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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)

January–March, 2009

Volume: XVI **Issue No.: 1**

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Arbitration and Conciliation Act

Ss. 20 and 31(3)(4) – Arbitral proceedings – Jurisdiction of Court

An analytical look at the provisions of sub-sections (3) and (4) will make it explicitly clear that any application in any reference, meaning thereby even an application under Section 20 of the Act could or should be filed in a Court competent to entertain such proceeding and having jurisdiction to decide the subject of the reference. Such jurisdiction would or could be restricted by the agreements entered into by and between the parties. The parties have clearly stipulated and agreed that no other Court, but only the Court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements, and therefore, it is the civil court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the Court which is competent to entertain such proceedings. The said Court being competent to entertain such proceedings, the said Court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other Court.

In the opinion of the court, the learned Division Bench of the Calcutta High Court misread and misinterpreted the provisions of sub-sections (3) and (4) of Section 31 of the Act and thereby arrived at a wrong finding to the effect that by virtue of the aforesaid provision of Section 31 (4) the Calcutta High Court would have jurisdiction in the matter. **(Rajasthan State Electricity Board v. Universal Petrol Chemicals Ltd.; 2009(1) AWC 653 (SC)**

S. 34(2) – Setting aside of Arbitral award – Principles for

The following principles emerge on scope and applicability of Section 34(2) of the Arbitration and Conciliation Act, 1996:

(a) An award, which is

(i) contrary to substantive provisions of law: or

(ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) Against the terms of the respective contract: or

(iv) Patently illegal, or

(v) Prejudicial to the rights of the parties

Is open to interference by the Court under Section 34(2) of the Act.

(b) Award could be set aside if it is contrary to:

(a) Fundament policy of Indian Law: or

(b) The interest of India: or

(c) Justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

(Delhi Development Authority v. R.S. Sharma & Co., New Delhi; 2009(1) AWC 246 (SC) (P.No. 246, Para)

Civil Procedure Code

O. 11, Rule 2 – Scope of

In Shiv Kumar Sharma v. Santosh Kumari; 2007(8) SCC 600, when the Court observed:

"If the respondent intended to claim damages and/or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

Law in this behalf is absolutely clear. What cannot be done directly cannot be done indirectly." **(Dadu Dayalu Mahasabhai, Jaipur (Trust) v. Mahant Ram Niwas; 2009(106) RD 493 (SC)**

O. III, R. 4(2) – Recall of order – Nonprinting of name of subsequent counsel in cause list – Itself would not be ground to recall judgment and order passed on merit.

When the party to the proceedings have chosen to engage two counsel without terminating the authority of the earlier counsel and the name of any of them is duly printed and no one attends the Court, it is obligatory for the party to give sufficient explanation for the absence of the both. The non-

printing of the name of the subsequent counsel itself would not be a sufficient ground to recall the judgment and order passed on merits. **(Smt. Krishna Kumari and Another v. Brijesh Kumar Gupta and Others; 2009(1) AWC 419)**

◆ **O. III, R. 4(2) – Appointment of counsel – Appointment of counsel shall be in force until determined with leave of court.**

Order III, Rule 4(2), CPC specifically provides that every appointment of the Counsel by party shall be deemed to be in force until determined with the leave of the Court. A Division Bench of this Court in Bijli Cotton Mills (P) Ltd. V. M/s. Chhagenmal Bestimal and Others (AIR 1982 Alld 183), while considering the above provision laid down that the authority of the Counsel once engaged can be terminated by the client but this cannot be done orally and must be done in writing with the permission of the Court in the manner laid down by Rule 4(2) of Order III, CPC. **(Smt. Krishna Kumari and Another v. Brijesh Kumar Gupta and Others; 2009(106) RD 332)**

◆ **O. V, R. 2 & O. IX, R. 13 – Exparte Decree – When can be set aside.**

Court holds that the service could not be held to be sufficient under Order V, Rule 2 of the CPC Since the petitioner was not served, the ex-parte decree was liable to be set aside and his application under Order IX, Rule 13 of the CPC was liable to be allowed. **(Chauthi Ram v. Balli and others; 2009(106) RD 331)**

◆ **O. V, R. 2 – Service of Summons – By refusal not accompanied by a copy by plaint is not a proper service in the eyes of law.**

The Court finds that the service of the summons by refusal is not a proper service in the eyes of law as required under Order V, Rule 2 of the CPC. The order sheet of the Court below indicates that the envelope containing the plaint and summons came back with the endorsement of refusal by the petitioner and this endorsement has been treated to be sufficient service against the petitioner, but a striking fact has been ignored by the Trial Court, namely, that the Trial Court itself opened the envelope which did not contain the copy of the plaint or the summons and that a blank envelope was sent.

The Court held that the envelope which is not accompanied by a copy of the plaint would not amount to service of the summons as required under

Order V, Rule 2 of the CPC. **(Chauthi Ram v. Balli and Others; 2009(106) RD 331)**

◆ **O. VI, R. 17 – Amendment can be made at any stage of the proceeding for sufficient cause to be shown.**

The Supreme Court, in a large number of decisions, has held that the amendment can be made at any stage of the proceeding for sufficient cause to be shown and that an amendment could also be allowed even after the suit is decided in an appeal.

In the present case, the Court finds that the plaintiff sought to implead the son as plaintiff No. 2 in order to remove the lacuna, if any, since the defendant had raised a plea that the person injured has not been impleaded. The Revisional Court was justified in impleading the son of the plaintiff as the plaintiff No. 2 since a formal defect, if any, was only being removed. **(Dr. P.K. Pandey v. Atul Tiwari (Alld. HC); 2009 (106) RD 328)**

◆ **O. VII, R. 11 – Exercise of power under – Plaint could be rejected only upon failure to remove the defect in plaint.**

Order VII, Rule 11 of the Code of Civil Procedure provides that the plaint would be rejected if the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, failed to do so. It clearly provides that if an objection with regard to undervaluation is taken by the defendant and the Court finds that the suit is undervalued, it cannot reject the plaint straightaway, but permit the plaintiff to rectify the defect and only upon its failure to do so that the Court would proceed to reject the plaint. **(Smt. Hiramani Devi and Another v. Sanjay Singh; 2009(106) RD 267 (Alld. H.C.)**

◆ **O. VII, R. 11 – Institution of suit – Court cannot prevent anyone from instituting a suit when his authority is apparently satisfactory.**

By showing such provision and relying upon the persuasive value of a Single Bench judgment of Delhi High Court in M/s. Nibro Limited v. National Insurance Co. Ltd., AIR 1991 Del 25, he stated that this provision only authorizes a person to sign and verify the pleadings on behalf of the corporation but does not authorize to institute suit on behalf of the corporation. He said that unless a power to institute a suit is specifically conferred on a particular Director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of Directors only by passing a resolution in this regard. The

question of authority to institute a suit on behalf of the company is not a technical matter. It has for reaching effects. It often affects policy and finances of the company. Therefore, there is no wrong on the part of the Court below in dismissing the suits under Order VII, Rule 11 of the CPC, which the Court below is otherwise competent to pass when found from the statement in the plaint that the same is barred by any law. **(Bharat Petroleum Corporation Ltd. v. Amar Autos and Others; 2009(106) RD 511)**

O. 8, R. 1 – Written statements – Time of file – Consideration of.

Order 8 Rule 1 of the Code of Civil Procedure reads thus:

"**Written statement**:- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

Although in view of the terminologies used therein the period of 90 days prescribed for filing written statement appears to be a mandatory provision, the court upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding the court in no uncertain terms stated that defendants may be permitted to file written statement after expiry of period of 90 days only on exceptional situation.

The matter was yet again considered by a three-judge Bench of the court in R.N. Jadi & Brothers and Ors. v. Subhashchandra; (2007) 6 SCC 420. P.K. Balasubramanyan J., in his concurring judgment, stated the law thus:

"It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered.

A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasize that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in court.

In view of the authoritative pronouncements of the court, the court is of the opinion that the High Court should not have allowed the writ petition filed by the respondent, particularly, when both the learned trial Judge as also the Revisional Court had assigned sufficient and cogent reasons in support of their orders. **(Mohammed Yusuf v. Faij Mohammad & Ors.; 2009(2) ALJ 185 (All HC)**

◈ O. VIII, R. 1 – Written statement – To be filed within 90 days from the date of service – Nature of provision – Directory being procedural.

The provision of Order VIII, Rule 1 of the CPC, stipulates that the written statement should be filed within 90 days from the date of service.

The Supreme Court, however has held in the case of Ram Kusum (Smt.) v. Kanchan Devi (Smt.) and Others; 2005 (33) AIC 85 (SC) = 2005 (99) RD 616 (SC), Kailash v. Nanku and Others; AIR 2005 (4) SCC 480 = 2005 (29) AIC 95 (SC), Shaikh Salim Haji Abdul Khaymsab v. Kumar and Others; 2006 (62) ALR 316 (SC) = 2006 (37) AIC 937 (SC) = AIR 2006 SC 396, and Salem Advocate Bar Association Tamil Nadu v. Union of India; AIR 2005 SC 3353 = 2005 (34) AIC 249 (SC), that the provision of Order VIII, Rule 1 of the CPC is directory in nature, being procedural and is not mandatory and that the Trial Court can extend the time for filing the written statement on sufficient cause being shown. The Supreme Court also observed that observance of the time schedule should be the rule and departure from it can only be made on satisfactory reasons to be recorded. **(Murli Manohar v.**

U.P. Sugar Company Ltd., Servahi through Deputy General Manager; 2009(106) RD 326)

◈ **O.XXII, R. 4(4) – Public Premises (Eviction of unauthorized occupants) Act – Appeal against eviction – Substitution – Though no prohibition against impleading them – Substitution application allowed subject to certain condition.**

Firstly CPC does not apply to proceedings under PP Act. Secondly, even if the principle of Order XXII, Rule 4(4) applies, still by virtue of the said provision, it is not essential to implead legal representatives of the party, who has not filed written statement, however, there is no prohibition against impleading them.

According, writ petition is allowed. Impugned order is set aside. Substitution application of petitioner filed before lower appellate court seeking substitution of sons of late Abdul Rajjak as respondents is allowed subject to. **(Abdul Gaffar v. VIIIth Additional District Judge, Kanpur Nagar and Others; 2009(1) AWC 66)**

◈ **O. XXXIX, Rules 1 & 2 – Wakf Act, S. 83(2) – Temporary injunction – Dispute as to management of Wakf – Jurisdiction of Wakf Tribunal – Determination of.**

The expression 'other matter relating to a wakf or wakf property' is very comprehensive and is of wide amplitude which may embrace in its sweep any matter relating to the management of *wakf* and *wakf* property, therefore, the appointment of *mutawalli* or Committee for management of the wakf and wakf property, in my considered opinion, would fall within the ambit of expression 'other matter relating to a *wakf* or *wakf* property' and can be decided by the Wakf Tribunals. This view also finds support from the decisions of the Court in *Najma Khatoon v. U.P. Sunni Central Board of Wakf and Others*; 2003(21) LCD 266, wherein it has been held that Tribunal can adjudicate any dispute, question or other matter relating to wakf or wakf property under the Act and another Division Bench of the Court in *Wakf Dargah Shah Mohd. And Others v. U.P. Sunni, Central Board of Wakf, Lucknow and Others; 2003(52) ALR 571: 2003(5) AWC3469*, has held that the Wakf Tribunal has jurisdiction to entertain the case, even if no order is passed under the Wakf Act, 1995 as the scope of Section 83 is very wide, the Court has held that the Wakf Tribunal has power to grant interim order also.

