard to say that the restriction contained in clause 11 of the Will should be treated as void because it violates the rule against perpetuity. The conjoint reading of clauses 4, 10 and 11 of the Will made it clear that the testator had intended to prevent transfer of property to anyone other than the heirs of her two sisters. In terms of clause 4 the two sisters were to enjoy the house property jointly without encumbering the same during their lifetime. After their death the male heirs of one of the sisters were to get 'A' property in equal shares and male heirs of another sister to get 'B' property subject to the condition specified in clause 11 which envisages that in case of alienation the male heirs of either sister had to sell the property to other sharers as per the prevailing market value and not to strangers. Since the intention of the testator was to impose a restriction on alienation of property clauses 10 and 11 cannot be interpreted in a manner which permits violation of that condition. **(K. Naina Mohamed v. A.M. Vasudevan Chettiar; 2010 AIR SCW 5360)**

► Indecent Representation of Women (Prohibition) Act

S. 4 – Applicability of – Complaint under S. 4 against accused for expressing her personal views on pre-marital sex that were published by news magazine is not tenable as accused is neither advertiser nor publisher.

Perusal of the complaints reveals that most of the allegations have pertained to offences such as defamation (Sections 499, 501 and 502 IPC), obscenity (Section 292 IPC), indecent representation of women and incitement among others. At the outset, the Court is of the view that there is absolutely no basis for proceeding against the appellant in respect of some of the alleged offences. For example, the Act, 1986 was enacted to punish publishers and advertisers who

knowingly disseminate materials that portray women in an indecent manner. However, this statute cannot be used in the present case where the appellant has merely referred to the incidence of pre-marital sex in her statement which was published by a news magazine and subsequently reported in another periodical. It would defy logic to invoke the offences mentioned in this statute to proceed against the appellant, who cannot be described as an 'advertiser' or 'publisher' by any means. Similarly, Section 509 IPC criminalizes a 'word, gesture or act intended to insult the modesty of a woman' and in order to establish this offence it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act. Clearly this offence cannot be made out when the complainants' grievance is with the publication of what the appellant had stated in a written form. **(S. Khushboo v. Kanniammal & Anr.; AIR 2010 SC 3196)**

► Indian Penal Code

S. 96 – Plea of private defence – When not tenable?

Hon'ble Supreme Court has observed that plea of private defence is not tenable when there is no evidence to show that deceased was armed or made any attempt on life of appellant. **(Narinder Kumar v. State of Jammu & Kashmir; AIR 2010 SC 3015)**

S. 96 – Right of private defence is not a right of aggression or of reprisal and it last so long as reasonable apprehension of danger to body continues.

The right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent.

According to these provisions, the right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (Sikandar Singh & Ors. V. State of Bihar; 2010 Cri.L.J. 3854 (SC)

S. 96 – Burden of Proof in case of private defence lies on accused but it is not as onerous as one that lies on prosecution.

It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record. In Vidhya Singh v. State of Madhya Pradesh; AIR 1971 SC 1857, the Court had observed that right of self-defence should not be construed narrowly because it is a very valuable right and has a social purpose.

In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injury so caused on the accused

probabilise the version of the right of private defence. (Sikandar Singh & Ors. V. State of Bihar; 2010 Cri.L.J. 3854 (SC)

S. 149 – Conviction on basis of common object – Factor to be considered

Six persons in all namely Raj Narain, Deo Narain, Shiv Singh, Vijay Singh, Raj Bahadur Singh and Anirudh Singh were brought to trial for offences punishable under Section 302 read with 149 of the Indian Penal Code for having committed the double murder of Ram Swarup and Ram Pratap Singh. They were all convicted by the trial court. While their appeal was pending in the High Court, Raj Narain, Vijay Singh, Raj Bahadur Singh and Anirudh Singh passed away. The High Court, accordingly, went into the matter qua Deo Narain and Shiv Singh, the two surviving accused, and vide the impugned judgment, dismissed the appeal. A Special Leave Petition was thereafter filed in the Court by the two convicted accused. By order dated 12th May, 2005, the Court dismissed the Special Leave Petition vis-à-vis Shiv Singh and granted leave to the present appellant. It is in this situation that the matter is before Supreme Court.

Supreme Court has observed that the factum of causing an injury or not causing an injury would not always be relevant where the accused is sought to be roped in with the aid of Section 149 of the IPC. At the same time, where the animosity between parties is admitted with a series of murders and attempted murders inter se and political rivalries going back for years together, a case of false implication is also a clear possibility. It is for this reason that the Courts sift the evidence to separate the grain from the chaff and to see that in a case of admitted animosity and a large number of accused some corroborating evidence to support the eye witness account must be looked for. **(Deo Narain v. State of U.P.; 2010(6) ALJ 676 (SC)**

S. 149 – Unlawful assembly – Determination of 'common object' – It has to be ascertained from acts and language of members and not from consideration of all surrounding circumstances.

A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each

member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, is some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. (Sikandar Singh & Ors. V. State of Bihar; 2010 Cri.L.J. 3854 (SC)

S. 300 – Benefit of exception 4 – Availability

The sine quo non for the application of an Exception to Section 300 always is that it is a case of murder but the accused claims the benefit of the Exception to bring it out of that Section and to make it a case of culpable homicide not amounting to murder. The court must, therefore, assume that this would be a case of murder and it is for the accused to show the applicability of the Exception, Exception 4 reads as under:-

"Exception-4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

A perusal of the provison would reveal that four conditions must be satisfied to bring the matter within Exception-4:

(i) it was a sudden fight;

(ii) there was no premeditation;

(iii) the act was done in the heat of passion; and; that

(iv) the assailant had not taken any undue aadvantage or acted in a cruel manner.

The Court of the opinion that this case, do not justify the applicability of Exception 4. Admittedly there was no pre-meditation in the incident. The second requirement of a sudden fight is however missing. The facts show that there was no sudden quarrel and it was a unilateral act on the part of the appellant as he lost his temper as he suspected the deceased of having misappropriated the fare that he had been collecting. The deceased also had no role to play. The Court also observed that the appellant had taken undue advantage of his position inasmuch as that he had run to the scooter opened the boot, taken out a knife and caused one injury on the person of the deceased who was a young, unarmed boy. It was, therefore, also a clear case where the appellant had taken undue advantage of his position.

It is also well settled that the number of injuries caused in such a case is not conclusive in determining the nature of the offence, but what has to be primarily seen are the circumstances preceding the incident and not exclusively during the incident.

The Court is therefore, of the opinion that the case of the appellant cannot fall within Exception-4. **(Vijender Kumar v. State of Delhi; 2010 Cri.L.J. 3851 (SC)**

S. 300 – Motive in murder case – Proof of – Motive is not essential when direct evidence establishes crime.

In instant case, undoubtedly, there is nothing on record to show as what could be the motive behind the murder of his wife and son by the appellant. The issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In such a case, particularly when a son and other closely related persons depose against the appellant, the proof of motive by direct evidence loses its relevance.

It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance.

In a case relating to 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 importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. (Vide Ujagar Singh v. State of Punjab; (2007) 13 SCC 90 **(Bipin Kumar Mondal v. State of West Bengal; 2010 Cri.L.J. 3880 (SC)**

S. 300 – Murder – Proof of – Abscondance by accused would not by itself – Sufficient to prove guilt.

Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Mere absconding by the accused after commission of the crime and remaining untraceable for a long time itself cannot establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience. **(Bipin Kumar Mondal v. State of West Bengal; 2010 Cri.L.J. 3880 (SC)**

S. 300 – Murder – Honour killing – Eyewitness was youngest member of family of deceased – Reliability – While his elder brother and sister has not been examined by prosecution.

Evidence of eye-witness who was the youngest member of family of deceased and had witnessed murder of his five family members in his tender age cannot be disbelieved on ground that his elder brother and sister who were of mature age and were in a better position to depose about the incident were not examined by prosecution. The witness was not in charge of prosecution case. The

Public Prosecutor was in charge of the case and it was for him to decide whether elder brother and sister should be examined or not. The evidence of witness in no uncertain terms, discloses that his brother and sister were ready to depose before the Court about the incident however, for non-production of his brother and his sister before Court, witness examined was never responsible. At no stage of trial, the defence had made request to the Trial Court to call upon the Public Prosecutor to examine elder brother and sister as witnesses. It was also open to the defence to examine them as defence witness. No payer was made by the defence even to examine them as court witnesses. Therefore, for non-examination of elder brother and sister the witness examined could not have been blamed nor his evidence could have been brushed aside in a casual manner. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 300 – Honour killing – Eye witness was youngest member of family of deceased who had been slept in same room along with member who were killed – His evidence cannot be disbelieved on ground that his brother and sister were not examined by prosecution.

Evidence of eye-witness who was the youngest member of family of deceased and had witnessed murder of his five family members in his tender age cannot be disbelieved on ground that his elder brother and sister who were of mature age and were in a better position to depose about the incident were not examined by prosecution. The witness was not incharge of prosecution case. The Public Prosecutor was in charge of the case and it was for him to decide whether elder brother and sister should be examined or not. The evidence of witness in no uncertain terms, discloses that his brother and sister were ready to depose before the Court about the incident howsoever, for non-production of his brother and his sister before Court, witness examined was never responsible. At no stage of trial, the defence had made request to the Trial Court to call upon the Public Prosecutor to examine elder brother and sister as witnesses. It was also open to the defence to examine them as defence witness. No payer was made by the defence even to examine them as court

witnesses. Therefore, for non-examination of elder brother and sister the witness examined could not have been blamed nor his evidence could have been brushed aside in a casual manner. **(State of U.P. v.Krishna Master & Ors.; AIR 2010 SC 3071)**

S. 302 – Death sentence – Honour killing of six persons of a family would certainly fall in the rarest of rare case so capital sentence would be justified.

The Hon'ble Court has heard the learned counsel for the parties regarding sentence to be imposed on each respondent for having committed offence punishable under Section 302 read with Section 34 IPC. The Court notices that the Trial Court had sentenced all the three respondents to capital punishment. There is no manner of doubt the killing six persons and wiping almost the whole family on flimsy ground of honour saving of the family would fall within the rarest of rare case evolved by the Court and, therefore, the Trial Court was perfectly justified in imposing capital punishment on the respondents. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

Ss. 304-B, 498-A – Proof of dowry death – Use of mere words 'tortured' and 'harassed' by witness is not sufficient.