(Zaheer Ahmad v. Waqf No. 12, Hauz Wali Masjid, Sarwat Gate, Muzaffar Nagar & others; 2009(1) AWC 483)

◆ **O. XLI, R. 5 – Order holding will null and void passed by trial court – Challenged in appeal – Appeal admitted – Order impugned in appeal has serious civil consequences must be suspended.**

In Mool Chand Yadav and another v. Raza Buland Sugar Co. Ltd. Rampur and Others; 1983 (9) ALR 403 (SC), the Supreme Court held that where orders are challenged in appeal which orders have serious civil consequences, the judicial approach required that during the pendency of the appeal, the operation of the order should be suspended more so when the appeal had been admitted. **(Bhagwan Shankar Bajpayee v. District Judge, Kanpur Nagar and Others; 2009 (106) RD 503)**

◆ **(i) Res-judicata – Applicability of Order rejecting application for abetment before judgment would not operate as res-judicata.**

The application of the plaintiff rejecting the application for attachment of the property before the judgment, was an interlocutory order, which was passed during the pendency of the suit and would not operate as res judicata in so far as the execution of the decree is concerned. **(Mewa Lal v. Kedarnath and others; 2009(106) RD 330)**

◆ **(ii) Res-judicata – Principle of – Explained.**

The principle of res-judicata is based on the need of giving finality to judicial decisions and the principle of res-judicata is that the same matter should not be judged again and again. It primarily applies to the past litigation and future litigation on the same issue. In the present case, an interlocutory application for attachment before the judgment is not a decision which brings finality between the parties, which would operate as res judicata after the decree is passed by the Trial Court. **(Mewa Lal v. Kedarnath and others; 2009(106) RD 330)**

◆ **Practice and Procedure – A judgment and decree could be set aside on a limited ground namely on the ground of fraud or collusion.**

A judgment or a decree could be set aside on a limited ground, namely, on the ground of fraud or collusion. If a judgment or a decree has been obtained on account of fraud or collusion, a suit for a declaration could be filed. **(Kedar Nath and others v. Fulena and others; 2009(106) RD 269)**

◆ **Practice and Procedure – No relief can be granted in absence of pleadings, issues and proof.**

It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-jointer of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the Court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs. One lakh, the Court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. IN a suit praying for permanent injunction, court grants a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings prayer, court fee paid, evidence led in, etc. **(Bachhaj Nahar v. Nilima Mandal and Others; 2009(1) AWC 706 (SC)**

◆ **S. 2(9) – Expression, "Decree" explained and judgment**

In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. For that purpose the operative portion of the judgment dated 29.3.2008 passed in Appeal No. 8 of 1976 is required to be looked into which is reproduced below:

^^pwWfd m0iz0 tksr pdcUnh vf/kfu;e dh /kkjk&5¼2½ ds vUrxZr ;g vihy mi'kfer gks pqdh gS bl dkj.k vihy esa fufgr vU; foUnqvksa ijxq.k&nks"k ds vk/kkj ij fopkj fd;s tkus dh dksbZ vko';drk ugha gSA

vkns'k

orZeku vihy mRrj izns'k tksr pdcUnh vf/kfu;e dh /kkjk&5¼2½ ds vUrxZr

iz'kfer gks pqdh gS blfy;s nkf[ky nQ~rj dh tk;sA**

From the bare perusal of the meaning of the judgment as contained under section 2(9) of the CPC and Order XLI Rule 32 of the same Code, it transpires that judgment may be for confirming, varying or reversing the decree from which the appeal is preferred. Otherwise also the judgment must contain the pleadings of the parties, evidence led and the conclusion drawn thereon. **(Mahendra Dhar Dubey (Dead) Through LRs and others v. Prashu Ram Pandey and others; 2009(106) RD 262)**

◆ **S. 11 – Res-judicata – To constitute – essential conditions for – To be satisfied.**

In Sheodan Singh v. Daryao Kunwar; 1966 (4) SCR 300, the Court laid down the ingredients of section 11 of the Code of Civil Procedure stating:

"A plain reading of section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-

(i) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(ii) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

The parties must have litigated under the same title in the former suit;

The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier, in order therefore, that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied. **(Dadu Dayalu**

Mahasabhai, Jaipur (Trust) v. Mahant Ram Niwas; 2009(106) RD 493 (SC)

S. 11 – Res-judicata – Order passed without jurisdiction is nullity – It is non est in eye of law – Principle of res-judicata will not apply in such cases.

An order passed without jurisdiction would be a nullity. It will be a coram non judice. It is non est in the eye of law. Principles of res judicata would not apply to such cases. **(Chandrabhai K. Bhoir and Others v. Krishna Arjun Bhoir and Others; 2009(1) AWC 715 (SC)**

S. 11 – Res-judicata – Dismissal of civil suit filed by workman for declaration of termination null and void would operate as res-judicata for workman to approach labour court.

Where a dispute relates to enforcement of a right under the industrial law or an obligation created therein, the jurisdiction of the civil court is barred. However, if it is an industrial dispute arising out of a right or liability under the general or common law, the suitor can choose the forum either under the industrial law or before the civil court. The aforesaid proposition laid down by the Apex Court in the case of Premier Automobiles Ltd. V. K.S. Wadke and others; AIR 1975 SC 2238, holds the field till date. In the case at hand the respondent had chosen the remedy of a civil suit seeking a declaration that his services were deemed confirmed on expiry of the probation and he obtained a judgment on merits which was upheld in appeal, cannot be now allowed to turn around and say that the said judgment was void. From the judgment, it is apparent that he was seeking a declaration under the common law obligation and having once elected to approach the civil court he had already exercised his option and, therefore, could not have approached the labour court as the decision thereon would operate as res-judicata. **(Indian Institute of Technology, Kalyanpur, Kanpur v. Presiding Officer, Labour Court-II and others; 2009(1) AWC 206)**

S. 24 – Transfer of Cases – Ground for transfer of matrimonial suit for divorce – Temporary residing place of parties will not give jurisdiction to the court of that place to entertain – Suit will be transfer to place of permanent address for divorce.

A perusal of sub-section (3) of Section 19 of the Act indicates that a petition could be presented to the District Court where the parties to the marriage last resided together. The word “reside” means a place where one

resides, abode, house. In the present context, the Legislature intended that where parties have lived under a roof in a permanent capacity or on a permanent basis and does not mean a temporary abode of living.

In view of divorce petition, the territorial jurisdiction of the Family Court, Kanpur was invoked on the ground that the parties had resided together at Kanpur at some place for the purpose of providing the medical treatment to the petitioner. This allegation by itself indicates that the residence at Kanpur, if any, was only temporary in nature and by this method a divorce petition would not lie at Kanpur. The address given by the defendant in the array of the parties indicates his residence at Lucknow and permanent address at Ambala. This also indicates the lack of territorial jurisdiction of the Family Court, Kanpur. **(Smt. Balvindar Kaur v. Mukul Kumar Srivastava; 2009(1) AWC 258)**

◆ **S. 24(3)(b) – Transfer of proceedings – District Judge has power and jurisdiction to transfer application for enforcement of award u/s. 36 of arbitration and conciliation Act.**

The language of S. 24(3)(b) of the CPC is clear and explicit and an application for the enforcement of the award filed under Section 36 of the Arbitration and Conciliation Act, 1996 would come under the category of the word "proceeding" under Section 24 of the CPC Consequently, the District Judge would have the power and jurisdiction to transfer the application filed by respondent under Section 36 of the Arbitration Act from Court which had no jurisdiction to decide case in first instance to Court of competent jurisdiction. **(Shahab Uddin alias Munnan v. District Judge, Muzaffarnagar & Anr.; 2009(2) ALJ 275 (All HC)**

◆ **S. 115 and O. XLIII, R. 1(s) – Maintainability of revision – Revision against orders asking parties to submit names for appointment as receiver not maintainable.**

The court is of the opinion that the application No. 12Ga of the opposite party, has not been fully allowed as yet and is still subject to certain conditions. Consequently, the issue with regard to appointment of a receiver, has not been finally decided and does not come under the category of the Explanation provided under Section 115 of the CPC The impugned order is not a case which has been decided finally nor does the impugned order decide the issue finally. Final order would be passed when a receiver is

appointed, against which, the petitioner has a remedy of filing an appeal under Order XLIII, Rule 1(s) of the CPC.

In view of the aforesaid the Court is of the opinion that the court below has rightly rejected the revision, as not maintainable. **(Anil Sharma v. Rajan Pathak and others; 2009(1) AWC 152)**

Appeal – Revision – Revisable order can also be challenged in appeal against decree passed ultimately.

If a right of appeal from the decree is conceded to a defendant, in the opinion of the Court, he cannot be denied a right to challenge an order which was subject to revision in his memorandum of appeal filed from the decree ultimately passed. **(Wada Arun Asbestos (P) Ltd. v. Gujarat Water Supply and Sewerage Board; 2009(1) AWC 431d (SC)**

S. 25 – Transfer of case – Age of wife is relevant factor to transfer matrimonial proceedings at her instance.

After going through the materials on record and after considering the age of the wife/petitioner, the court is of the view that the aforesaid case being civil proceeding no. 549 pending before the learned Judge, Family Court at Cuttack, Orissa be transferred to the Family Court at Jaipur in the State of Rajasthan. Accordingly, the Court allow the application for transfer and direct transfer of the aforesaid case to the Family Court at Jaipur, Rajasthan. **(Sapna Agarwal v. Om Prakash Jalan; 2009(1) AWC 560 (SC)**

S. 47 – Execution of consent decree – No authority with the executing court to set aside, modify or vary the consent decree – Application U/s. 47 CPC made by respondent was not maintainable.

The Court is of the view that, in the present case, section 47, CPC, application made by the respondents herein was totally misconceived. It was not maintainable. The Executing Court had no authority to set aside, modify or vary the consent decree. Clause K makes the valuation by Ernst and Young final and binding on the disputing parties. If, according to the respondents, the opinion of the valuer was tainted, biased or that they had failed to do their duty as a valuer, then appropriate proceedings ought to have been taken by the respondents either for setting aside or modifying the consent decree before the Competent Court but not in the Executing Court which has no power to set aside, modify or vary the decree. It was not open to the respondents to move under section 47, CPC for the relief, namely, to have the valuation report set aside as that would amount to virtually setting

aside a portion of the consent decree which, as stated above, constituted very core and the basis of the consent decree.

In the opinion of the court, without going into the merits of the matter, we hold that section 47, CPC application made by the respondents was not maintainable and ought not to have been entertained by the Executing Court. **(M/s. Premium Exchange and Finance Ltd. and Another; 2009(106) RD 516)**

◆ **Ss. 115 and 47 and O. XXI, R. 54 – Revision validity of attachment not raised in objection under S. 47 CPC and raised for first time in revision – It could not be allowed to be raised.**

The validity of the attachment proceedings was not raised by the defendants in his objections under Section 47 nor any objection was filed by the defendants under Order XXI, Rule 58 CPC. It transpires that the defendants raised this ground for the first time in the revision which, in the opinion of the court, could not be allowed to be raised for the first time in a revision. In M/s. Gangotri Sahkari Avas Samiti Ltd., Allahabad v. Smt. Usha Mukherji and others; 2002 (20) LCD 284, the court held that a point raised in the revision for the first time, which not raised in the objection under Section 47, could not be raised in the revision nor can it be decided by the revisional court. Similarly, the Supreme Court in the case of Khajan Singh (d) By LRs v. Gurbhajan Singh and others; AIR 2007 SC 2941: 2007 (3) AWC 3158 (SC), has held that the revisional court has a limited jurisdiction and the exercise of the revisional power could be exercised on limited grounds and that the appreciation of evidence on the basis of material brought on record was within the domain of the executing court and that the revisional court could not interfere in a finding of fact. **(Shobha Kant Chaturvedi v. Hon'ble the Addl. District Judge 2nd, Etawah Court (U.P.) (Revisioning Court) and Others; 2009(1) AWC 568)**

Conservation of Foreign Exchange & Prevention of Smuggling Activities Act

◆ **S. 3(1) – Preventive detention – Delay in issuing order – Detention not vitiated on ground of delay of satisfactory explanation has been given by defining authority.**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3(1) – Preventive detention – Delay in issuing order – Clarification and explanation given by detaining authority for the

delay was satisfactory – Detention not vitiated on ground of delay. **(Vipul Diliphbai Dorda & Anr. V. State of Maharashtra & Ors.; 2009 Cri.L.J. (NOC) 243 (Bom)**

Constitution of India

◈ **Article 14 – Whether student passed in Class X examination of CBSE from Central School can be denied admission to Class XI in same school on ground that he failed to secure cut-off marks prescribed for admission – Held, "No".**

One can have no objection to a school laying down cut off marks for selection of suitable stream/course for a student giving due regard to his/her aptitude as reflected from the class X marks where there are more than one stream. But it would be quite unreasonable and unjust to throw out a student from the school because he failed to get the cut off marks in the Class X examination. After all the school must share at least some responsibility for the poor performance of its student and should help him in trying to do better in the next higher class. The school may of course give him the stream/course that may appear to be most suitable for him on the basis of the prescribed cut off marks. **(Principal, Kendriya Vidyalaya and Others v. Saurabh Chaudhar and Others; 2009(1) AWC 163 (SC)**

◈ **Article 14 & 16 – Recruitment of constables in civil police, PAC etc. – Cancellation of entire selection – Validity of**

The requirement of fairness demands that the body which has to enquire or decide on a issue which may affect individual right, the character of such body should be above board. Official bias is likely to arise when the person enquiring into a matter has a previous or personal knowledge of the material facts of the case before him by virtue of his dealing with those facts in some other capacity or context. The possibility of predisposition or prior inclinations hovering over the mind of such a person into the matter, cannot always be ruled out. However, to vitiate such an enquiry it would be necessary to show a case of reasonable probability that the report was less than fair. But, there is an exception to this rule in the nature of doctrine of necessity when either under law or in certain exacting circumstances, but for the said person none else can be asked to conduct the enquiry. The fairness of the report would be commented upon later in this judgment, but, the necessity of inclusion of the two individuals in the enquiry has not been demonstrated before the Court. The State or DGP has a right to nominator

anyone to conduct an enquiry but, in the present facts, there is no reason forthcoming why the two individuals were involved in the enquiry though several other officers were available. In fact, the DGP at the time of constituting the Mishra Committee appears to have been oblivious of the fact that Shailja Kant Mishra and Mohd. Javed Akhtar were a part of the recruitment process. This fact is apparent from the minutes of the meeting held under the Chairmanship of the DGP on 31.7.2007 where it was provided that any officer who was part of the recruitment process in the last three years should not be allowed even to assist the Mishra Committee in the enquiry. Thus, it can safely be deduced that the DGP without applying his mind constituted the four member Mishra Committee out of which at least two were part of the recruitment process and asking them to enquire into the process of which they had personal knowledge in their capacity as members of the recruitment process and, therefore, it can be said that the composition of the Mishra Committee itself was less than fair and vitiated. **(Pawan Kumar Singh and Others v. State of U.P. and Others; 2009(1) AWC 391)**

Articles 14, 16, 21 and 226 – Appointment – Time-bound appointment comes to end by efflux of time – Right to employment is not included in Article 21.

At this stage, it would also be appropriate to notice that earlier it was held by the Apex Court that right to earn livelihood is part and parcel of "right to life" under Article 21 of the Constitution and this was equated with the right to employment. However, the Apex Court in Secretary State of Karnataka and others (supra) has rejected this submission that Article 21 would include the right to employment and in para 42 of the judgment has held as under:

"The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right of employment can also be brought in under the concept of right of life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through

the back door. The obligation cast on the State under Article 39 (a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the Courts recognize that an appointment to a post in Government service or in the service of its instrumentalities can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut in the eyes of the Court to the Constitutional scheme and the right of the numerous as against the few who are before the Court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all not to a particular group of citizens. The Court, therefore, overrule the argument based on Article 21 of the Constitution." **(Gyanendra Veer Singh and Others v. State of U.P. and Others; 2009(1) AWC 676)**

◈ **Articles 19, 20 and 21 – Narco analysis and Brain Mapping tests – Permissible even in absence of consent/willingness of accused/witness.**

In the instant case the question is whether in absence of consent/willingness of the accused/witness, who is subjected to the Narco Analysis, Brain Mapping or similar tests, the same should be undertaken by order of Court. The matters at hand are of general importance and larger interest. Article 20 and Article 19, of the Constitution of India which guarantee Fundamental Right and are resorted to as a shield for seeking protection against alleged tests, which is not a physical invasion, but an intellectual invasion, will prima facie come within the bracket of reasonable restriction on Fundamental Rights. Here is a tie between silencing constitutionally available individual right and prerogative of State to investigate and use, for that purpose, modern medico forensic aids for larger good of larger number of persons, the community on the whole whose such individual is a member. In larger interest, it is felt necessary that this modern scientific invention based on an aesthetic drugs already in use over decades and electro gram and similar systems already used for over decades and safe enough needs to be allowed, as an aid in the process of investigation and retrieval of data and information stored in the memory of the person concerned. In the background, larger interest should outweigh the individual liberties and fundamental rights and balance can be struck by considering the perspective of reasonable restrictions. **(Sampatrao R. Arvelli & Anr. Etc. v. State of Maharashtra & Ors.; 2009 Cri.L.J. 457 (Bom H.C.)**

◆ **Art. 141 – Precedents – Blend reliance on decision without reference to facts – Not proper.**

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. **(Bangalore v. Srikumar Agencies; 2009 AIR SCW 942 (A))**

◆ **Article 226 – Writ Petition – Interim matter – Whether while adjudicating upon interim matter High Court justified in giving categorical finding on merits – Held, "No".**

While adjudicating an interim matter, the High Court has given a categorical finding on merits holding inter alia that there is nothing to show that even prima facie, goods are liable to confiscation. The High Court appears to have decided the matter on merits finally even though that was not the stage for doing so and was beyond the scope of adjudication of the writ petition. This is not the way the High Court should have dealt with the matter. Apart from that, the High Court has not indicated any reason as to why the condition of execution of indemnity bond equivalent to seizure value of goods and/or furnishing of bank guarantee equal to 10% of value of goods, as was stipulated by the authorities, was not justified. This also adds to the vulnerability of the order. The court set aside the impugned orders of the High Court. **(Union of India and others etc. etc. v. Kundan Rice Mills Ltd.; 2009(1) AWC 157 (SC)**

◆ **Art. 226 – CPC – O. 39, R.1 and 2 and O.XLIII, R. 1 – (Maintainability of) Writ petition against order for temporary injunction would not be maintainable.**

Once a suit is filed, Order XXXIX, Rules 1 and 2 of the CPC comes into play. The impugned order is an order of injunction granted under Order XXXIX, Rules 1 and 2 of the CPC, against which, an appeal lies under Order XLIII, Rule 1® of the CPC. **(T. Chand Bidi Company and Others v. Sh. Ameer Hasan; 2009(1) AWC 325)**

◆ **Article 226 – Alternate remedy – Not an absolute bar.**

Availability of an alternative remedy by itself may not be a ground for the High Court to refuse to exercise its jurisdiction. It may exercise its writ jurisdiction despite the fact that an alternative remedy is available, inter alia, in a case where the same would not be an efficacious one. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior Courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy. **(Committee of Management v. Vice-Chancellor; 2009 AIR SCW 398 (b) All HC)**

Articles 311, 309 – U.P. Govt. Servants (Discipline and Appeal) Rules, R. 9(4) – Disciplinary Proceedings – Reasoned order as contemplated U/R. 9(4) of above rules not passed – Order of punishment liable to be quashed.

When the rule framing authority itself has made separate provision making it obligatory upon disciplinary authority to record reasons at two different stages, one, when it disagrees with findings of inquiry officer and, secondly, when it decides to pass an order or punishment after considering the reply given by delinquent employee against findings of disagreement of disciplinary authority, then it is obligatory upon disciplinary authority to follow such procedure strictly. High Court would not read the aforesaid provision in such a manner so as to make one or the other exercise nugatory. The reasons contained in disagreement note constitute the ex-parte view taken by disciplinary authority against findings recorded by inquiry officer. When it is communicated to delinquent employee and he submits its reply, the disciplinary authority is benefited with the explanation given by delinquent employee. In order to find out as to whether it would like to stick to its earlier view of disagreement with finding of inquiry officer or same needs to be changed, modified, partly or wholly in light of explanation given by delinquent employee, it has to apply its mind again. The reasons, therefore, are required to be recorded by disciplinary authority as to why explanation given by delinquent employee is or is not satisfactory. The purpose and objective of reasons to be recorded under sub-rules (2) and (4) of Rule 9 are different. They are to be recorded at different stages with slightly different material inasmuch as at former stage, the stand of delinquent employee is not available to disciplinary authority while in later case it is available. Therefore non-observance of Rule 9(4) is fatal since its compliance is mandatory. If the delinquent employee after communicating its disagreement note and inquiry officer's finding to delinquent employee and

after receiving reply failed to pass a reasoned order imposing punishment upon delinquent employee, such order would not be tenable in law and has to be set aside. **(Sanjeev Kumar v. State of U.P. & Ors.; 2009(2) ALJ 158 (All HC)**

Contempt of Court Act

◆ **S. 2(c) – Filing of frivolous and vexatious contempt petitions – Exemplary cost of Rs. 1 lakh imposed.**

Contempt of Courts Act (70 of 1971), S. 15 – Court's power to take suo motu cognizance – Cases are placed before various Benches on judicial side under order of Chief Justice – Once matter is placed before Contempt Bench on judicial side without any decision of Chief Justice that it is a fit case for suo motu cognizance – It would normally imply that Chief Justice has not found matter to be appropriate for suo motu cognizance.

Contempt of Courts Act (70 of 1971), S. 2(c) – Filing of frivolous and vexatious contempt petitions – Exemplary costs of Rs. One Lakh imposed. **(Deepak Kumar Gupta v. Hon'ble K.S. Rakhra, Justice High Court, Allahabad & Anr.; 2009 Cri.L.J. (NOC) 187 (All. H.C.)**

Court Fees Act

◆ **S. 6(5) – Deficiency in court fee – Once deficiency of court fee is made good within the time allowed by the court, the date of the institution of suit would be deemed to be the date on which the suit was filed.**

Order VII, Rule 11 of the Code of Civil Procedure provides that the plaint would be rejected if the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, failed to do so. It dearly provides that if an objection with regard to undervaluation is taken by the defendant and the Court finds that the suit is undervalued, it cannot reject the plaint straightaway, but permit the plaintiff to rectify the defect and only upon its failure to do so that the Court would proceed to reject the plaint.