Husband along with his mother and other in-laws charged for dowry death and cruelty – Exact manner adopted by mother and in-laws for harassing deceased not proved – Use of mere words 'tortured' 'harassed' by witness not sufficient – Mother-in-law and other in-laws entitled to be acquitted. **(Amar Singh v. State of Rajasthan; 2010 AIR SCW 5141)**

S. 306 – Offence of abetment of suicide – Clear mens rea is necessary.

The question is, whether the petitioners can be accused of abetting Kiran's suicide. The answer is in negative. Section 306 reads as under:

"306- Abetment of suicide – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with

imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 107 reads as under:

107-Abetment of thing – A person abets the doing of a thing, who –

First – Investigates any person to do that thing; or

Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 – A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done is said to instigate the doing of that thing.

The Supreme Court in the case of Gangula Mohan Reddy v. State of A.P.; AIR 2010 SC 327, held that clear mens rea to commit offence must be present for proving the abetment of suicide. The Supreme Court held as under:-

"Abetment involves a mental process of instigation a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained."

The Supreme Court also held that it is not possible to lay down any formula in dealing with such cases. **(Mandakini Kiran Landge & Ors. V. State of Maharashtra & Anr.; 2010 Cri.L.J. 4085 (Bom HC)**

S. 307 – Attempt to murder – Availability of benefit of doubt

In this case, the medical evidence found on record leads to the conclusion that the complainant also caused injuries to above accused

persons, namely. Manoj Kumar and Ashok Kunar, who sustained injuries on their head and forehead, which were found vital parts. These injuries of Manoj Kumar and Ashok Kumar cannot be said to be self inflicted because in normal course no one would sustain injuries on his own vital parts. These injuries sustained by above accused persons are found serious in nature and these accused persons were also brought by the same constable to hospital for their medical examination, but the prosecution failed to explain these injuries of the accused persons. All the prosecution witnesses categorically stated that no injuries were caused to above accused persons nor they had seen the said injuries on their person, while they had been taken to hospital along with the complainant for medical examination. This type of attitude of the complainant leads to the conclusion that he did not want to tell the truth in the court and he tried to conceal the real and correct prosecution story. Under these circumstances the prosecution version has not been proved beyond all reasonable doubts, when injuries of the accused persons have not been explained by the prosecution witnesses. The learned trial court has rightly disbelieved the prosecution story, because the prosecution witnesses have not come with clean hands and put a different story than what, in fact, happened.

In several cases where the prosecution has failed to explain the injuries on the person of the accused, two results would follow (i) either the evidence of the prosecution witnesses is untrue or (ii) that the injuries on the person of the accused probabilities the plea of self defence taken by the accused persons. In such event the benefit of doubt would go to the accused and the prosecution story cannot be believed as it has been produced in court. **(Dinesh Chandra Pachauri v. State of U.P. & Ors.; 2010(6) ALJ 456 (All HC)**

S. 363 – Kidnapping – Proof of

In this case, counsel for the appellant has argued that there was no evidence whatsoever against the appellant. He has further pointed out that his name had not figured in the FIR and that the only evidence used by the Courts below to convict the appellant was the statement under Sec. 164 of the Cr.P.C. made by victim before the

Magistrate. He has also pointed out that this statement was inadmissible in evidence but even if taken into account did not involve or implicate the appellant in any manner.

Supreme Court in Ram Kishan Singh v. Harmit Kaur and Another; AIR 1972 SC 468, has held that a statement of S. 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-à-vis statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more. This court observed from the record that victim was not produced as a witness as she had since been married in Nepal and her husband had refused to let her return to India for the evidence. In this light her statement under Section 164 cannot be used against the appellant. Even otherwise, a look at her statement does not involve the appellant in any manner. The allegation against him is that after she had been kidnapped by the other accused she had been brought to their home, where the appellant was also present. In other words, when she had been brought to the appellant's home the kidnapping had already taken place. The appellant could therefore not be implicated in the offence under S. 363 or 366-A of the IPC dehors other evidence to show his involvement in the events preceding the kidnapping. **(Brij Nath Sah v. State of Bihar; 2010 Cri.L.J. 3821 (SC)**

S. 406 – Criminal breach of trust – Dishonour of cheque – Summoning accused U/s. 138 NI Act as well as U/s. 420 IPC would not be barred.

Even after introduction of S. 138 of the Negotiable Instruments Act, prosecution under S. 420 IPC is maintainable in case of dishonour of cheques or post dated cheques issued towards payment of price of goods purchased or hand loan taken, or in discharge of an antecedent debt or, towards payment of goods supplied earlier, if the charge-sheet contains an allegation that the accused had dishonest intention not to pay even at the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, cause damage to his mind, body or reputation. Private complaint of FIR alleging offence under S. 420 IPC for dishonour of cheques or post dated

cheques cannot be quashed under S. 482 Cr.P.C., if the averments in the complaint show that the accused had, with a dishonest intention and to cause damage to his mind, body or reputation, issued the cheques which was not honoured. **(Veer Singh Yadav v. State of U.P. & Anr.; 2010(6) ALJ 210 (All HC)**

S. 415 – Ingredient of – Cheating – Deception necessary ingredient for offence of cheating

The offence of cheating as defined under section 415, IPC. The aforesaid section is as under:-

"Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceive, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation – A dishonest concealment of facts is a deception within the meaning of the section."

A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived must be fraudulent or dishonest. Such deception must induce the person deceived to: either (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must be deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. **(Iridium India Telecom Ltd. V. Motorola Incorporated; 2010 (71) ACC 987 (SC)**

Ss. 438-A, 406 – Constitution of India, Art. 136 – FIR lodged by wife against foster sister of husband alleging cruelty for non-fulfillment of demand of dowry and criminal breach of trust – As regard for allegation U/s. 406, Court concerned has already taken cognizance thereof so Supreme Court U/A. 136 declared to quash FIR altogether.

In this instance case, the FIR insofar as it concerned Section 498-A, IPC, would be of no consequence and the appellant shall not be tried for the offence under Section 498-A, IPC.

There can be no doubt that the allegations made are extremely wild and disgusting. However, how far those allegations can be used to meet the requirements for the offence under Section 406, IPC is a moot question. For obvious reasons, the Court will not go into that exercise. Whatever the form in which the allegations under Section 406, IPC are made, the fact of the matter is that there is an FIR and the Court concerned has taken cognizance thereof. Under these circumstances, the court would only protest the interest of the appellant by directing that she would not be required to attend the proceedings unless specifically directed by the Court to do so and that too in the case of extreme necessity. Similarly, no coercive step shall be taken against her. She shall be granted bail by the Court trying the case if it decides to try the offence by framing the charge. The Apex Court expects that the court below to be careful while considering the framing of charge.

The Supreme Court, therefore, hold that the appellant shall not be tried for offence under Section 498A, IPC. However, the Court desists from quashing the FIR altogether in view of the allegations made under Section 406, IPC. **(Vijeta Gajra v. State of NCT of Delhi; 2010 Cri.L.J. 3841 (SC)**

S. 304-B – Expression 'soon before her death' – Concept of reasonable time would be applicable.

The expression 'soon before her death' has to be given its due meaning as the legislature has not specified anytime which would be the period prior to death, that would attract the provisions of section

304-B of IPC. The concept of reasonable time would be applicable, which would primarily depend upon the facts of a given case, the conduct of the parties and the impact of cruelty and harassment inflicted upon the deceased in relation to demand of dowry to the cause of unnatural death of the deceased. It is considered view of the court, the marriage itself has not survived even for a period of two years, the entire period would be a relevant factor in determining such an issue. **(Uday Chakraborty & Ors. V. State of West Bengal; 2010 Cri.L.J. 3862 (SC)**

S. 498-A – Complaint U/s. 498-A – Direction issued by Supreme Court to Bar Members

Bar members should treat every such complaint as basic human problem and must make serious endeavour to help parties in arriving at amicable solution of that problem. **(Preeti Gupta v. State of Jharkhand; 2010 AIR SCW 4975)**

S. 499 – Defamation – Key ingredients

In order to constitute offence of defamation the words, signs, imputation made by accused must either be intended to harm the reputation of a particular person or the accused must reasonably know that his/her conduct could cause such harm. The appellant giving statement to news magazine that pre-marital sex must be socially accepted neither intended to cause harm to the reputation of the complainants nor any actual harm done to their reputation could be discern. Both the elements i.e. mens rea and actus reus are missing. The appellants' statement published in news magazine is a rather general endorsement of pre-marital sex and her remarks are not directed at any individual or even at a 'company or an association or collection of persons'. It is difficult to fathom how the appellant's views can be construed as an attack on the reputation of anyone in particular. **(S. Khushboo v. Kanniammal & Anr.; AIR 2010 SC 3196)**

► Indian Stamp Act

S. 2(14) & 3 – Instrument – What constitutes

The ‘instrument’ is defined under Section 2(14) of the Act as under:-

“(14) ‘Instrument – ‘Instrument’ includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.”

The above definition of the instrument includes every document by which any right or liability is created or purported to be created, transferred, limited, extended, and extinguished or recorded.

It is to be noted that an instrument need not be one which creates right or liability in the present but also in future. This is implicit from the use of the words “purports to be created” used in Section 2(14) of the Act. Thus, where a document has been executed purporting to be creating right or liability in future in anticipation of some rights to be acquired, it would also be an instrument under Section 2(14) of the Act. **(M/s. Aegis BPO Service Ltd. V. State of U.P. & Ors.; 2010(6) ALJ 431 (All HC)**

S. 2(16) – Lease deed is chargeable to stamp duty irrespective of fact that it is not registered.

Even if lease deed for a period upto 11 months is not compulsorily required to be registered under Section 17 of the Registration Act but nonetheless a lease as defined under Section 2(16) of the Act is chargeable to stamp duty in view of Sections 2(6) and 3 of the Act which provides that where any such lease deed in respect of a immovable property is executed it would be amenable to stamp duty as provided in Schedule 1-B of the Act. There is no dispute that the lease deeds are otherwise chargeable to stamp duty on execution and therefore petitioner cannot escape the liability of payment of stamp duty on the lease deed on the ground that it is not registered. **(Mohan Lal Sareen v. State of U.P. & Ors.; AIR 2010 All 153)**

S. 33(b) – Rental agreement – Determination of stamp duty

In this case, there is no dispute that the copy of the instrument was on record of the U.P. Trade Tax Department. It was examined by the Assistant Commissioner (Stamps) in exercise of powers under Section 73 of the Act and thereupon on being satisfied that proper stamp duty has not been paid on it, he had made a reference to the Collector under Section 33(4) whereupon Collector had called upon the petitioner to submit the original instrument. The petitioner having failed to produce the original, the Collector proceeded to determine the deficiency on the basis of the copy of the instrument as provided under Section 33(5) of the Act. In such a situation, no error of jurisdiction has been committed by the Collector in passing the impugned order. **(M/s. Aegis BPO Service Ltd. V. State of U.P. & Ors.; 2010(6) ALJ 431 (All HC)**

S. 47-A (1) (U.P. Amendment) – Determination of market value of undervalued instrument – Process for reference to collector.