Section 6(5) of the Court Fees Act, as applicable in the State of U.P., provides as under:-

> "6(5) In case the deficiency in Court-fee is made good within the time allowed by the Court, the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented."

From the aforesaid, it is clear that once deficiency of Court-fee is made good within the time allowed by the Court, the date of the institution of the suit would be deemed to be the date on which the suit was filed. There is another look into this matter. Once an amendment is allowed, the said amendment is deemed to have been incorporated from the date of presentation of the plaint itself. **(Smt. Hiramani Devi and Another v. Sanjay Singh; 2009(106) RD 267 (Alld. H.C.))**

Criminal Trial

Prosecution – Non explanation of injuries on accused by prosecution – Effect of

One of the pleas is that the prosecution has not explained the injuries on the accused.

"……..The issue is, if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where the prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In Mohar Rai v. State of Bihar; AIR 1968 SC 1281, it was observed:

'6. ……. In the judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants.'

In another important case Lakshmi Singh v. State of Bihar; 1976 SCC (Cri) 671, the court observed:

'12. ……. Where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants.'

'12. ……. In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.'

25. In Mohar Rai case; 1990 SCC (Cri) 378, it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently, the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by the Court in Vijayee Singh v. State of U.P.; 1990 SCC (Cri) 378.

26. Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. As observed by the Court in Ramlagan Singh v. State of Bihar; 1973 SCC (Cri) 563, the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare Krishna Singh v. State of Bihar; 1988 SCC (Cri) 279, it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by

the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused,. It is more so when the injuries are simple or superficial in nature." **(Shaikh Majid & Another v. State of Maharashtra & Others; (2009) 1 SCC (Cri) 366)**

Criminal Procedure Code, 1973

S. 154 – FIR – When not to be treated as

Mere information received on phone by Police Officer without any details as regards identity of accused or nature of injuries caused to victims as well as name of culprits – May not be treated as FIR. **(Ravishwar Manjhi v. State of Jharkhand; 2009 AIR SCW 575 (C) Jharkhand HC)**

(1) S. 154 – FIR – Delay in lodging FIR has great importance when incident takes place out of enmity.

Delay in lodging the First Information Report has a great importance in a case of this nature. Enmity between the parties stands admitted. The prosecution case proceeded on the basis that immediately after occurrence and after shifting the dead body under a shed, the informant got the First Information Report scribed by Ganga Sahai and immediately thereafter proceeded on foot to the Police Station. If this part of the story is correct, the prosecution's case would not be subject to much doubt. But if the scribe of the first Information Report was residing in a separate village which is 10 kms. Away from the place of occurrence, and it was at that place the FIR was scribed where after PW1 arrived at the Police Station, it would impossible for him to reach by 4.30 in the morning. The prosecution did not examine the scribe of the First Information Report although his son has been examined as an eye-witness. If he was residing at the relevant time in the village where the incident had taken place, it was expected that either he had witnessed the occurrence or had reached the place of occurrence immediately after the accused fled away. The prosecution, therefore, should have made attempts to clarify this anomaly. **(Om Prakash v. State of U.P.; 2009 Cr.L.J. 782 (SC)**

(2) S. 154 – FIR Offence of rape – Mere delay in lodging FIR cannot be ground to throughout prosecution case.

The delay in a case of sexual assault cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. **(State of Himachal Pradesh v. Prem Singh; 2009 Crl.L.J. 786 (SC)**

Ss. 154 and 172 – FIR to be registered first and then entries to be made in Police station daily diary.

It is clearly evident from the statement of Iqbal Rai that the first information report was recorded first and DDR thereafter. He further stated that DDR had been recorded on the basis of the facts recorded in the first information report. We find it difficult to comprehend as to how totally a different version is found in DDR which is said to be a photocopy of DDR. There is obviously something more than meets the eye. The contention that under the Punjab Police Rules information must be reduced to writing and be entered in the police station daily diary and only thereafter the first information report is to be issued is absolutely untenable. The relevant rule says:

"Every information covered by Section 154 of the Criminal Procedure Code must be reduced to writing as provided in that section and the substance thereof must be entered in the police station daily diary which is the book provided for the purpose."

A bare reading of the rule makes it clear that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station shall be reduced to writing and the substance thereof shall be entered in a book to be kept in such form as may be prescribed and only thereafter in the police station diary. **(Paramjit Singh alias Mithu Singh v. State of Punjab Through Secretary (Home); (2009) 1 SCC (Cri) 299 (SC)**

Ss. 155 to 168 – Defect in investigation – Held, does not by itself vitiate the trial based on such defective investigation

It is well settled that even a defect, if any, found in investigation, however serious, has no direct bearing on the competence or the procedure

relating to the cognizance or the trial. A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation. **(Paramjit Singh alias Mithu Singh v. State of Punjab Through Secretary (Home); (2009) 1 SCC (Cri) 299 (SC)**

S. 156(3) – Registration of FIR – More than one FIR can be registered regarding same incident.

More than one FIR can be registered regarding the same incident or incidents. Where FIR was lodged regarding one incident only, whereas in application under S. 156(3) a number of incidents have been mentioned, which occurred on different places affecting different persons, therefore, it cannot be said that FIR registered in one case covers all incidents mentioned in application under S. 156(3) and as such, there was no legal bar in that case to get FIR registered on basis of application moved by applicant under S. 156(3) and its investigation by police, because all allegations made in said application and in the FIR registered at earlier case were not the same. **(Parvez Parwaz v. State of U.P.; 2009(1) ALJ 174)**

S. 161 – Statement of witnesses whose presence at the time of incident was natural – Cannot be discarded by I.O. on ground that they are interested witness.

Where the presence of witnesses at the time of incident, which took place in the market area, was found natural S. 161 does not authorize investigation officer to ignore the statements of such witnesses, recorded by ASI on the ground that they were interested witnesses. Section 161 makes no distinction between one person acquainted with facts and circumstances of a case and another. It does not divide them into the classes of complainants, accused persons and witnesses, instead they are all interrogates. A statement made under Section 161 can only be used for the purpose of contradicting the evidence of a prosecution witness. It cannot be used for corroborating the evidence of a prosecution witness. The Investigating Officer should behave like an impartial friend of the victim and there should be no room for entertaining a doubt about the fair investigation of the case. When the evidence of witnesses on scrutiny, is found credible and acceptable, the Court cannot be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation and in preparing the records unscrupulously. **(Pintoo alias Kamal Kishore & Anr. Etc. v. State of Rajasthan; 2009 Cri.L.J. 748 (Raj. HC)**

S. 174 – Inquest report – Purpose of

Mentioning of the name of accused persons or weapons carried by them and names of eye-witnesses in the inquest report is not the requirement of law. Inquest report is confined to ascertainment of apparent cause of death and it need not mention, who assaulted the deceased and who were the witnesses of assault. An investigation under S. 174 Cr.P.C. is limited in scope and is confined to ascertainment of apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal and homicidal or caused by animal. It is for this limited purpose that persons acquainted with facts of case are summoned and examined under S. 175 Cr.P.C. The details of overt acts are not necessary tobe recorded in inquest report. The question regarding the details as to how deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are witnesses of the assault is foreign to ambit and scope of proceedings under S. 174. Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details. Thus, due to non-mentioning the names of witnesses and the accused persons as well as the weapons carried by them in the inquest report, it cannot be inferred that FIR was not in existence at the time of holding the inquest proceedings. **(Ram Naresh & Ors. V. State of U.P.; 2009(1) ALJ 218 DB)**

S. 178 – Panchnama prepared under – Non-mention of names of accused thereunder – Prosecution version not vitiated on that ground.

In Ram Bali v. State of U.P. 2004(10) SCC 598, it was highlighted that in the panchanama prepared under Section 174 of the Code names of accused persons were not indicated and that adds vulnerability to the prosecution version. This plea is clearly unsustainable. In Amar Singh v. Balwinder Singh and Ors.; (2003) (2) SCC 518), it was observed as follows:

"The High Court has also held that the details about the occurrence were not mentioned in the inquest report which showed that the investigating officer was not sure of the facts when the inquest report was prepared and this feature of the case carried weight in favour of the accused. The Apex Court is unable to accept this reasoning of the High Court. The provision for holding of an inquest and preparing an inquest report is contained in section 174 Cr.P.C. The heading of the section is "Police to enquire and report on suicide etc." Sub-section (1) of this section provides that when the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has

committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give information to the nearest Executive Magistrate and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds, fractures, bruises, and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, and accidental or by some machinery etc. The scope and purpose of Section 174, Cr.P.C. was explained by the Court in Pedda Narayana v. State of A.P.; (1975) (4) SCC 153 and it will be useful to reproduce the same: (SCC pp. 157-58, para 11):

'The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report.

It is therefore not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of court.' **(Aqeel Ahmad v. State of U.P.; 2009(2) ALJ 178 (SC)**

◆ **S. 190 – Taking of cognizance – Magistrate is not required to weigh evidence in detail.**

The Magistrate while taking cognizance of offence is not required to weigh the evidence in detail but is required to see whether prima facie

offence is made out or not. He need not give the reasons in detail for purpose of taking cognizance but has to record his satisfaction on perusal of records. The impugned order shows that the Magistrate after perusing the complainant, the evidence of P.Ws and materials on record took cognizance and summoned the accused to face trial. As such the court does not find any illegality in the impugned order. **(Rakesh Singh & Anr. V. State of Bihar & Ors.; 2009 Cri.L.J. 668 (Patna HC)**

◈ **S. 227 – Framing of charge – "Consideration of" by Magistrate – Scope**

Per Altamas Kabir, J. - There is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such material as are indicated in S. 227 Cr.P.C. can be taken into consideration by the Magistrate at that stage. However, in a proceeding taken therefrom under S. 482 Cr.P.C. the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This appears to be the intention of the legislature in wording Ss. 227 and 228 the way in which they have been worded and as explained in 2004 AIR SCW 6813.

Per Markanday Katju, J. – It can not be said as an absolute proposition that under no circumstances can the court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e., where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. In some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted. **(Rukmini Narvekar v. Vijaya Satardekar & Ors.; 2009 Cri.L.J. 822 (SC)**

◈ **S. 239 – Discharge of accused – Recording of reasons – Necessity.**

The Apex Court in the case of Kanti Bhadra Shah & Another v. State of West Bengal; AIR 2000 SC page 522 has considered in detail as to how the charge/s will be framed against the accused as well as how he can be discharged. The relevant observation of the Hon'ble Supreme Court and the principle of law laid down therein is being extracted below:

The court wish to point out that if the trial court decides to frame a charge there is no legal requirement that he should pass an order specifying

the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial Judge has formed the opinion, upon considering the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned. **(Ganga Ram v. State of U.P. & Ors.; 2009(2) ALJ 267 (All HC)**

◈ **S. 240 – Framing of charge – Recording of reasons necessity – Magistrate deciding to frame charge against accused on basis of material available in case diary is not required to given reason.**

When the Magistrate, on the basis of the materials available on the Case Diary, decides to frame charge/s against the accused, he is not required to record the reason.

In the instant case, the Magistrate has considered in detail the materials available on the Case Diary to frame the charge/s against the accused. The Magistrate has passed the order not in a mechanical way but after applying his mind on the materials available on the Case Diary and has drawn the conclusion that there is prima facie evidence in support of the offences against the accused and so they will be charged accordingly. The Additional Sessions Judge has set aside the impugned order passed by the Magistrate mainly on the ground that he has not properly considered the evidence available on the Case Diary. Furthermore, the statement of the complaint regarding the allegations made in the complaint was vague in nature. He has not specifically mentioned the date, time and place of occurrence. In fact the Sessions Judge has made a meticulous comment of the evidence and other materials available on the Case Diary at the stage of framing of the charge, which was not required at this stage. As per legal requirements the Magistrate was expected only to go through the Case Diary at the time of framing the charge against the accused and after a perusal of the Case Diary, if he found that there was prima facie evidence in support of the alleged offences, he could order to frame the charge/s against the accused. In this case, the Magistrate after considering the materials available on the Case Diary and after hearing the prosecution and the accused, found prima facie evidence for framing charges against the accused for the aforesaid offences and thus he passed the impugned order for framing the charge against him. The Sessions Judge was expected to consider the question of legality/propriety or correctness of the impugned order passed by the Magistrate. He was not expected to consider the evidence available on Case Diary and make meticulous comments. But he has considered the

evidence available on the Case Diary on merit as if he was hearing the appeal. The order passed by the Additional Sessions Judge is, therefore, illegal and is liable to be set aside. **(Ganga Ram v. State of U.P. & Ors.; 2009(2) ALJ 267 (All HC)**

◆ **S. 319 – Summoning of person other than accused – Powers of court, as to**

The fulcrum on which the invocation of S. 319 Cr.P.C. rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned. Further, it is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction.

Where the evidence which sought to connect the appellants with the commission of the offence was hearsay in nature and except for a statement in the FIR that the complaint strongly believed that the murder of her father was pre-planned and there were many conspirators involved, there was no direct evidence of the complicity of the appellants in the incident, it would not be proper to subject the appellants to trial by invoking the provisions of S. 319 Cr.P.C. **(Brindaban Das v. State of West Bengal; 2009 AIR SCW 556 (Cal HC)**

◆ **(1) S. 319 – Summoning of additional accused – Exercise of power – If from evidence prima facie commission of offence is disclosed against other person then trial court can summon other person to face trials.**

In the instant case power used by the trial court, no doubt should be exercised sparingly and that should be exercised only to achieve criminal justice. If there is no remote possibility or likelihood of conviction, the court will refuse to exercise the power. There is no compelling duty of the Court to proceed against the other persons. Merely on the basis of the suspicious of the involvement in the offence, might not be enough, to exercise the power, for summoning the other person under S. 319 Cr.P.C. unless there is prospect of the conviction. If from the evidence collected during inquiry or trial prima facie commission of offence is disclosed against other person then after satisfaction the trial Court in exercise of judicial discretion can summon the other person, under Section 319 Cr.P.C., to face the trial along with other

accused. **(Ramakant Tripathi & Ors. V. State of U.P. & Anr.; 2009 Cri.L.J. 459 (All HC)**

(2) S. 319 – Summoning of additional accused – Prior hearing to accused – Not necessary.

Under S. 319 Cr.P.C. there is no provision for hearing the accused who has been proposed to be summoned at any stage of inquiry & trial. If there is evidence against a third person against whom no charge sheet has been filed & Prima facie commission of offence is disclosed from the evidence and there is possibility and likelihood of the conviction then that person can be summoned U/s. 319 Cr.P.C. to face the trial. **(Ramakant Tripathi & Ors. V. State of U.P. & Anr.; 2009 Cri.L.J. 459 (All HC)**

S. 319 – Cognizance taken against persons other than arrayed accused in pending trial – their separate trial is not warranted

Where the trial Court was satisfied on the evidence adduced before it that the other two persons who had not been arrayed as accused should face the trial the order passed by trial court taking cognizance against such persons under Section 319 was perfectly legal. Since the trial court proceeded against such persons under Section 319 they could be tried together with the accused, who were already being tried as accused. A separate trial against them is not necessary. No objection in regard to illegality in trial having been raised before the trial Court, the appellate Court cannot permit to raise this objection. **(Pintoo alias Kamal Kishore & Anr. Etc. v. State of Rajasthan; 2009 Cri.L.J. 748 (Raj. HC)**

S. 354 – Penalogy – Imposition of sentence – Factors to be considered.

Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under

such serious threats. **(State of Punjab v. Rakesh Kumar; 2008 AIR SCW 7444(A) P. & H.)**

S. 378 – Appeal against acquittal – High Court disposing of appeal in a cryptic manner – Not permissible.

The approach of the trial court and the High Court is clearly unsustainable. Merely because the victim was more than 16 years of age as held by the trial court that cannot be a ground to hold that she was a consenting party. No evidence was led to show such consent. Normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape. This has been the consistent view of the Court. The High Court was, therefore, clearly wrong in disposing of the appeal in such a cryptic manner. In the circumstances of the case, the court set aside the order of the High Curt and remits the matter to it for fresh hearing so that it can consider the matter and hear in detail and dispose of the same by a reasoned judgment. **(State of Uttar Pradesh v. Manoj Kumar Pandey; (2009) 1 SCC (Cri) 244 (SC)**

S. 386 – Appeal against acquittal – Interference with conclusion of Trial Court ought to be by reasoned order.

Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable. **(State of U.P. v. Munshi; 2009(1) ALJ 243)**

S. 401 – Revision cannot be dismissed in default or for non-prosecution – It has to decide on merit.

Criminal revision cannot be dismissed in default or for non-prosecution. It is settled law that criminal revision has to be decided on merit, even if the counsel of the parties are not present to make their submissions. Reference in this regard maybe made to the case of Madan Lal Kapoor v. Rajiv Thapar; 2007 (59) All Cri C 788: (AIR 2007 SC (Supp) 826) in which the Hon'ble Apex Court has held that criminal revision cannot be dismissed in default or for non-prosecution and it has to be decided on merit. It is also held by the Hon'ble Apex Court that criminal appeal also cannot be dismissed in default. Therefore, in view of this specific law laid down by the

Hon'ble Apex Court, the order dated 30.3.2007., whereby criminal revision No. 4693 of 2006 was dismissed for non-prosecution, is not in accordance with law.

Now the question remains whether the order dismissing criminal revision for default or non-prosecution can be recalled. In my considered opinion, such order can certainly be recalled by the Court in exercise of inherent powers, which are vested in all Courts whether Civil or Criminal. **(Mithaee Lal v. State of U.P. & Ors.; 2009 Cri.L.J. 612 (All HC)**

◆ **S. 437 – Bail – Grant of – Considerations.**

It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

3. Prima facie satisfaction of the Court in support of the charge.

(Lokesh Singh v. State of U.P.; 2008 AIR SCW 6980 (B) All. H.C.) (P.No. 2008 AIR SCW 6980)

◆ **S. 438 – Anticipatory bail – Nature and scope – Extraordinary/Special power for grant of, has given to higher scholars of judicial service i.e. a Court of Session and High Curt.**

Section 438 Cr.P.C. makes special provision for granting "anticipatory bail" which was introduced in 1973. The expression "anticipatory bail" has not been defined in Cr.P.C. Anticipatory bail means a bail in anticipation of arrest. The expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail presently granted is in anticipation of arrest. Where a competent court grants "anticipatory bail", it makes an order that in the event of arrest, a person shall be released on bail. The power of granting "anticipatory bail" is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power may be exercised. Thus, the power is "unusual in nature" and is entrusted only to the

higher echelons of judicial service i.e. a Court of Session and a High Court. **(Union of India v. Padam Narain Aggarwal and Others ;(2009) 1 SCC (Cri) 1 (SC)**

S. 439, 389 – Bail – Grant of – Order should indicate reasons – Grant of bail pending appeal against conviction – Also has to be by reasoned order.

Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a Court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The Court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. The position is not different when the application is made during pendency of an appeal after conviction has been recorded. **(Bhuvaneshwar Yadav v. State of Bihar; 2009 AIR SCW 925 (A) Bihar HC)**

S. 439 – Bail – Cannot be refused on the ground that another bench of High Court has declined bail to the co-accused.

Criminal Procedure Code (2 of 1974), S. 439 – Bail – Cannot be refused on the ground that another Bench of High Court has declined bail to the co-accused. **(Nawal Pal v. State of U.P.; 2009 Cri.L.J. (NOC) 184 All)**

S. 482 – Quashing of criminal proceedings – High Court's approach in exercise of its power under, should be wider caution, care and circumspect – Factors which should be kept in mind.

The High Court should be extremely cautious and slow to interfere with the investigation and/or trial of criminal cases and should not stall the investigation and/or prosecution except when it is convinced beyond any manner of doubt that FIR does not disclose commission of any offence or that the allegations contained in FIR do not constitute any cognizable offence or that the prosecution is barred by law or the High Court is convinced that it is necessary to interfere to prevent abuse of the process of the Court. In dealing with such cases, the High Court has to bear in mind that judicial intervention at the threshold of the legal process initiated against a person accused of committing offence is highly detrimental to the larger public and

societal interest. The people and the society have a legitimate expectation that those committing offences either against an individual or the society are expeditiously brought to trial and, if found guilty, adequately punished. Therefore, while deciding a petition filed for quashing FIR or complaint or restraining the competent authority from investigating the allegations contained in FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect.

If the allegations contained in FIR or complaint disclose commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges *malus animus* against the author of FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same.

However, if the High Court is satisfied that the complaint does not disclose commission of any offence or prosecution is barred by limitation or that the proceedings of criminal case would result in failure of justice, then it may exercise inherent power under Section 482 Cr.P.C. **(Sanapareddy Mahendhar Seshagiri & Another v. State of Andhra Pradesh & Another; (2009) 1 SCC (Cri) 170 (SC)**

S. 482 – Quashing of summoning order on the ground that notice was not served on respondents – When cannot be done.

A proceeding under Section 138 of the Negotiable Instruments Act was initiated against the respondents. In the said proceeding, the Judicial Magistrate, First Class, Saharanpur passed an order summoning the respondents for trial. Challenging the aforesaid order, an application under Section 482 of the Code of Criminal Procedure was moved by the respondents for quashing the summons. The High Court by the impugned order had quashed the said proceeding on the ground that no notice was served on the respondents.

Admittedly, notice under Section 138-B of the Negotiable Instruments Act was sent to the respondents through registered post and under a

certificate of posting on the correct address of the respondents. The High Court had quashed proceeding on the ground that although notice through registered post and also under certificate of posting were sent by the appellant/complainant to the respondents but because of the endorsement of the postal peon, the service could not be said to have been effected. In the opinion of the Court, the High Court was not justified in holding that service of notice could not be found to be valid. In K. Bhaskaran v. Sankaran Vaidhyan Balan & Anr. [1999 (7) SCC 510], it has been held that the context of section 138-B of the Negotiable Instruments Act invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction and provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. It is also well settled that once notice has been sent by registered post with acknowledgment due in a correct address, it must be presumed that the service has been made effective. We do not find from the endorsement of the postal peon that the postal peon was at all examined.