The Stamp Act in its applicability to State of U.P. provides, that a reference to the Collector can be made by the Sub-Registrar even before registration of instrument, if he is satisfied that the market value of the property or the consideration set out in the instrument is less than even the market value notified by the Collector under the Rules and the party has failed to make good the deficient stamp duty despite opportunity. **(M/s. Saya Traders v. State of U.P. & Ors.; 2010(6) ALJ 147 (All HC)**

► Juvenile Justice (Care & Protection of Children) Act

S. 7-A – Rejection of application for declaring juvenile without following procedure prescribed U/s. 7-A would be improper.

Section 7-A of the Act provides as under:-

"7-A Procedure to be followed when claim of juvenility is raised before any Court.-(1) Whether a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age

of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

It is apparent from the aforesaid provision that whenever a claim of juvenility is raised before any Court, the Court is bound to make an enquiry and to take all such evidence as may be necessary so as to determine the age of the accused. In the instance case, no opportunity to lead evidence was afforded to the revisionist. Therefore, the impugned order cannot be sustained and is liable to be set aside. (Nafees Ahmed v. State of U.P.; 2010 Cri.L.J. 3800 (All HC)

S. 7-A – Determination of age – In order to determine age of accused medical opinion of duly constituted medical board must be obtained.

As per Section 7-A of the Act, the Trial Judge was bound to hold an enquiry into the juvenility of the revisionist. The revisionist is not educated. Learned Sessions Jude was bound to obtain the medical opinion by a duly constituted Medical Board in accordance with Rule 22(5) (IV). Learned Sessions Jude disposed of the application of the revisionist disbelieving the statements of his father and the person, who prepared the horoscope but no order was passed for medical examination of the revisionist by a Medical Board to ascertain his age. **(Amit v. State of U.P. & Ors.; 2010(6) ALJ 243 (All HC)**

S. 7-A – Age of juvenile – Determination of – Matriculation or equivalent certificate is best evidence on basis of which age of juvenile can be determined.

It is clear that the matriculation or equivalent certificate, if available, is the best evidence on the basis of which it can be decided as to whether the revisionist was a juvenile or not and in the absence of matriculation or equivalent certificate, the date of birth certificate from the school first attended or the birth certificate given by the Corporation or Municipal Authority or Panchayat could have been relied upon. In the absence of above three certificates, the medical evidence has to be relied upon. It is thus obvious that if matriculation or equivalent certificate is available, then other evidence is not required. **(Pawan v. State of U.P.; 2010(6) ALJ 584 (All HC)**

S. 12 – Bail application by juvenile accused would be liable to be considered U/s. 12 of above Act and not U/s. 37 of NDPS Act

In S. 12 of Juvenile Act, a non obstante provision "notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force" has been placed, which clearly indicates that provisions of S. 12 of the Juvenile Act has an overriding effect not only on Code but also on other laws, if any, for the time being in force. It is also true that S. 37 of NDPS Act, 1985 has also a non obstante clause, according to which provisions of S. 37 of the NDPS Act 1985 have effect notwithstanding anything contained in the Code. Therefore, S. 37 of the NDPS Act, 1985 has an overriding effect only on Code and not on other laws. Moreover, the NDPS Act was enacted in the year 1985 and was in force on the date of commencement of Juvenile Act, therefore, non obstante provision "notwithstanding anything contained in Code of Criminal Procedure, 1973 or any other law for the time being in force" contained in S. 12 of Juvenile Act would override also provisions of S. 37 of the NDPS Act because NDPS Act squarely falls within expression "any other law for the time being in force", contained in S. 12 of Juvenile Act. Moreover, when there is conflict between two enactments, later enactment prevails.

S. 37(1)(b) has imposed two conditions, fulfillment of which is necessary before grant of bail, firstly, public prosecutor must be given an opportunity to oppose application for bail and secondly, where the public prosecutor opposes the application for bail, the court must record its satisfaction before releasing the accused on bail that – (a) there are reasonable grounds for believing that the accused is not guilty of such offence, and (b) that he is not likely to commit any offence while on bail. Therefore, a non-juvenile accused who is involved in dealing with the narcotic substances involving commercial quantity is not entitled for bail in a routine manner, but where accused was admittedly a juvenile on the date of occurrence, therefore, his bail matter was liable to be governed by S. 12 of the Juvenile Act and the provisions of S. 37 of the NDPS Act would not be applicable, specifically when S. 12 of the Juvenile Act overrides the provisions of S. 37 of the NDPS Act in the case of a person who is juvenile. **(Praveen Kumar Maurya v. State of U.P.; 2010(6) ALJ 464 (All HC)**

S. 49 – Claim of juvenility – Determination of – Relevant date for determining age of accused would be date of occurrence.

The occurrence took place on 18.06.1994. Therefore, the relevant date for determining the age of each of the revisionists is the date of the occurrence. If on that date the revisionists have not completed the age of 18 years, they will be deemed to be juveniles and in that event they have to be referred to the Juvenile Justice Board for inquiry and appropriate order. The Additional Sessions Judge has not specifically recorded any finding regarding the exact age of each of the revisionists on the date of the occurrence. The prayers of the revisionists were turned down merely on the ground that they had completed the age of 18 years on the date of the commencement of the Act of 2000. While recording this finding the learned lower court had merely assumed the age of each of the revisionists as 16 years on the date of the occurrence, which is nothing except to guess work, therefore, the same cannot be upheld. The question of juvenility needs to be decided afresh in accordance with the aforesaid Rule 22(5). Therefore, the matter has to go back to the learned trial court for a

fresh finding. **(Subhash & Ors. V. State of U.P.; 2010(6) ALJ 267 (All HC)**

► Land Acquisition Act

S. 4 – Acquisition of land for big project like express highway – Legality of – Court should take holistic view in deciding legality of acquisition

There was an acquisition for building up a highway and the abovementioned Writ Petitions pertained to the land required for interchange. It is obvious that the alignment of the highway cannot be changed, as its design has been prepared after consideration of so many factors by the experts in building the road. Its direction or alignment, therefore, cannot be changed, with the result, the area which is required for interchange, also cannot be changed. This is a typical example of the individual having to sacrifice his land for the public good. There can be no dispute that this road would add to the betterment of the citizens of the East Yamuna area in particular and Uttar Pradesh in general. This is apart from the fact that the majority of the persons, whose lands have been acquired, have either not objected to it or have accepted the compensation without any demur. It will, therefore, not be possible for the court to go into these individual grievances, which have been rightly rejected by the High Court. **(Nand Kishore Gupta v. State of U.P.; 2010(6) ALJ 284 (SC)**

S. 18(2) – Reference to Court – Time barred application for reference to court – Collector has no option but to reject time barred application.

The Collector while considering an application filed under Section 18(1) of the Land Acquisition Act for making reference acts as a statutory authority and the said application is to be dealt by him subject to the statutory conditions as laid down in S. 18(2) of the Act.

The jurisdiction to make reference under S. 18 arises only when the application satisfies the statutory conditions enumerated in S. 18(2).

If the application is not filed within statutory period prescribed the Collector has to reject the same. The Collector cannot condone the delay since the Collector is not a Court, Section 5 of the Limitation Act, is not applicable in the proceedings of reference under Section 18 of the Act.

Thus, the Collector while considering an application under Section 18 of the Act, if comes to the conclusion that the application is barred by time which having not been made in accordance with Section 18(2) the Collector has no option, but to reject the said application. **(Vijai Pal v. State of U.P. & Ors.; 2010(6) ALJ 158 (All HC) (FB)**

Ss. 39 and 40 – Acquisition for Company – Concept of public purpose is not totally irrelevant in this regard

It is not as if a public purpose is not relevant in Part VII, where under Section 39, the previous consent of appropriate Government is required for execution of an agreement between the Government and the Company. Section 40 of the Act then puts a specific rider that the State Government shall not give the consent unless it is satisfied of any of the contingencies described in sub-sections (a), (aa) and (b) thereof, which are as under:-

40. Previous enquiry:- (1) Such consent shall not be given unless the appropriate Government be satisfied, either on the report of the Collector under Section 5A, sub-section(2), or by an enquiry held as hereinafter provided.-

(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or

(aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public. This

would suggest that even when the acquisition is meant for the Company, the concept of public purpose has to be at the back of mind of the acquiring body like Government. **(Nand Kishore Gupta v. State of U.P.; 2010(6) ALJ 284 (SC)**

► Limitation Act

S. 5 – Condonation of delay – Sufficient cause means presence of Legal and adequate reasons

The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done suffices to accomplish the purpose in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. **(Balwant Singh (Dead) v. Jagdish Singh & Ors.; AIR 2010 SC 3043)**

S. 5 – Applicability of provision of S. 5 in Land Acquisition matter – Section 5 of Limitation Act is not applicable in the proceedings of reference U/s. 18 of the Land Acquisition Act

The Collector while considering an application filed under Section 18(1) of the Land Acquisition Act for making reference acts as a statutory authority and the said application is to be dealt by him subject to the statutory conditions as laid down in S. 18(2) of the Act. The jurisdiction to make reference under S. 18 arises only when the application satisfies the statutory conditions enumerated in S. 18(2).

If the application is not filed within statutory period prescribed the Collector has to reject the same. The Collector cannot condone the delay since the Collector is not a Court, Section 5 of the Limitation

Act, is not applicable in the proceedings of reference under Section 18 of the Act.

Thus the Collector while considering an application under Section 18 of the Act, if comes to the conclusion that the application is barred by time which having not been made in accordance with Section 18(2) the Collector has no option, but to reject the said application. **(Vijai Pal v. State of U.P. Ors.; 20120(6) ALJ 158 (All HC)**

S. 5 – Civil Procedure Code, O. 22, R. 9 – Condonation of delay – Liberal approaches cannot be so applied as to take away right accrued to party.

Even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the rirhgt and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

Sometimes the Courts have taken a view that delay should be condoned with a liberal attitude, while on certain occasions the Courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay.

Thus it is evident that is difficult to state any straight jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept inmind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of O. 22, with particular reference to Rule 9 and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. To say that the Court should take a very liberal approach and interpret these provision (Order 22, Rule 9 of the CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. AIR 2004 SC 4158 Held Per incuriam.

Delay is just one of the ingredients which has to be considered by the Court. In addition to this, Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record should be rejected unless sufficient cause is shown for condonation of delay. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. **(Balwant Singh v. Jagdish Singh; AIR 2010 SC 3043)**

► Motor Vehicles Act

S. 140 – Claim for no fault compensation – It does not get lost if not raised in beginning of claim proceedings.

Section 140 is indeed intended to provide immediate succour to the injured or the heirs and legal representatives of the deceased. Hence, normally a claim under section 140 is made at the threshold of the proceeding and the payment of compensation under section 140 is directed to be made by an interim award of the Tribunal which may be adjusted if in the final award the claimants are held entitled to any larger amounts. But that does not mean, that in case a claim under Section 140 is not made at the beginning of the proceedings due to the ignorance of the claimant or no direction to make payment of the compensation under Section 140 was issued due to the over-sight of the Tribunal, the door would be permanently closed. Such a view would be contrary to the legal provisions and would be opposed to the public policy.