That being the position, we are unable to sustain the order of the High Court and the impugned order is set aside and the proceeding started under Section 138 of the Negotiable Instruments Act is restored to its original file. **(M/s. Indo Automobiles v. M/s. Jai Durga Enterprises & Ors.; 2009(1) ALJ 245)**

Education

S. 16FF and Regulation 2(1) of Chapter II of Regulations – Minority institution – Appointment of officiating principal/Principal – Committee of management of minority institution entitled to appointment principal/Principal of its choice irrespective of seniority of lecturers.

The proviso to Regulation 2(1) of Chapter II of the Regulations framed under the Intermediate Education Act provides that a temporary vacancy could be filed by promotion of the seniormost qualified teacher of the institution. This provision is applicable only to other institutions, but they are not applicable to minority institutions, which are governed by the provisions of Section 16FF of U.P. Intermediate Education Act. For ready reference Regulation 2(1) of Chapter II of the Regulations is extracted below:

> "2. [1] The post of the Head of Institution shall except as provided in clause (2) be filled by direct recruitment after reference to the

Selection Committee constituted under sub-section (1) of Section 16F, or as the case may be, under sub-section (1) of Section 16FF:

Provided that in the case of any institution not being an institution referred to in Section 16FF a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, retirement or suspension of an incumbent occurring during an educational session in the post of the Head of Institution shall be filled by the promotion of the seniormost qualified teacher, if any, in the highest grade in the institution."

Therefore, the aforesaid provisions make it clear that for the post of officiating principal the committee of management of a minority institution is free to appoint the principal of its choice irrespective of the seniority list of lecturers.**(Mohd. Ayyub Khand v. State of U.P. and Others; 2009(1) AWC 71)**

◆ **Regulation 2 of Chapter III of – Regulations – Promotion – Promotion of Class IV employee to Class III in educational institution on the basis of seniority subject to rejection of unfit – Merit alone cannot be considered.**

From a perusal of Regulation 2 (2) of the Act it is evident that a Class IV employee who possesses prescribed eligibility and has served continuously for 5 years on his substantive post and if his service record is good, then he shall be promoted on the criteria of seniority subject to rejection of the unfit. The criteria "seniority subject to rejection of unfit" is admittedly different than the criteria of 'merit'. In a case where the promotion is to be made on the criteria seniority, subject to rejection of unfit individuals on the basis of their seniority are required to be considered without going into a comparative assessment of merit and if the seniormost person fulfils the minimum required fitness or merit, he shall be selected without undergoing assessment of merit with others. This is how the Apex Court has also interpreted the criteria of seniority subject to rejection of unfit in B.V. Sivaiah and others v. K. Addanki Babu and others; AIR 1998 SC 2565: Unionof India and others v. Lt. General Rajendra Singh Kadyan and another; JT 2000 (8) SC 276: Central Council for Research in Ayurveda and Siddha v. Dr. K. Santhakumari; AIR 2001 SC 2306, Diploma Engineers Sangh v. State of U.P. and Others; JT 2007 (4) SC 532: 2007 (5) AWC 5346 (SC). The D.I.O.S. in the case in hand has considered the petitioner only on the criteria of 'merit' and has totally ignored the requisite factors which have

to be taken on account for the purpose of promotion of a class IV employee to class III post as provided under Regulation 2 under Chapter III of the Regulations framed under the Act, therefore, the impugned order cannot sustain. **(Dheerendra Singh v. State of U.P. and Others; 2009(1) AWC 730)**

Employee's State Insurance Act

◆ **S. 1(5) – Whether educational institution can be brought within purview of E.S.I. Act – Held, "Yes.".**

By virtue of Section 1(5) of the Act, the Act in the first instance applied to all the factories and in the second instance to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise, hence educational institution is not included in it.

Court of the view that the word 'otherwise' is of wide amplitude covering all other establishments including educational institutions. **(Maharshi Shiksha Sansthan and Another v. State of U.P. and Another; 2009(1) AWC 267)**

Essential Commodities Act

◆ **S. 2(a)(v) – Essential Commodities – Rice and paddy are essential commodities within meaning of S. 2(a)(v).**

The Officer-in-charge of a police station or a Police Officer making investigation under the Code of Criminal Procedure, 1973, can search premises and seize any essential commodity in any place within the limits of his jurisdiction, under general penal laws. **(Elluru Chandra Obul Reddy v. Joint Collector, Kadapa & Ors.; 2009 Cri.L.J. 427 (AP HC)**

Evidence Act

◆ **S. 3 – Video recording – Admissibility of**

In the present case, since all the original chips (except one) are in existence, we have no hesitation in accepting the genuineness and authenticity of the video footage which led to the telecast on 30th May, 2007. But, what about the chip that has been re-recorded on, wiping out the original?

There can be no doubt about the relevance or admissibility of the contents of the original chips which are then recorded on video footage. As observed in Robson the Court has to be prima facie satisfied as to the

originality of the recordings. Even in Ram Singh the Supreme Court heard the tapes and then held them to be unreliable. Following these two decisions, and to give an opportunity to Mr. Anand and Mr. Khan to demonstrate to us the lack of integrity in the video recordings, we saw the video recordings in open Court (though on a Saturday) in their presence but found nothing odd to make us doubt the originality of the recordings or the contents thereof. Even if the 'offending' portions are removed from consideration, the sum and substance of the conversations and their gist are more than apparent.

The court need to move with the times and accept and recognize that technology of the 1980s is quite different from the technology of this century, is clear from a reading of State of Maharashtra v. Praful B. Desai; (2003) 4 SCC 601: (2003 Cri.L.J. 2033) where recording of evidence by video conferencing was held permissible in law. It is true that the technology of this century also enables an expert to doctor or morph video material, but there is no allegation in the present case that NDTV has doctored or morphed images for some purpose. A viewing of the original chips and video recordings leaves us in manner of doubt of the genuineness and reliability of the footage. In view of the above, we have no hesitation in rejecting the contention of Mr. Anand and Mr. Khan regarding the integrity of the video recordings and certainly that of the chips. **(Court on its own motion v. State & Ors.; 2009 Cri.L.J. 677 (Delhi HC)**

S. 3 – Interested witness – Reliability of

In Namdeo v. State of Maharashtra; 2007 AIR SCW 1835☹2007 Cri.L.J. 1819), the Apex Court held that a witness who is a relative of deceased or victim of the crime cannot be characterized as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. The Apex Court also observed that a close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully, if on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. The Apex Court also referred to the decision rendered in the matter of Harbans Kaur v. State of Haryana; 2005 AIR SCW

2074: (2005 Cri.L.J. 2199), in which, it was held that there is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

There, in view of the above, it cannot be held that the testimonies of PW 2, Gandami Sukdi, and PW 3, Gandami Munni, cannot be relied on only on the ground that they are the close relatives of the deceased. The court scrutinized their evidence with due care and caution and if their evidence passes the test of credibility in appreciation by applying the above principles, the conviction can well be based on their testimonies. **(Markami Deva and Ors. V. State of Chhattisgarh; 2009 Cri.L.J. 585)**

S. 9 – Identification by voice – Reliability of

Undisputedly it was a dark night. They claimed to have identified them from their voice. Though such identification in some cases is possible in the instant case no evidence was adduced to show that the witnesses were closely acquainted with the accused to even identify him from his voice that too from a very short reply, purported to have been given. This fact was lost sight of by the Trial Court. The High Court found the possibility of identification as claimed by PWs 1 and 2 an impossibility. So far the purported extra judicial confession is concerned the High Court found that the same also has not been established through the evidence of PW 3. The reasons given by the High Court to discard the evidence of PW 3 do not suffer from any infirmity. **(Inspector of Police, T.N. v. Palanisamy @ Selvan; 2009 Cri.L.J. 788)**

S. 24 – Extra judicial confession – Credibility of witness to whom it is made – Determines its value.

An extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other evidence. The value of the evidence as to confession depends upon the veracity of the witness to whom it has been made. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. **(Mohd. Azad @ Samin v. State of West Bengal; 2009 AIR SCW 752 (G) Cal HC)**

S. 24 – Extra-judicial confession – Voluntariness – Factors to considered.

If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with, is, whether when the accused made the confession, he was a freeman or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed.

So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. Every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonial untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind for the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession.

The value of evidence as to confession depends on the reliability of the witness who gives evidence. A confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought

out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. **(Chattar Singh v. State of Haryana; 2008 AIR SCW 7426 P. & H.)**

S. 24 – Extra-judicial Confession – Reliability of

Confession alleged to be made by accused to former President of village Panchayat almost week after occurrence. President neither reduced it into writing nor producing accused before Police. Information about making of confession given to Police only after many hours, confession is unreliable. **(Inspector of Police, T.N. v. Palanisamy @ Selvan; 2009 Cri.L.J. 788)**

S. 32 – Dying Declaration – Can be acted upon without corroboration

It is well settled that a dying declaration can be acted upon without corroboration. In Khusal Rao v. State of Bombay [1958 SCR 552: (1958 Cri.L.J. 106]. Harban Singh v. State of Punjab; 1962 Suppl (1) SCR 104: (1962 (1) Cri.L.J. 479) and Gopal Singh v. State of M.P.; AIR 1972 SC 1557: (1972 Cri.L.J. 1045), it is held by the Supreme Court that there is not even a rule of prudence, which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing, then the Court may for its assurance, look for corroboration to the dying declaration. In Kanak Singh Rai Singh Rav v. State of Gujarat; (2003) 1 SCC 73: (2003 Cri.L.J. 855), it is held by the Supreme Court that the law is well settled and if a dying declaration is made voluntarily and truthfully by a person, who is physically in a condition to make such statement, there is no impediment in relying such a declaration. **(Anisetti Veerabhadra Rao & Anr. V. State of Andhra Pradesh; 2009 Cri.L.J. 730)**

S. 32 – Dying Declaration – Reliability – Determination of

In the present case, the Doctor has given certificate firstly on the top of the dying declaration, as stated above, and, then in the last portion of the dying declaration, he again made an endorsement that "patient remains conscious during giving her statement". Apart from the above, evidence of the Executive Magistrate would show that what questions he had asked to the

deceased and what answers were given by the deceased to the said questions. The answers of the deceased to the questions asked by the Magistrate would show that she was properly responding to them and when she was responding to the questions asked by the Executive Magistrate, the Magistrate continued to record the declaration till end by putting subsequent questions, which were also properly replied by her in the manners she wanted to reply. This shows that when the Executive Magistrate was satisfied with the answers of the questions given by the deceased, he continued to complete the dying declaration and the subjective satisfaction of the Magistrate can be gathered from such course of action adopted by him from beginning to end while recording the dying declaration. Even in the cross-examination, not a single question was asked to the Executive Magistrate that the deceased was not in a position to make the dying declaration. **(Lokendra Tiwari alias Kaushlendra v. State of Chhattisgarh; 2009 Cri.L.J. 420 (Chhattisgarh HC)**

◈ **S. 32(1) – Oral dying declaration – Must be considered with care and caution – oral dying declaration allegedly made by deceased to his mother, her testimonies needs corroboration from independent witness.**

The deceased's mother being an interested witness, her testimony without corroboration from the independent witness including the medical officer cannot be blindly accepted to prove that the deceased had regained consciousness when she met him in the hospital and named the appellant to be the assailant. Her testimony cannot be accepted for another reason that she has not stated in her statement recorded by the police under Section 161 Cr.P.C. that before his death the deceased named the appellant as an assailant and it was for the first time in the Court that she made the said statement.

The oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother, who arrived at the hospital only on the following day when the doctor had already operated the deceased for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased to his mother

relied upon by the prosecution and accepted by the trial court and the High Court, was not cogent, satisfactory and convincing to hold that the deceased before his death was in a fit condition to make oral declaration to his mother. **(Arun Bhanudas Pawar v. State of Maharashtra; (2009) 1 SCC (Cri) 112 (SC)**

◆ **S. 32(1) – Dying declaration – Multiple, inconsistent dying declarations – Conviction on the basis of – Cannot be sustained.**

A short question which arises for consideration before Supreme Court is as to whether having regard to the contradictory and/or inconsistent stands taken by the deceased in her dying declarations; the impugned judgment can be sustained in law.

The deceased had made four dying declarations: two before the medical officers, one before the Executive Magistrate and one before the police officer. In her statements before the medical officers, she alleged that while she had been cooking in her house in the morning at 1100 hrs on 29.5.2004, accidentally, the stove burst and she sustained burn injuries. In her dying declaration recorded by Parappa Gurappa Thotagi, ASI, she alleged:

"I have been married with Shri Mehbooba Saheb Mamadapur 6 years ago. I have three children. My husband is a driver. He was again and again troubling me, beating me. My mother-in-law, father-in-law and husband were forcing me to bring golden chain. They have been giving harassment to me in this manner.

On 29.5.2004, in the morning at about 9.30 when I was in the house again my father-in-law, mother-in-law and husband started abusing me. My husband thrashed me on my back. As soon as I fell down, they poured kerosene which was in the stove on my body and by lightening the matchbox they burnt me."

Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied. **(Mehiboobsab Abbasabi Nadaf v. State of Karnataka; (2009) 1 SCC (Cri) 287 (SC)**

◆ **S. 45 – Opinion of Expert – Relevance of.**

Section 45 of the Evidence Act indicates that where the Court has to form an opinion as to the identity of the handwriting on a document, the opinion upon that point of persons especially skilled in such matter becomes a relevant fact. The power of attorney executed by defendant No. 1 can be proved by a variety of methods, such as, the signatures and handwriting of the said defendant from other admitted documents and then comparing it and forming an opinion. Alternatively, expert opinion can also be taken. The opinion of an expert is only an evidence of opinion and is not decisive or conclusive. It is not substantive evidence. The opinion of the expert can be relied by the plaintiff when the opinion is supported by other corroborative evidence. The handwriting experts' opinion only corroborate the internal or external evidence that comes on the record, as held by the Supreme Court in AIR 1973 SC 2200, Ram Narain v. State of Uttar Pradesh. Further, such evidence has to be received by the Court with great caution and may be accepted, if it is corroborated by other evidence supporting the view of the expert.

Evidence to support the plaint allegation is by way of filing documents and proving it by way of oral evidence. Opinion of an expert is an aid to corroborate the other evidence on that point and, as stated earlier, it is not conclusive in nature. The law prescribes that substantial justice has to be made by the Court. That is the legal system of our country but could the plaintiff be ousted on this count by not permitting him to lead the evidence by production of an expert evidence or should an opportunity be given to the plaintiff to prove his case. **(Ajay Swaroop Mehrotra v. D.N. Raina (Deceased) & Ors.; 2009(2) ALJ 311)**

S. 61 – Proof of document – Modes of

Contents of a document are not automatically proved only because the same is marked as an exhibit. However, the factum of an accident could also be proved from the FIR. In the claim petition itself a reference was made to the lodging of the FIR. **(Oriental Insurance Company Limited v. Premlata Shukla and Others; (2009) 1 SCC (Cri) 204 (SC)**

S. 45 – Applicability of

In the opinion of the Court, in the light of the provision of Section 45 of the Evidence Act, opinion of an expert could at some stage become relevant fact. That stage has not as yet arrived but the Court could foresee

such a situation but has unnecessarily closed the door of the plaintiff by rejecting his application and not permitting him to lead the evidence.

In view of the aforesaid, the impugned order cannot be sustained and is quashed. **(Ajay Swaroop Mehrotra v. D.N. Raina (Decd.) through L.Rs. and Others; 2009(1) AWC 141)**

◆ **S. 113-B – Presumption as to dowry death – Available only if trial is for offence of dowry death.**

The presumption as to dowry death can be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B, IPC.

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

(Tarsem Singh v. State of Punjab; 2009 AIR SCW 928 (A) Punjab & Haryana HC)

◆ **S. 137 – Cross-examination – Necessacity of – Document produced by prosecution was in favour of accused – No necessity to cross-examine any prosecution witness on those documents.**

If the copy of any document supporting the prosecution case had not been supplied by the prosecution, the accused would have been justified to seek an opportunity to further cross-examine the prosecution witnesses on that document, but when the documents are in favour of the accused-applicant, there is no necessity to cross-examine any prosecution witness on those documents and the accused can safely rely on these documents as they have been proved by the prosecution. **(Ramkesh Sharma v. State of U.P. & Anr.; 2009(1) ALJ 81)**

◆ **Hearsay Evidence – In dept. enquiries against employees – There is no allergy to hearsay evidence.**

As far as the domestic enquiries concerning industrial employees are concerned, it has been laid down way back in State of Haryana and another v. Rattan Singh; AIR 1977 SC 1512, that in a domestic enquiry, the strict and sophisticated rules of evidence under the Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. **(Mahatam Singh v. U.P. State Road Transport Corporation, Lucknow and Others; 2009(1) AWC 464)**

Family Law

◆ **Property – Whether family property or individual property? – Property in dispute stands in name of "P" in revenue record – Presumption is that it belongs to him unless contrary proved.**

It is settled principle of law that property belongs to the person in whose name it stands unless contrary is proved. Admittedly the property in dispute stands in the revenue record in the name of Panchu. Therefore, presumption is that it belongs to him. A very heavy burden lies upon the petitioners to prove that it relates to the joint family. **(Girdhari and others v. Board of Revenue and Others; 2009(1) AWC 115)**

Family Court Act

◆ **Ss. 15 & 16 – Recording of evidence – Evidence of oral character to be recorded in substance – But evidence of formal character can be permitted to be given an affidavit.**

By reading of two sections together, one can conclusively arrive at the conclusion that evidence of only formal character can be permitted to be given on affidavit. Enacting a separate provision for giving of evidence of formal character on affidavit, itself discloses the intention of the legislature as under section 15 substance of oral evidence alone has to be recorded. It means that oral evidence cannot be permitted to be given on affidavit. The very purpose of section 15 will stand frustrated in case any party is permitted to give oral evidence on affidavit for the reason that if oral evidence on affidavit is permitted to be given, the Court will not be able to restrict the party in starting whatever it likes which may be against the spirit of section 15 which says that it will not be necessary to record the evidence at length.

Sections 15 and 16 clearly disclose the intention of the legislature that the evidence of formal character alone can be permitted to be given on affidavit and not other oral evidence. Separate provision for giving of

evidence of formal character on affidavit leads to the conclusion that giving of oral evidence on affidavit is excluded in view of section 15 of the Act. **(Dr. Anil Kumar Lal v. Addl. Principal Judge, Family Court, Lucknow; 2009 (106) RD 306 (Alld. H.C.-LB.)**

◆ **S. 19(1) – Const. of India – Art. 227 – Hindu Marriage Act, Ss. 24 and 28 – Appeal – Maintainability of – Appeal U/s. 19(1) of above Act against order U/s. 24 of Hindu Marriage Act for payment of interim maintenance would not be maintainable – Order passed under S. 24 of Hindu Marriage Act can be challenged under Article 227.**

The court is of the considered opinion that neither an appeal under Section 19(1) of the Family Courts Act, 1984 nor under Section 28 of the Act, 1955 nor revision under Section 115, CPC, is maintainable where an order has been passed under Section 24 of Act, 1955 by Additional District Judge or District Judge exercising his original civil jurisdiction where family courts had not been established, but there must be a remedy to challenge an order granting ad interim maintenance. The court is of the considered opinion that the order passed by Additional District Judge under Section 24 of the Act, 1955 under his original civil jurisdiction can be challenged by the appellant under the power of superintendence before the High Court under Article 227 of the Constitution of India.

In view of aforesaid discussion, there can be no scope for doubt to hold that the instant appeal filed by the appellant under Section 19(1) of the Family Courts Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 is not maintainable and the appeal is accordingly dismissed as not maintainable. However, it shall be open to the appellant to challenge the order passed under Section 24 of the Act, 1955 under Article 227 of the Constitution of India. **(Sunil Pathak v. Gunja alias Gunjan Pandey; 2009(1) AWC 561)**

General Clauses Act

◆ **S. 6 – Motor Vehicles Act, 1988 – Ss. 217 and 140 – Repeal and Saving clause making reference to S. 6 of Act – Construction/Interpretation of**

Section 6 of the General Clauses Act, inter alia, saves a right accrued and/or a liability incurred. It does not create a right. When Section 6 applies, only an existing right is saved thereby. The existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. If a new Act confers a right, it does so with prospective effect when

it comes into force, unless expressly stated otherwise. **(State of Punjab & Others v. Bhajan Kaur & Others; (2009) 1 SCC (Cri) 328 (SC)**

◈ **Ss. 7, 8, 17 and 19 – Hindu Minority and Guardianship Act – Ss. 6 and 13 – Custody of Minor Child – Welfare of child is of paramount consideration.**

The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force. **(Nil Ratan Kundu and Another v. Abhijit Kundu; 2009(1) AWC 377 (SC)**

◈ **S. 27 – Service of Notice – When it should presumed that service has been made.**

Notice sent to respondents through registered post and under certificate of posting on their correct addresses and must be presumed that service has been made effective. Service of notice could not be found to be not valid merely because of endorsement of postal peon. **(M/s. Indo Automobiles v. M/s. Jai Durga Enterprises & Ors.; 2009(1) ALJ 245)**

Hindu Marriage Act

◈ **Ss. 2, 5, 8 and 12(1)(c) – Marriage – Whether marriage entered into by Hindu with Christian valid under Hindu Marriage Act – Held, "No".**

In the facts pleaded by the respondent in her application under Section 12(1)(c) of the 1955 Act and the admission of the appellant that he was and still is a Christian belonging to the Roman Catholic denomination, the marriage solemnized in accordance with Hindu customs was a nullity and its registration under Section 8 of the Act could not and/or did not validate the same. In the view of the High Court rightly allowed the appeal preferred by the respondent herein and the judgment and order of the High Court does not warrant any interference. **(Gullipilli Sowria Raj v. Bandaru Pavani alias Gullipilli Pavani; 2009(1) AWC 427 (SC)**

◈ **S. 9 – Suit for restitution of conjugal rights – Sufficient reasons for living separately – Held, order of Trial Court in decreeing suit for restitution of conjugal rights against her was erroneous.**

Learned counsel for the appellant (wife) argued that under Section 9 of the Hindu Marriage Act, 1955, party cannot be forced to live with his or her spouse in a joint family, particularly, when she (wife) is in a Government

service at another place. On examination of the evidence on record, we found that the trial Court has totally ignored the fact that by decreeing the suit for restitution of conjugal rights, the appellant has been asked to live in the joint family of her husband at Gadarpur while she is employed in a Government service in Jhankat (Sitarganj). Learned counsel for the present respondent pointed out that the husband got the appellant (wife) transferred to Gadarpur, but she did not joined her duties there. We are of the view that where wife is serving as a teacher at a different place and unable to live with her husband's parents place, it cannot be said that she has withdrawn from the society of her husband without sufficient reason.