Sub-section (1) of Section 141 makes the compensation under Section 140 independent of any claim of compensation based on the principle of fault under any other provision of the Motor Vehicles Act or under any other law but subject to any claim of compensation under Section 163-A of the Act. Sub-sections (2) and (3) of S. 141 further provide that even while claiming compensation under the principle of fault one may claim no fault compensation under Section 140,S. 144 gives overriding effect to the provisions of Chapter X.

Seen in isolation the provisions of S. 140 might appear harsh, unreasonable and arbitrary inasmuch as these create the liability of the vehicle(s) owner(s) even where the accident did not take place due to any wrongful act, neglect or default of the owner of the vehicle or vehicles concerned but entirely due to the wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made but the above provisions must be seen along with certain provisions of Chapter XI. Section 146 forbids the use of the vehicle in a public place unless there is in force, in relation to the use of the vehicle, a policy of insurance complying with the provisions of that chapter. Section147 contains the provisions that are commonly referred to as ‘Act only insurance’. The provisions

of Sections 146 and 147 are meant to create the large pool of money for making payments of no fault compensation. Thus the liability arising from Section 140 would almost invariably be passed on to the insurer to be paid off from the vast fund created by virtue of sections 146 and 147 unless the owner of the vehicle causing accident is guilty of some flagrant violation of the law. **(Eshwarappa alias Maheshwarappa & Anr. V. C.S. Gurushanthappa & Anr.; AIR 2010 SC 2907)**

S. 149(2) – Liability of insurer – Insurer would not be liable to pay compensation if driver of offending vehicle had no valid driving licence at time of occurrence.

In the instant case, the driver of the bus in question did not hold any driving licence at all. In the case reported in (2004) 3 SCC 343 – Malla Prakasa Rao v. Malla Janaki & Others, Hon'ble Supreme Court has held that according to the terms of the contract, the Insurance company has no liability to pay any compensation where an accident takes place by a vehicle, driven by a driver without a driving licence. Under these circumstances, the liability to pay compensation cannot be fastened on the insurance company. **(Mohd. Siddiq v. Munney Ansar & Ors.; 2010(6) ALJ 252 (All HC, LB)**

S. 163-A – Applicability of – If Motor Accident claim petition filed U/s. 110-A of the 1939 Act then Second Schedule that refers to S. 163-A of the 1988 Act would not be of much guidance.

The issue whether the multiplier specified in Second Schedule for the purposes of Section 163A of 1988 Act could be taken to be guide for computation of amount of compensation in a motor accident claim case falling under Section 166 of the 1988 Act is not yet authoritatively decided and is pending consideration before the larger bench. Insofar as present appeal is concerned it arises out of a motor accident claim filed under Section 110-A of the 1939 Act and, therefore, the Second Schedule that refers to Section 163A of the 1988 Act may not be of much guidance. **(Leela Gupta & Ors. V. State of Uttar Pradesh & Ors.; 2010 (6) ASLJ 275 (SC)**

Ss. 168, 163A, Sch. 2, Cl. 6 – Determination of compensation in case where victim was housewife – Compensation to be paid by applying criteria in Cl. 6 of Sch. 2 and applying appropriate multiplier.

The contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. she teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maid-servant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term 'services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. The amount payable to the dependents cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

It is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an

employee and no evidence or data can possibly be produced for estimating the value of such services. In its wisdom, the legislature had, as early as in 1994, fixed the notional income of a non-earning person at Rs. 15,000/- per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation. Though, Section 163-A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in clause 6 of the Second Schedule and then apply appropriate multiplier. **(Arun Kumar Agrawal v. National Insurance Co. Ltd.; 2010 AIR SCW 5335)**

S. 168 – Accident claim – Consideration for choice of multiplier

The deceased was the driver of Tempo and his age was about 30 years and his monthly income was Rs. 1500/-. The opposite party No. 1, Mohd. Siddiq was the owner of the bus in question. It was insured with National Insurance Company Ltd., opposite party No. The claimants are the legal representatives of the deceased and have claimed a sum of Rs. 3,61,000/- as compensation.

After appraisal of evidence available on record, learned Tribunal held that the accident in question was caused due to rash and negligent driving of bus, the bus was insured with the opposite party no. 3, but, the owner of said bus violated the conditions of insurance policy as it was being driven by Moharram Ali, who had no valid and effective driving licence at the time of accident; that the insurance company is not liable to pay any compensation; that the petitioners are entitled to get a sum of Rs. 1,87,000/- as compensation from the opposite party no.1.

Feeling aggrieved by the impugned award dated, the opposite party no. 1 has preferred this appeal.

The age of the deceased was about 30 years. The amount of compensation has been computed on the basis of notional income of the deceased i.e. Rs. 15,000/- per annum by using multiplier of 18 and

1/3rd amount was deducted as personal expenses of the deceased. The learned Tribunal has awarded a sum of Rs. 1,87,000/- only to the petitioners as compensation, which cannot be said to be excessive. **(Mohd. Siddiq v. Munney Ansar & Ors.; 2010(6) ALJ 252 (All HC, LB)**

► NDPS Act

S. 37 – Grant of bail – Consideration of

In this case, accused appellants were on bail during trial, but they did not misuse liberty of bail. Accused were found in possession of 12 grams of Smack and trial Court had awarded only 4 months' sentence. Keeping in view recovered quantity of Smack and sentence awarded by trial Court to accused appellants. So, accused would be released on bail. **(Harish Chandra Singh & Anr. V. State of U.P.; 2010 Cri.L.J. (NOC) 1220 (All)**

►Prevention of Corruption Act

Ss. 7, 13(1)(d) and 2 – Illegal gratification – Proof of

The appellant was put on trial for commission of an offence punishable under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. He was found guilty by the trial court by its judgment and order dated 4th April, 2002 and sentenced to undergo rigorous imprisonment for a period of one year under each count and also to pay fine of Rs. 1,000/-, in default to undergo simple imprisonment for a period of three months under each count. The aforesaid judgment and order of conviction and sentence has been upheld by the High Court in appeal. Hence this appeal filed in Supreme Court.

In present case, defence witnesses have clearly stated that the time which one may spend for presenting the bills could be maximum three and a half hours. They have not stated in their deposition that the appellant or for that matter anybody presenting the bills have to remain in the treasury continuously for three and a half hours. In the face of the evidence of the prosecution witnesses that the appellant demanded bribe on 6.1.1997 and received the same on 8.1.1997

cannot be doubted on the ground that for few hours the appellant was assigned the duty of presenting the bills in the treasury. The alleged quarrel between the appellant and the de facto-complainant on 30.12.1996 is also of no consequence in view of the specific and consistent evidence about the demand and payment of bribe unfolded by the prosecution witnesses. The plea put forth by the appellant that the money was thrust on his pocket is not fit to be believed in the face of the categorical and consistent evidence of the prosecution witnesses. **(Billa Nagul Sharief v. State of Andhra Pradesh; 2010 Cri.L.J. 3885 (SC)**

Ss. 13(i)(d) and 71 – Indian Evidence Act, Ss. 45 and 73 – Whether the opinion of handwriting expert can be admitted in evidence without examination of handwriting expert – Held "No"

In this case the question which raised was whether without examining the handwriting expert his report could have been admitted into evidence and relied upon although the same formed the main basis of conviction. In this regard, the learned Counsel placed reliance on the decision of the Court in State of Maharashtra v. Damu; 2000 (41) ACC 56 (SC) has observed that wherein while considering the case of abducting and triple infanticide, the Court had occasion to consider whether reliance could be placed on the opinion of the Assistant State Examiner of Documents without examining him as a witness in Court. The Court held that from the opinion itself it could not be gathered whether his office would fall within the purview of section 293 Cr.P.C. Accordingly, the court observed that without examining him as an expert witness, no reliance could be placed on his opinion. **(Keshav Dutt v. State of Haryana; 2010(71) ACC 910 (SC)**

► Protection of Women from Domestic Violence Act

S. 2(f) – Expression "relationship" in the nature of marriage – Meaning of – It is akin to a common law marriage, but all live in relationships will not amount to a relationship in the nature of marriage.

In opinion of court 'relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In the opinion of the court not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by Court above must be satisfied, and this has to be proved by evidence. **(D. Velusamy v. D. Patchiammal; 2010 (71) ACC 966 (SC)**

► Provincial Small Cause Courts Act

S. 17, Proviso – Disposal of application for setting aside exparte decree on ground that decreetal amount had not deposited was proper.

A plain and literal construction of Section 17 of the Act shows that for presentation of an application under Order 9, Rule 13 CPC or review of the judgment, it shall be incumbent on the applicant to deposit in the court the amount due from him under decree or in pursuance of the judgment. The proviso to section 17 of the Act at the face of record makes it obligatory to deposit the entire decreetal amount.

Accordingly, in case the provision contained in Section 17 of the Act is interpreted literally, it is incumbent on the applicant to deposit the entire dues or decretal amount or furnish security. The statutory mandate does not extend any right to escape from liability conferred by the proviso to Section 17 of the Act.

The provision contained in Section 17 of the Act seems to have got mandatory force. In case the legislature has provided to do certain thing in certain manner for depositing the entire decretal amount or furnishing security in lieu thereof, then that should be done in the same manner and not otherwise. Any deviation to the statutory provisions shall frustrate the very object of proviso to Section 17 of the Act. **(R.B. Shukla & Ors. V. IInd ADJ, Bahraich; 2010(5) ALJ 505 (All HC, LB)**

► Registration Act

Ss. 40(1), 41(2) – Registration of Will deed – Who can object? – Person who was totally stranger to proceeding would not be legally entitled to object registration of Will.

The satisfaction of the Registering Authority about execution of a Will by the testator is provided in sub-section (2) of Section 41 of the Act, which can be achieved by examining the attesting witnesses and the scribe, who are the person most competent to testify in this regard. Neither the petitioners nor any other person can be, by any stretch of imagination, held to be the person or persons competent to testify the factum of execution of Will. They may be competent to challenge the legality of the transaction covered by the Will. The registration of a document is merely a notification of factum of execution of a document evidencing the event of transaction affecting the title qua any person or property. The registration has nothing to do with the legality of the transaction covered by the document, which may be open to challenge by the affected person in appropriate proceedings at proper forum.

In view of the above discussion, the court is of the considered view that as per the scheme of the Act, the petitioners are not legally entitled to object the registration of Will and they are totally strangers to the said proceedings. **(Krishna Kumar & Ors. V. Court of District Registrar/ADM (F & R), Raebareli & ors.; 2010(5) ALJ 395)**

► Right to Information Act

Pre – Seeking information – Requirement of locus standi is not condition precedent.

The preamble to the Act says that the Act is passed because ‘democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and hold Governments and their instrumentalities accountable to the governed’. The Act restricts the right to information to citizens (S. 3). An applicant seeking in formation does

not have to give any reasons why he/she needs such information except such details as may be necessary for contacting him/her. Thus, there is no requirement of locus standi for seeking information. **(Secretary General, Supreme Court of India v. Subhash Chandra Agarwal; AIR 2010 Delhi 159 (FB)**

S. 2 – Public Authority – Chief Justice of India (CJI) is 'Public Authority' under Act.

The expression "Public authority" as used in the Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for Chief Justice of India. While providing for Competent Authorities under Section 2(e), the Act specifies Chief Justice of India as one such authority in relation to Supreme Court, also conferring upon him the powers to frame rules to carry out the purposes of the said law. Chief Justice of India besides discharging the prominent role of 'head of judiciary' also performs a multitude of tasks specifically assigned to him under the Constitution or various enactments. These varied roles of the CJI are directly relatable to the fact that he holds the office of Chief Justice of India and heads the Supreme Court. In absence of any indication that the office of the CJI is a separate establishment with its own Public Information office under the Act, it cannot be canvassed that the office of the Central Public Information Officer (CPIO) of the Supreme Court is different from the office of the CJI. **(Secretary General, Supreme Court of India v. Subhash Chandra Agarwal; AIR 2010 Delhi 159 (FB)**

S. 2(f), (j) – 'Information' – Definition of Information comprehends all matters which fall within expression "material in any form".

Two definitions are crucial for answering the first issue i.e. "Information" [Section 2(f) and "Right to Information" [Section 2(j)]. Information is defined to mean any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, log-books, contracts, reports, papers, samples, models. Also, data held in any electronic form such as FAX,

micro film, microfiche etc. It also includes information relating to any private body which can be accessed by a public authority under any other law for the time being in force. The definition thus comprehends all matters which fall within the expression "material in any form". In absence of any specific exclusion, asset declarations by the Judges held by the CJI or the CJs of the High Courts as the case may be, are 'information' under Section 2(f). This position is not disputed by the learned Attorney General. But according to him, the term 'held' under the Act necessarily requires a Public Authority to have the right to call for the information, or impose on a person an obligation to provide such information to the public authority. **(Secretary General, Supreme Court of India v. Subhash Chandra Agarwal; AIR 2010 Delhi 159 (FB)**

► SC & ST (Prevention of Atrocities) Act

S. 3(2)(v) – Applicability of

Section 3(2)(v) of the SC/ST Act provides as under:-

"3(2) whoever, not being a member of a scheduled caste or a scheduled tribe,

…….

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

It is apparent from the above provision that Section 3(2)(v) SC/ST Act shall apply only if the offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed by a person of upper caste against a person who is a member of scheduled caste or scheduled tribe. It is not sufficient that if the accused belongs to upper caste and the victim belongs to scheduled caste. It is also necessary to prove that the offence was

committed on the ground of the victim being of scheduled caste. No such allegation has been made in the FIR that the offence was committed because of victim belonged to scheduled caste nor there is any such evidence of record. Thus the conviction of appellant under Section 3(2)(v) SC/ST Act cannot be sustained.

In Ram Das and Others v. State of Maharashtra; AIR 2007 SC 155, the Apex Court held as under:-

> "…….the mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Perdhi Community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a scheduled caste community. The conviction of the appellant under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

In the instant case also there is no evidence on record to show that the incident was caused by the appellant on the ground that the victim belonged to scheduled caste. The fact that the victim belongs to a scheduled caste, by itself is not a sufficient ground to bring the case within the purview of Section 3(2)(v) of the SC/ST Act. Thus in considered opinion of the Court, conviction of the appellant under Section 3(2)(v) of the SC/ST Act cannot be sustained and is liable to be set aside. **(Dharmendra v. State of Uttar Pradesh; 2010(6) ALJ 560 (All HC)**

► Service Law

Art. 309 – Compassionate appointment – Nature of – It is neither heritable right nor alternate mode of employment

Compassionate Appointment is not vested right. It is neither heritable right nor alternate mode of employment and it cannot be granted after unreasonable period. Its object is not to provide employment but to allow family to tide over financial crisis and to take it out of penury **(Lalit Sirohi v. State of U.P. and Ors.; 2010(6) ALJ (DOC) 49 All)**

Constitution of India, Art. 16 – Compassionate appointment – Word 'family' includes daughter-in-law

U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules 1974 Rule 2(c) thereof is quoted below:-

2.(c) "family" shall include the following relations of the deceased Government servant-

(i) Wife or husband

(ii) Sons;

(iii) Unmarried and widowed daughters;

(iv) If the deceased was unmarried Government servant, brother, unmarried sister and widowed mother dependant on the deceased Government servant;

Keeping in view the aforesaid provisions, the petitioner who is admittedly the daughter-in-law of the deceased employee and the sole survivor, is entitled to be considered for appointment on compassionate basis. **(Smt. Krishna Saxena v. State of U.P. & Ors.; 2010(6) 649 (All HC)**

Constitution of India – 309 – Seniority – Determination of

The petitioner was appointed as Lecturer on 23.3.1996 in Ras Shastra in Rajkiya Ayurvedic College and Chikitsalaya, Lucknow and since then, he has been working continuously. The State Government notified the Service Rules for the teachers of Uttar Pradesh Ayurvedic Colleges, vide Notification dated 21.12.1990 namely, Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Aadhyapako Ki Seva Niyamawali, 1990 (in short Service Rules), contained in Annexure No. 2 to the writ petition. Feeling aggrieved with the inaction on the part of the opposite parties with regard to promotion, the petitioner

approached this Court under Article 226 of the Constitution of India by preferring Writ Petition No. 1136 (S/B) of 2004 which was disposed of finally directing the U.P. Public Service Commission for filling up the post of Reader in the Ayurvedic College. A mandamus was issued by this Court to the U.P. Public Service Commission to make earnest effort to expedite the matter with regard to promotion on the post of Reader within six months. In consequence thereof, the U.P. Public Service Commission sent recommendation to the State Government, vide letter dated 15.6.2005 (Annexure No. 10 to the writ petition), recommending the names of persons for promotion to the post of Reader. The petitioner's name appears at serial No. 6 in the recommendation letter dated 15.6.2005. The U.P. Public Service Commission while sending its recommendation to the State Government, has specifically provided that the recommendation is against the vacancy of the year 2001-2002. The petitioner was recommended for promotion to the post of Reader under the promotees quota on the vacancy arisen on account of retirement of one Dr. Hari Shanker Pandey from 31.7.2001. It has been stated that after receipt of recommendation from the Commission, the State Government has made query from U.P. Public Service Commission. In response to it, the U.P. Public Service Commission again communicated that the petitioner has been promoted against the vacancy arisen on account of retirement of Dr. Hari Shanker Pandey, vide letter dated 10.8.2007 (Annexure No. 7 to the writ petition). However, in pursuance of the recommendation letter dated 15.6.2005 of the U.P. Public Service Commission, the State Government has issued Office memorandum dated 16.8.2005 (Annexure No. 4 to the writ petition). In consequence thereof, the petitioner was promoted on the post of Reader. After availing the promotional avenue on the post of Reader, the petitioner raised grievance with regard to seniority in the cadre of Reader and claimed that he is entitled for seniority from the year when the vacancy arisen on account of retirement of Dr. Hari Shanker Pandey i.e., from the year 2001. The Government by the impugned Office memorandum dated 2.1.2008, contained in Annexure No. 1 to the writ petition, rejected petitioner's claim and

observed that the petitioner be entitled for seniority from the date of promotion order.

It is settled principle of law that equals can not be treated unequally. State Government cannot adopt different standard in the matter of seniority and appointment. Once under the garb of Rule 21 of the Service Rules, seniority has been accorded from the year of vacancy to 10 persons, then State action does not seem to justified in not granting same benefit to the petitioner with regard to whom the U.P. Public Service Commission has made recommendations. There appears to be discriminatory treatment on the part of the State Government while passing the impugned order with regard to petitioner. State Government should have adopted equal standard while exercising power under Rule 21 of the Service Rules considering the cases of persons working in the cadre with regard to promotion of the incumbents under Service Rules. There appears to be hostile discrimination by imparting different treatment to the identically situated person like the petitioner while passing the impugned order. The petitioner seems to be entitled for seniority from the year 2001 when the vacancy has arisen on account of retirement of Dr. Hari Shanker Pandey, in pursuance of the recommendation of the U.P. Public Service Commission. **(Ashok Kumar Srivastava v. State of U.P. & Ors.; 2010(5) ALJ 550 (All HC, LB)**

Constitution of India, Arts. 309, 16 – Date of birth – Correction in service record – Correction of date of birth in service record which stipulated period is necessary.

The application for correction of date of birth is also to be looked into from the point of view of the concerned department and the employees engaged therein. The other employees have expectations of promotion based on seniority and suddenly if such change is permitted; it causes prejudice and disturbance in the working of the department. It is, therefore, quite correct for the State to insist that such application must be made within the time provided in the rules, say, two years, as in the present case. **(State of Haryana v. Satish Kumar Mittal; 2010 AIR SCW 5301)**

Constitution of India, Art. 311 – Disciplinary enquiry – Procedure to be followed – Stated.

If the disciplinary proceedings are initiated against the delinquent/public servant, the first and foremost requirement is that the charge-sheet should be framed with specific and precise charges which should be accompanied by the copies of such evidence which are sought to be relied upon, including evidence for proving the charge and also the list of witnesses which the prosecution/department wants to give to the delinquent to submit his reply to the charge-sheet and he is also to be afforded adequate opportunity to adduce any evidence in rebuttal and indicate as to whether he intends to examine or cross examine the witnesses.

This requirement of asking about the desire of the delinquent of examining or cross-examining the witnesses does not mean that in case delinquent denies the charges in the reply but does not make any such request to rebut during course of enquiry, the department would stand absolved from proving the charges on the basis of material and evidence on record.

After the service of the charge-sheet and receipt of the notice, the inquiry officer is to fix a date, time and place to hold an enquiry which is to be communicated to the delinquent and on that date, the charges are required to be proved by evidence which the department intends to adduce. Such evidence is to be corroborated by oral evidence or documentary as may be admissible under law. Delinquent has to be given opportunity to rebut the evidence both by examining or cross-examining the witnesses.

The delinquent thereafter is also required to have an opportunity to adduce independent evidence to rebut the evidence adduced by the department which may be proved against him. After the evidence part is over, the enquiry officer may prepare the report on the basis of the material on record and making assessment of the evidence before him so as to find out whether the charge/charges against the delinquent stand proved or not. Such inquiry report will be

furnished to appointing authority who will take further action as per the report.

In the instant case, the above said procedure for holding the disciplinary enquiry had not been followed as such the entire enquiry proceedings as well as the order of dismissal passed in pursuance to the same as well as the order of appellate/revisional authority would be arbitrary in nature and in violation of principles of natural justice. **(Saudan Singh v. Union of India & Ors.; 2010(5) ALJ 495 (All HC)**

► Societies Registration Act

S. 25(1) (UP) – Powers of Prescribed Authority to refer dispute to Registration

In the present case, the Deputy Registrar has given cogent reasons for registering the list of office bearers. He has also recorded findings that in terms of the Rules and Regulations of the Society, the petitioners could not have held the elections at all and in any case they did not even submit the original documents to support their case. It is, therefore, a case whether the dispute raised by the petitioners is not a bona fide and genuine dispute. The Deputy Registrar was, therefore, not obliged to refer the dispute to the Prescribed Authority.

In any case, the petitioners, if they so desire, can approach the Prescribed Authority under Section 25(1) of the Act in accordance with the procedure prescribed therein. **(Field Council of Norwegian Evangelical Mission, Karwai v. State of U.P.; 2010(5) ALJ 399 (All HC)**

► Specific Relief Act

S. 6 – Scope of –

It is to be noted that remedy under Section 6 of the Specific Relief Act, 1963 providing for restoration of possession is not available against the State and a suit under Section 6 of the Specific Relief Act, 1963 is not maintainable against the State. **(Bheekam Chandra v. State of U.P. & Ors.; 2010(6) ALJ 328 (All HC)**

Ss. 10, 20 and 16 – Specific performance of contract – Who can enforce

For a plaintiff to seek specific performance of a contract of sale relating to immovable property and for a Court to grant such specific performance it is not necessary that the contract should contain a specific provision that in the event of breach the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific performance of a contract are made out specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from Section 23 that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance the party in breach cannot contend that in view of specific provision for payment of damages and in the absence of a provision for specific performance the Court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to given to the party in default an option to pay money in lieu of specific performance then specific performance may not be permissible. **(Man Kaur v. Hartar Singh Sangha; 2010 AIR SCW 6198)**

S. 34 – Suit for declaration of title of Evacuee Property – Lease holder of property migrated to Pakistan and lease cannot renewed – On the basis of possession name of some "J" was found in revenue records and nature of property would remain same – So no more would have right to get himself declared as owner of said property.

It is not in dispute that Raja Saheb Mohamoodabad Md. Amir Ahmad Khan was lease holder which expired in 1930 without renewal. Only on the basis of possession the name of Smt. Jubaida Khatoon had been found recorded in the revenue records, who executed oral gift deed to the petitioner, but it is not disputed that nature of the land remained same as after migration of Raja Saheb Mahmoodabad-Mohammad Amir Ahmad Khan to Pakistan the property indispute became evacuee property as no body was there

behind him in his family to inherit it. Therefore, in terms of the decision rendered in the case of Satya Narain Kapoor v. State of U.P. and Others; 1998 (16) LCD 72, the court is of the view that nobody has right to get declare himself as owner of the said property. **(Khursheed Jamal Qudwai v.State of U.P. & Ors.; 2010(5) ALJ 577 (All HC Lko Bench)**

► Transfer of Property Act

S. 52 – Doctrine of lis pendens – Sale would be illegal if purchaser has purchased property during pendency of suit and even he has no knowledge of status quo order. (Abdul Wahid v. Hameed Mian & Ors.; AIR 2010 (NOC) 931 (Del)

S. 106 – Quit notice – Validity after termination of lease

In this case, there must be a clear explicit intimation to the tenant about the date after which if he continues in occupation of the premises, his status will no longer exist. In the instant case, the notice clearly provides that tenancy of the petitioner has been terminated with effect from 13.3.2007, therefore, it cannot be said that the notice is bad in law. The provisions of U.P. Act No. 13 of 1972 were not applicable to the building under the tenancy of the tenant which was constructed in the year 2000. **(Babu Tandon Lal v.Additional District Judge, Bareilly; 2010(6) ALJ 587 (All HC)**

► United Provinces Panchayat Raj Act, 1947

S. 12(d) – Applicability of – Election petition – Election of candidate not belonging to SC category is open to challenge U/s. 12(c) of above Act

Once effective representation/participation of scheduled caste candidate is the motto, then any candidate not belonging to Scheduled Caste category cannot offer himself as a candidate in reserved constituency, and in case such an offer is made claiming to be from reserved category, then election of such candidate is open to challenge under Section 12-C of the Act, on the ground that such person was not qualified to be nominated as a candidate for the said election, and in the said election petition. Election Tribunal as per procedure

prescribed is entitled to make enquiry, as it deems necessary, qua the said person, and then record finding, and requisite orders under Section 12(4) of the Act can be passed.

There are two stages of disqualification of a person elected as office bearer of Village Panchayat; (i) if it exists at the time of filing of nomination and continue to exist up to declaration of his result, then such disqualification is to be agitated by way of filing an election petition before the Election Tribunal under Section 12-C of U.P. Panchayat Raj Act; (ii) but if such disqualification is earned by a person after filing of nomination paper and declaration of results then State Legislature, has authority to make law disqualifying such an incumbent as a member of Panchayat.

In such a situation and in this background, remedy of writ of quo warranto can also be availed of and writ of quo warranto can be issued when public office is being held, wherein election is not under challenge, but challenge is to subsequent continuance of Pradhan in her capacity belonging to a particular caste. **(Smt. Meena Devi v. State of U.P. & Ors.; 2010(6) ALJ 541 (All HC)**

► U.P. Basic Education Act, 1972

S. 19 – Whether appointee already engaged as fair price shop dealer in full time sale would entitled to be appointed as Shiksha Mitra – Held, "No".

It is clear that the fair price shop owner is engaged for full time job to run the fair price shop. A person engaged as fair price shop dealer, does not seem to be able to discharge the duties as Shiksha Mitra. In case, a person like the petitioner is appointed on the post of Shiksha Mitra, it shall amount to abuse of process of law and giving a favour to a person to obtain honorarium without discharging his duties. Keeping in view the working hours and engagement of fair price shop dealer, it cannot be inferred that a person as in the present case, shall be able to discharge duty on the post of Shiksha Mitra. Accordingly, the appointment of a fair price shop dealer or any person engaged in a business does not seem to be entitled to appointment on

the post of Shiksha Mitra. **(Jawahar Lal Mishra v. State of U.P. & Ors.; 2010(5) ALJ 705 (All HC, LB)**

► U.P. Consolidation of Holdings Act

S. 48 – Revision against interlocutory order would not be maintainable.

Upon perusal of the order dated 15.4.2010 passed by the Settlement Officer Consolidation, Court of the definite view that it is purely temporary in nature. He has not determined any issue rather has stayed only the operation of order to protect the interest of land in dispute, therefore, the decisions referred in the order impugned do not give right to the Deputy Director of Consolidation to decide the revision on merit against the interlocutory order, but on wrong premises he has entertained so, therefore, court of the view that it warrants interference of the Court. **(Malik Ram v. Deputy Director, Consolidation, Bahraich; 2010(6) ALJ 134 (All HC, LB)**

► U.P. Excise Act

S. 31 – Liability to licence fee – No liability to pay licence fee can be fastened on petitioner if ingredients of contract between parties in terms of statutory provisions was not completed.

Under R. 12 U.P. Excise (Settlement of Licences for Retail Sale of Country Liquor) Rules, 2002, money has to be deposited before any licence can be granted to the selected candidates for excise shops and unless and until payment of basic licence fees and security money as required under aforesaid Rule 12 is made, selected applicant is not treated to be a licensee nor he is entitled to the benefits of licensee flowing therefrom. Rule 12 itself contemplates the consequences, incase of violation of the conditions stipulated therein and therefore, the Rule is mandatory in nature. The Rule does not confer any discretion upon the licensing authority to relax any of the conditions mentioned therein.

Therefore where petitioner had deposited earnest money of Rs. 15,650/- to participate in auction and as there was no competitor, same was allotted in favour of petitioner by way of telephonic

message and no letter was issued by authorities, and thereafter just within two days, petitioner had informed authorities that he was not interested to take license of said shop and no basic license fee was deposited within a period of three days, till petitioner had not deposited security money, as required under Rule 12 of the Rules of 2002, his selection for grant of licence itself stood cancelled in eye of law and he could not be treated to be a licensee. Merely because petitioner was illegally permitted by me Excise authorities of district Etah to continue and run his shops, despite non-compliance of the mandatory Rule 12, he cannot be held to become licensee within meaning of rules of 2002. Since the petitioner cannot be said to have been granted any licence, having regard to the language of Rule 12, the provisions of Rules 13, 14 and 15 will not be attracted in his case and as no agreement was executed between the parties in view of statutory provisions and said agreement was at the initial stage, petitioners cannot be fastened with liability qua Minimum Guaranteed Quantity or for payment duty relating to the Minimum Guaranteed Quantity, as no licence was ever granted to petitioner in eyes of law. **(Dhanpal Singh & Anr. V. State of U.P. & Ors.; 2010(5) ALJ 703 (All HC, LB)**

► U.P. Government Servants Seniority Rules, 1991

R. 3 – Provisions of 1991 Rules would be applicable for determination of seniority of ministerial staffs of subordinate civil court.

The issue as to whether 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate courts have been considered in detail in this court's judgment of the date in special appeal No. 147 of 2007 Omvir Sharma v. State of U.P. wherein it has been held that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and after enforcement of 1991 Rules, 1947 Rules shall stand repealed. The similar submissions raised by learned counsel for the appellant in this regard, have been considered and negatived by court in above judgment. For the reasons given by court in the above

judgment of the date, the Court hold that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and rule 19 of 1947 rules is no longer in force after enforcement of 1991 Rules. **(Dileep Kumar Srivastava v. State of U.P. & ors.; 2010(6) ALJ 474 (All HC)**

► U.P. Industrial Disputes Act

S. 4-K – There is no period of limitation prescribed by Act for reference of Dispute – hence rejection of reference on ground of delay would be illegal. (Abdul Kalam v. State of U.P. & Anr.; 2010(5) ALJ (NOC) 658 (All HC)

► U.P. Kshetra Samities and Zila Parishads Adhiniyam

S. 7(3) (As inserted by Amendment Act, 2007) – Abolition of office of U.P.-Pramukh by Amendment Act – Effect of

The effect of amendments made by Amendment Act, 2007 is that offices of Up-Pramukh, Senior Up-Pramukh and Junior Up-Pramukh have been omitted wherever occurring in the Act including marginal headings and Schedule. The Legislature however, while omitting the aforesaid offices continued the office the Up-Pramukh, who was elected before the enforcement of Amendment Act, 2007. The special provision in Section 7(3) beginning with non-obstante clause has been inserted providing that notwithstanding anything to the contrary contained in any other provision of the Act, the persons who have been elected to the office of Up-Pramukh before the commencement of the Amendment Act, 2007 "shall continue to hold the office as such till the expiry of their term as if the said Act was not enacted."

Thus, the legislature intended that Up-Pramukh who were elected prior to Amendment Act shall continue to hold the office as if the Amendment Act, 2007 had not been enacted. Non-obstante clause in S. 7(3) clearly contemplates to disregard of the provisions of the 2007 Amendment Act which affects the functioning of Up-Pramukh as such. The words "shall continue to hold the office as such" clearly

contemplates the continuance of Up-Pramukh in the same manner and in the same capacity as he was continuing prior to the Amendment Act, 2007.

Further when the Legislature continued the office of Up-Pramukh, it is to be assumed that such continuance is with performance of duties attached to the office. **(Shamsher v. State of U.P. Ors.; 2010(6) ALJ 221 (All HC)**

► U.P. Land Revenue Act

S. 34 – Mutation application cannot be entertained during pendency of proceedings U/s. 9A of U.P. Consolidation of Holdings Act

Since the proceedings under Section 9-A of U.P. Consolidation of Holdings Act were pending prior to issuance of Notification under Section 52(1) of the said Act, the said proceedings shall be continued in accordance with the provisions of the said Act and for that purpose, the Consolidation operation shall not be deemed to have been closed in accordance with sub-section (2) of Section 52 of the U.P. Consolidation of Holdings Act. Under the circumstances, until and unless, the rights and title of the concerned parties are determined by the competent Court, the petitioners would have no right to move an application under Section 34 of the U.P. land Revenue Act for mutation of their names on the basis of sale deed in question. Consequently, the orders passed by Tahsildar as well as the revisional Court with reference to said application for mutation during the pendency of the proceedings under Section 9-A of U.P. Consolidation of Holdings Act, would be without jurisdiction. **(Ram Achal & Anr. V. Board of Revenue, U.P., Lucknow & Ors.; 2010(5) ALJ 675 (All HC, LB)**

► U.P. Municipalities Act

S. 10-A (4) – Constitution of India, Art. 243-U-Section (4) of S. 10-A thus does not violate Art. 243-U of Constitution regarding extension of tenure of members of Municipality beyond 5 years.

Sub-section (4) of S. 10-A does not authorize the extension of the tenure of the members of the municipality beyond the term of five years. In fact, on the completion of the tenure of five years, the existing members would be replaced, either by the District Magistrate or by a Gazetted Officer not below the rank of Deputy Collector. In sum and substance, therefore, the members elected to the Municipal Boards Nagar Palikas would not continue for a period in excess of their tenure of five years. Sub-section (4) of S. 10-A of the Uttar Pradesh Municipalities Act, 1916, furthers the mandate of Article 243-U of the Constitution by preventing the existing members of the Municipal Boards/Nagar Palikas from continuing beyond the term for which there were elected. Rather than authorizing the extension of the tenure of the office of the existing members of the municipality, sub-section (4) curtails their tenure in consonance with the mandate of Article 243-U of the Constitution. Not only sub-section (4) of S. 10-A, but also sub-sections (1) and (2) of S. 10-A of the Act, are drawn to give effect to Art. 243-U of the Constitution. Therefore, sub-section (4) of S. 10-A of Uttar Pradesh Municipalities Act, 1916 (as applicable to the State of Uttarakhand) does not violate Art. 243-U of the Constitution. **(Rajiv Lochan Sah v. State of Uttarakhand & Ors.; AIR 2010 Uttarakhand 94)**

► U.P. Panchayat Raj Act

S. 5-A, 95(1)(g)(ii) – Election disqualification – Ground for – If member is convicted of offence involving moral turpitude he stand disqualified but on mere involvement in offence is no disqualification.

It is only a conviction, which brings about a disqualification and, therefore, a person, if convicted of an offence involving moral turpitude, cannot be permitted to contest the election. Even otherwise, after having been convicted, a Pradhan can be removed on such conviction. Section 5A, however, does not disqualify a person on a mere involvement in a criminal case involving moral turpitude so as to prevent him from contesting the election.

Thus, if a person is merely involved in a criminal case of moral turpitude and not convicted, prior to his contesting the election, the same is not a disqualification for him to contest the election. Further offence which would bring about such a removal has to be of the period which may have been committed after the person has been elected as Pradhan. The provisions of Articles 243-F and 243-O read with the provisions of Sections 5-A and 95(1) (g) (ii) of the Act 1947 leads to the conclusion that the Court cannot provide for any qualification which has not been included under Section 5A. The court cannot substitute and provide for a disqualification on the ground of any obscurity that can be imagined. **(Nanhey v. State of U.P. & Ors.; 2010(6) ALJ 177 (All HC)**

► U.P. Urban Land Ceiling and Regulation Act

S. 10 (since repealed) – Acquisition of land – Once land vested in State, it cannot be divested.

The land once vested in the State cannot be divested. Once the land is vested in the State it has a right to change the user. The appellant cannot be heard raising grievance on either of these issues.

Supreme Court has further held that Once the land is vested in the State it has a right to change the user because once the land is acquired, it vests in the State free from all encumbrances. It is not the concern of the land owner how his land is used and whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes person non grata once the land vests in the State. He has a right to get compensation only for the same. The person interested cannot claim the right of restoration of land on any ground, whatsoever. **(Smt. Sulochana Chandrakant Galande v. Pune Municipal Transport & Ors.; ARI 2010 SC 2962)**

S. 34 – Revision – Limitation for filing – Revisional powers cannot be used arbitrarily at belated stage.

Where the revision was filed after expiry of about two decades, it was liable to be dismissed on ground of delay. The legislature in its wisdom did not fix a time limit for exercising the revisional power nor

inserted the words "at any time" in S. 34. It does not mean that the legislature intended to leave the orders passed under the Act open to variation for an indefinite period inasmuch as it would have the effect of rendering title of the holders/allottee(s) permanently precarious and in a state of perpetual uncertainty. In case, it is assumed that the legislature has conferred an everlasting and interminable power in point of time, the title over the declared surplus land, in the hands of the State/allottee, would forever remain virtually insecure. **(Smt. Sulochana Chandrakant Galande v. Pune Municipal Transport & Ors.; ARI 2010 SC 2962)**

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

S. 2 – Applicability of Act – Building under tenancy was constructed in year 2000, hence Act would be not applicable to such building.

In this case, the provisions of U.P. Act No. 13 of 1972 were not applicable to the building under the tenancy of the tenant which was constructed in the year 2000. **(Babu Tandon Lal v. Additional District Judge, Room No. 1, Bareilly & Ors.; 2010(6) ALJ 587 (All HC)**

S. 2 – Applicability of Act – If rent of disputed premises was Rs. 5,000/- per monthly then rented premise in dispute would not be covered by above Act. (Abdul Majid Mir v. Col. Kapil Dev Ghai & Ors.; 2010(5) ALJ (NOC) 633 (All HC)

S. 2(2) (c), Expln. 9 – Applicability of Act

Even if there is substantial addition to an existing building like in the present case, the whole of the building shall be deemed to be constructed on the date of completion of the said addition. The Apex Court also in the case of Smt. Mundri Lal v. Smt. Sushila Rani; AIR 2007 SC (Supp) 911 has held that substantial addition to an existing construction would tantamount to new construction. Therefore, also it is evident from the record that the building was a new construction

and as such was beyond the purview of the Act. **(Banke Lal Agarwal v. Pradeep Kumar Jain; 2010(5) ALJ 542 (All HC)**

S. 20(4) – Protection from eviction – If tenant had not deposited whole of rent amount on first date of hearing the tenant would not be entitled to benefit U/s. 20(4) of above Act.

It is an admitted fact that tenant petitioner who is the tenant, had not deposited whole of the amount on the first date of hearing of the SCC revision towards arrears of rent and use of the accommodation in dispute with interest etc. as is required under section 20(4) of the Act. It is apparent from record that petitioner moved the application later on before the court that his client is inclined to deposit the arrears of rent etc.

It is not in dispute at all that the petitioner had not complied with the conditions of interim order passed in SCC revision, and therefore execution proceedings have not been stayed. It may be that the court below had overlooked the fact that application for extension of the interim order i.e. Paper No. 23 Kha was on record and for this reason, the order vacating interim order may be bad but in view of the admitted fact that petitioner had not complied with provisions of section 20(4) of the Act as admitted by him, he cannot get the benefits provided in the said section even if the application for extension of the interim order was on record and the court failed to look into it. **(Brijendra Kumar Jain v. Nirmal Kumar Jain; 2010(6) ALJ 617)**

S. 21(1) (a) – Release of accommodation – Determination of bonafide need.

The said application was moved in the year 2003 and seven years have elapsed since then. Therefore, the age of the opposite party No. 2 would be 63 years, wife Smt. Manorama 55 years, son Ashwani Kumar 30 years and the second son Pawan Kumar 28 years. In the application it was mentioned that the first son is likely to be married in the near future. Therefore, the members of family must have increased by now. It has also been pleaded in the application that the wife was suffering from High Blood Pressure and Angina. With the

advancement of the age, the opposite party No. 2 and his wife might be suffering with the old age problems too.

The Appellate Authority has found that the landlord was likely to suffer greater hardship in theevent the application was rejected.

The Court has also found from the record that the tenant has made no efforts for searching alternative accommodation after the release application was submitted by the landlord before the prescribed authority in the year 2003.

IN view of the aforesaid discussion, the court finds no infirmity or illegality in the impugned judgment. **(Mukesh Kumar Verma v. Special Judge/ADJ, Lucknow; 2010(5) alj 507 (All HC, LB)**

S. 21(1)(b) – Release of promises on ground that building was in dilapidated condition – Consideration of

From a perusal of the judgment of the court below it is apparent that the prescribed authority was satisfied that the building was in dilapidated condition. It required demolition and reconstruction and that the landlord has financial capacity to reconstruct the building. It appears from the argument of the learned counsel for the petitioner that only objection against release application was that the map submitted by the landlord for reconstruction was rejected by the local body/Kanpur Development Authority as it was not in accordance with bye-laws.

In view of the fact that the building was in dilapidated condition, the court below has rightly come to the view in allowing the release application and directing the tenant for handing over the possession of the house in dispute for reconstruction as the courts cannot jeopardize the life of any person by allowing him to live in a building which may fall at any time for holding the landlord respondents for any accidental happening. If the building plan was not in accordance with the bye-laws or there was some difference in the map the same could have been removed by the landlord and another building plan could have been submitted. This may save the life of the person living in the rented building. If the building requires

reconstruction then courts have duty to order release rather than permitting such a tenant to continue to live therein by putting his life in danger. The prescribed authority was therefore justified in allowing the application for release under section 21(1)(b) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. **(Vijai Kumar Jaiswal v.Sheo Shankar Lal Gupta & Ors.; 2010(6) ALJ 595)**

S. 29-A – Applicability of section 29-A for determination of fare rent.

For applicability of Section 29-A as provided by sub-section (2), two conditions must be satisfied, namely, (one) that land alone has been let out and (two) that permanent structure has been constructed by the tenant with landlord's consent incurring his own expenses. It is not important whether the land has been let out either before or after the commencement of Section 29-A. Sub-section (4) provides for the liability of the tenant to pay to the landlord mutually agreed rent and in the absence of such agreement, the rent as may be determined under sub-section (5). The District Magistrate is empowered under sub-section (5) to determine the annual rent payable in respect of such land at the rate of 10% per annum of its prevailing market value. Such determination of annual rent can be made by the District Magistrate at the instance of the landlord or the tenant and the rent so determined is payable from the date of expiration of the lease period or from the commencement of Section 29-A, whichever is later. By virtue of sub-section (7), the provisions contained in Section 29-A overrides any term to the contrary in the contract between the landlord and tenant or instrument or any other existing law. That the conditions stated in sub-section (2) of Section 29-A are satisfied is not in dispute before the Court. What has been argued by the learned senior counsel for the tenants is that the lease provides for automatic renewal on expiry of its term and since rent was mutually enhanced to Rs. 105/- p.m., the lease got automatically renewed and, therefore, Section 29-A is not attracted. The Court fails to perceive any force in the argument of the learned senior counsel for tenants. Clauses 4 and

5 of the Lease Deed upon which reliance was placed by the learned senior counsel for the tenants read as follows:-

"That if the lessee duly observe and perform the conditions and covenants herein contained in that case the lessees will have a right of renewal of the lease on the same terms and conditions or agreed upon, but on every renewal on existing rate of rent, the lessees shall be bound to enhance rate of rent @5% on total rent of the year at the time of every renewal.

That at least one month before the expiry of the lease the lessees shall communicate to the lessor for getting the lease renewed. In case the lessor fails to get executed the renewed lease the lease "shall continue for another terms."

It is true that under the aforenoted clauses of lease, tenants have been given right of renewal by giving notice of at least one month before the expiry of the lease to the landlord for getting the lease renewed but what is seen from the material on record is that initial rent as provided in the lease was enhanced to Rs. 105/- p.m. and the tenants continued to remain in possession of leased premises. Such possession of the tenants does not render Section 29-A inoperative. In the absence of any agreed rent between the parties for the land let out to the tenants, after expiry of lease, it is open to the landlord or tenant to get the annual rent determined in respect of such land under sub-section (5) on the basis of the prevailing market value. Seen thus, there remains no doubt that rent of the said land is determinable under Section 29-A(5). **(Trust Jama Masjid Waqf No. 31 v. M/s. Lakshmi Talkies & Ors.; 2010(5) ALJ 439 (SC)**

► U.P.Z.A. & L.R. Act

S. 10 – Deduction of collection charge in order to recovery of dues as arrears of land revenue would be permissible.

In Mange Ram and another v. State of U.P. and Others reported in 2010(4) ADJ 390. The question for consideration before the Court was whether the cost of collection of recovering land revenue or a sum as an arrear of land revenue can at all be recovered or realized

from the defaulter when the recovery has not been made through the process/machinery of the Collector under the provisions of the U.P. Zamindari Abolition and Land Reforms Act/Rules despite provisions under the Act to realize 10% of the amount as collected charges.

This Bench was pleased to observe that on a plain reading of Section 10 along with Rule 8 of the Rules, it is clearly brought out that the Recovering Authority has to remit the amount to the authority concerned after deducting the collection charges, if any. The learned Bench then observed that this envisages deducting of collection charges only after recovering the amount and before remitting the same to the authority concerned. **(Satya Veer Singh v. State of U.P. & Ors.; 2010(6) ALJ 48 (All HC)**

S. 331 – Suit for cancellation of sale deed – Applicability of S. 331 of above Act – Determination of

In the present case, the order of the competent authority is in favour of the plaintiff and only the formality of entering the name in the revenue records remained to be completed.

In view of above, the order of the competent authority directing for the mutation of her name is sufficient and good enough to establish her prima facie title entitling her to institute suit for cancellation of the sale deed in the civil court and the same would not be barred by Section 331 of the U.P. Zamindari Abolition and Land Reforms Act. **(Smt. Chankali v. Doodh Nath Mani & Ors.; 2010(6) ALJ 502 (All HC)**

► Wakf Act

Ss. 6, 7 & 85 – Exclusion of jurisdiction of Civil Court – Not absolute either by Ss. 6, 7 or 85.

The exclusion of jurisdiction of Civil Court by either Ss.6, 7 or by Ss. 83, 85 of Act is not absolute. By Ss. 6 & 7 the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a Shia Wakf or a Sunni Wakf is made to rest entirely with the Tribunal and no suit or other proceeding can be instituted or commenced in a Civil Court in relation to any such question after the

commencement of the Act. Section 85 also bars the jurisdiction of the Civil Courts to entertain any legal proceedings in respect of any dispute, question or matter relating to a wakf, wakf property or other matter which is required to be determined by Tribunal by Act. The words "which is required by or under this Act to be determined by Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the Civil Court. Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a Civil Court the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the Tribunal constituted under the Act. If the answer be in the affirmative, the jurisdiction of Civil Court would be excluded qua such a question. Although exclusion of jurisdiction of Civil Court under S. 85 is wider than what is contained in Ss. 6 and 7 the exclusion of jurisdiction of Civil Courts even under it is limited only to matters that are required by the Act to be determined by a Tribunal. So long as the dispute or question raised before the Civil Court does not fall within four corners of the powers vested in the Tribunal,. The jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred. The expression "for the determination of any dispute, question or other matter relating to a wakf or Wakf property "also appears in S. 83(1) but there is, nothing in S. 83 to suggest that it pushes the exclusion of the jurisdiction of the Civil Courts beyond what has been provided for in S. 6(5), S. 7 and S. 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the Civil Courts stands completely excluded by reasons of such establishment. **(Ramesh Gobindram (Deceased by LRs) v. Sugra Humayun Mirza Wakf; AIR 2010 SC 2897)**

► Water Prevention and Control of Pollution Act

S. 47 – Discharge of trade effluents in river Karva by Industrial Unit – Complaint filed against Managing Director of Company without consent of Pollution Control Board – Maintainability of

Section 47(1) spells out a deeming fiction of vicarious liability and a rule of evidence laying the burden of proof on persons in charge of an responsible to the company for the conduct of its business. It is settled beyond cavil that rules of evidence and deeming fictions are not to be expressly spelt out and pleaded.

In the instant case the categoric allegation in the evidence was that the petitioner was the Managing Director of the company and this fact was undisputed on the record. The Managing Director of a company from his very designation implies both the control and command of the affairs of such a company and equally a statutory liability to the company for responsible conduct of its business. It is a compendious term, which signifies both control of and responsibility to the company both in ordinary parlance and by virtue of the provision of a person as a Managing Director of the company there must be a further pleading that he is the person in charge thereof and is responsible to it for the conduct of its business would suffer from the vice of literality of course, as the proviso, to Section 47(1) shows, it is permitted even for a Managing Director to show that he did not have any knowledge of the commission of the offence or that the acted with the greatest diligence to prevent the same. But, the burden of proof is laid upon him. The factum of being the Managing Director of the company is by itself sufficient to attract the provisions of Section 47(1) and the vicarious liability specified therein. The specific words therein that he was incharge of and was responsible to the company for the conduct of the business of the company are not a magic incantation which, unless repeated would vitiate a prosecution if the substance of the matter is well spelt out either in the complaint itself or in categoric terms by acceptable testimony. Thus, Section 47(1) of the Act does not necessarily mandate the incorporation of the words “was in charge of and was responsible on the company” – in all complaints against the Chairman, the Managing Director or the General Manager of the Company for offences in contravention of the

company for offences in the Act. Consequently, to insist that inspite of the description of a person as a Managing Director of the company there must be a further pleading that he is the person in charge thereof and is responsible to it for the conduct of its business would suffer from the vice of laterality of course, as the proviso, to Section 47(1) shows, it is permitted even for a Managing Director to show that he did not have any knowledge of the commission of the offence or that he acted with the greatest diligence to prevent the same. But the burden of proof is laid upon him. The factum of being the Managing Director of the Company is by itself sufficient to attract the provisions of Section 47(1) and the vicarious liability specified therein. **(Sushil Ansal & Ors. V. State of U.P. & Anr.; 2010(6) ALJ (NOC) (All, LB)**

► Words and Phrases

Legal Practitioner – Meaning of

'Legal Practitioner' means an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue agent. Act XVIII of 1879 [Legal Practitioners), S. 3].

The above-referred explanations clearly show that a Judge in service cannot be termed as a legal practitioner, as it will mean and include only an Advocate or a vakil of Court practicing in a Court, may even be a Barrister, Special Pleader, solicitors depending on the facts of a given case. Rule 2(e) of the Central Administrative Rules, 1987 also defines the word 'legal practitioner'. However, it, in turn, requires that this expression shall have the same meaning as is assigned to it under the Advocates Act, 1961. In that Act the word 'legal practitioner' has been defined under Section 2(i) to mean an advocate or vakil of any High Curt, a pleader mukhtar or revenue agent. In other words, this is an expression of definite connotation and cannot be granted an extended or inclusive meaning, so as to include what is not specifically covered. A Judge may be law graduate holding a Bachelor Degree in Law from any University established by law in India but this by itself would not render him as a 'legal

practitioner'. On the contrary, there is a definite restriction upon the Judge from practicing law.

John Indermaur, Principles of the Common Law 169 (Edmund H. Bennett ed., 1st Am.ed. 1878 explains the term as follows:

"Legal practitioners may be either barristers, special pleaders not at the bar, certified conveyancers, or solicitors. The three latter may recover their fees, but the first may not, their acting being deemed of a voluntary nature, and their fees merely in the light of honorary payments; and it follows from this, that no action lies against them for negligence or unskillfulness."

Thus, the expression 'legal practitioner' is a well defined and explained term. It, by any stretch of imagination, can include a serving Judge who might have been appointed as a presenting officer in the departmental proceedings. **(Dinesh Chandra Pandey v. High Court of Madhya Pradesh & Anr.; AIR 2010 SC 3055)**

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