Learned counsel for the present respondent (husband) argued that the burden of proof lies on the appellant to show that she has sufficient reasons to live separately from her husband. No doubt, burden lies on the person who has withdrawn from the society of his or her spouse to show that he/she has sufficient reason to do so, as is required under Explanation to Section 9 of the Hindu Marriage Act, 1955. The Court agreed with the position of law pointed out by learned counsel for the present respondent. But, on the perusal of the evidence on record, the court found that there are sufficient reasons shown by the wife for living separately from her husband. D.W. 1 Manpreet Kaur has stated on oath that her husband and in-laws are greedy. They make demand of dowry. She has further alleged that her husband has taken money from her which she had got in the form of the fixed deposits. Said fact is admitted by P.W. 1 Devendra Pal Singh (husband). It is further alleged by her that even the clothes and gift items of the son given to him at the time of his naming ceremony were retained by the present respondent. It is further alleged by her that her husband has committed MAARPEET with the appellant, even after she left her husband's house. In support of the averments relating to MAARPEET, copy of the first information report is filed on behalf of the appellant before the trial Court. In the circumstances, the view of the court that the trial court has erred in law in holding that the wife has not shown any sufficient reason for withdrawing herself from the society of her husband.

For the reasons as discussed above, we are of the view that on the part of the appellant there are sufficient reasons for living separately from her husband which are established on the record and the trial Court has erred in law in decreeing the suit for restitution of conjugal rights against her. Therefore, the appeal deserves to be allowed. The appeal is allowed. The judgment and order dated 7.1.2008, passed by Judge, Family Court, Udham Singh Nagar, in Suit No. 24 of 2006, is set aside. The petition for restitution

of conjugal rights, filed by Devendra Pal Singh against the appellant, is hereby dismissed. No order as to costs. **(Smt. Manpreet Kaur v. Devendra Pal Singh; 2009(1) ALJ 140 (Uttarakhand HC)**

◆ **S. 13(1)(i-a) – Ground of divorce – Cruelty includes mental cruelty – Some illustration regarding mental cruelty discussed.**

Recently, in Samar Ghosh v. Jaya Ghosh; (2007) 4 SCC 511: 2007 (2) SCCD 589: 2007 (5) AWC 4820 (SC), the Court held:

> "No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> (iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.
>
> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.
>
> (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.
>
> (vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount tomental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. 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."

(Suman Kapur v. Sudhir Kapur; 2009(1) AWC 169 (SC)

◆ **S. 19(3) – Divorce Petition – Territorial jurisdiction – Word "reside" would include place where parties had lived on permanent basis and does not mean temporary abode of living – Matter transferred to family court at Lucknow, both parties were permanently residing at Lucknow.**

A perusal of Sub S. (3) of S. 19 of the Act indicates that a petition could be presented to the District Court where the parties to the marriage last resided together. The word "reside" means a place where one resides, abode and house. In the present context, the legislature intended that where parties have lived under a roof in a permanent capacity or on a permanent basis and, does not mean a temporary abode of living.

In view of paragraphs 21, 22 and 24 of the divorce petition, the territorial jurisdiction of the Family Court, Kanpur was invoked on the ground that the parties had resided together at Kanpur at some place for the purpose of providing the medical treatment to the petitioner. This allegation by itself indicates that the residence at Kanpur, if any, was only temporary in nature and by this method a divorce petition would not lie at Kanpur. The address given by the defendant in the array of the parties indicates his residence at Lucknow and permanent address at Ambala. This also indicates the lack of territorial jurisdiction of the Family Court, Kanpur.

In view of the aforesaid, the court finds that the Family Court, Kanpur had no territorial jurisdiction to entertain the divorce petition. On the other hand, I find that the petitioner is now permanently residing at Lucknow, in the house alleged to be owned by the opposite party. The opposite party has also shown his address at Lucknow in the divorce petition. Consequently, I allow the transfer application and directed the Matrimonial suit No. 312 of 2003. Mukul Kumar Srivastava v. Smt. Balvinder Kaur, filed under Section 13 of the Hindu Marriage Act, pending in the Court of Principal Judge, Family Court, Kanpur to be transferred to the Family Court, Lucknow. **(Smt. Balvinder Kaur v. Mukul Kumar Srivastava; 2009(2) ALJ 78 (All HC)**

◆ **Determination of.**

In the instant case wife used to insult husband by saying that his practice as Advocate was poor and he was living as dependant on his family. She used to say that she earned more than her husband. Even when outsiders used to come to visit house, wife used to use insulting words against husband in their presence. Such conduct of wife not justified. Husband held entitled to

decree of divorce. **(Harish Chandra Singh Chilwal v. Smt. Pushpa; 2009(1) ALJ)**

Indian Succession Act

◈ **Ss. 74 & 119 – Will – Construction of – Intention of testator in respect of his bequeath of dwelling house – Ascertaining of.**

If the Court is to put itself into the testator's armchair to ascertain his intention from the words used in the Will; it must take into consideration the surrounding circumstances, the position of the testator, his family relationships, and attach importance to isolated expressions so as to give effect to all the clauses in the Will rather than making some of it inoperative.

On ascertaining intention of the testator, in respect of his bequeath of the dwelling house, it could be said that he did not intend to give it to a third party. Evidently, the brothers and sister were residing in the said house. They were given equal shares. But the share bequeathed to sister was given as after her demise, the brother was entitled to occupy the entire premises. The meaning of the word 'occupy' should not be read in isolation. The right to occupy is the subject-matter of devise. It must be read with the word 'absolutely'. Right to occupy as a limited owner and a right to occupy absolutely could not have different meanings. The heirs and legal representatives of brother and sister were to get the interest in the dwelling house absolutely. If the intention of the testator was otherwise, the question of brother occupying the said premises after the demise of his sister would not have specifically been mentioned. **(Syamal Kanti Guha v. Meena Bose; 2009 AIR SCW 444 (Cal HC)**

◈ **S. 302 – Whether testamentary court in exercise of jurisdiction U/s. 302 can enforce contract qua contract – Held, "No".**

The testamentary Court in exercise of its jurisdiction under Section 302 of the Act cannot enforce a contract qua contract; only because the executor is a party thereto. From the prayers made in the notice of motion, it would appear that the executor had sought for direction against himself. Such a prayer was whether maintainable in terms of section 302 of the Act had not been adverted to by the courts below. **(Chandrabhai K. Bhoir and Others v. Krishna Arjun Bhoir and others; 2009 (1) AWC 715 (SC)**

◈ **S. 302 – Applicability of**

If the agreement was not a part of the Will, in the opinion of the court, Section 302 will have no application. **(Chandrabhai K. Bhoir and others v. Krishna Arjun Bhoir and others; 2009(1) AWC 715 (SC)**

◈ **Will – Probate – Caveatable interest – A person having a slight interest in estate of testator is entitled to file caveat and contest grant of probate of will of testator.**

The only question that was agitated before the Court by Mr. Thiayagarajan, learned counsel, appearing for the appellant challenging the judgment of the High Court revoking the probate granted in respect of the Will executed by the testator, was that the respondents having no caveatable interest in the estate of the deceased, the application for revocation filed by them could not be allowed. We are unable to accept these submissions made by Mr. Thiayagarajan, learned counsel appearing on behalf of the appellant only for the simple reason that admittedly the respondents were grandchildren of the testator and they have claimed the estate of the deceased on the basis of a settlement deed executed by the testator himself which admittedly was revoked by the testator. That being the position, we must hold that the respondents had caveatable interest in the estate of the testator and, therefore, they are entitled to be served before the final order is passed. It is well settled that if a person who has even a slight interest in the estate of the testator is entitled to file caveat and contest the grant of probate of the Will of the testator. **(G. Gopal v. C. Baskar and others; 2009 (1)AWC 95 (SC)**

Indian Stamp Act

◈ **S. 2(10), Explanation – Applicability of.**

The Co-owners in this case had transferred their shares to other co-shares who had pre-existing right in the property. It did not amount to any transfer rather it only amounted to an extension of their existing share. Since there was no transfer to any outsider, it would not amount to a sale or conveyance within the meaning of Section 2(10), even if the Explanation is taken into account. **(State of U.P. v. Dharam Pal and Another; 2009(1) AWC 473)**

◈ **S. 2(10) – Conveyance deed or release deed – Determination of.**

The writ petition No. 15189 of 2006 has been filed by the State against the judgment and order passed by the Chief Controlling Revenue Authority dated 28.7.2004 by which he has set aside the order of Collector

passed under section 47-A of the Indian Stamp Act, by which he had imposed stamp duty on the respondents by coming to the conclusion that the release deed dated 7.6.2002 was not a release deed but was a conveyance and stamp duty was attracted on it, as provided in the explanation to sub-section (10) of section 2 of the Indian Stamp Act taking into consideration the said explanation clause inserted by U.P. Act No. 19 of 1981 which reads as under:

"2(10) Conveyance – 'Conveyance' includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos, and which is not otherwise specifically provided for by Schedule I, Schedule I-A or Schedule I-B, as the case may be.

Explanation:- An instrument whereby a co-owner of a property having defined share therein, transfers such share or part thereof to another co-owner of the property, is, for the purposes of this clause an instrument by which property is transferred."

The court is of the opinion that this case is squarely covered by the Full Bench decision of the Court in the case of Balwant Kaur (1984 All LJ 305). The co-owners in this case had transferred their shares to other co-sharers who had pre-existing right in the property. It did not amount to any transfer rather it only amounted to an extension of their existing share. Since there was no transfer to any outsider, it would not amount to a sale or conveyance within the meaning of section 2(10), even if the explanation is taken account.

In the opinion of the court, the Chief Controlling Revenue Authority has not committed any error in coming to the conclusion that the deed dated 7.6.2002 was a release deed. **(State of U.P. v. Dharam Pal & Anr.; 2009(2) ALJ 283 (All HC)**

◈ **S. 33 – Impounding of document – S. 33 costs a statutory obligation on all authorities to impounding a document.**

Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The Court being an authority to receive a document in evidence is bound to give effect thereto. **(Avinash Kumar Chauhan v. Vijay Krishna Mishra; 2009(106) RD 254 (SC)**

◈ **S. 35 – Court can pass order in terms of S. 35 of above Act if adequate stamp duty not paid.**

The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The Court, therefore, was empowered to pass an order in terms of section 35 of the Act. **(Avinash Kumar Chauhan v. Vijay Krishna Mishra; 2009(106) RD 254)**

◆ **S. 47-A (U.P.) – Sale-deed – Stamp duty is to be paid on nature of land at time of purchase and not its future or potential use.**

In this case, the court of the opinion that the orders passed by the authorities below are not justified in view of the previous decisions of the Court including the decision given by Hon'ble Justice Sudhir Agarwal; 2008(3) ADJ 669, Anil Kumar and another v. State of U.P. and others, wherein his Lordship has reviewed the case law on this point and has come to the conclusion that the Collector is under obligation to determine the market value under Section 47-A(3) of the Act read with Rule 7 of 1997 Stamp Rules and thereafter would made an enquiry in accordance with the procedure prescribed there under to find out the correct market value. He has further held that the future potential of the land for use either for residential purposes or for commercial purposes would not form the sole determinative factor for determining the market value and the Collector has to examine all the relevant aspects. **(Ram Iqbal Singh & Ors. V. State of U.P. & Ors.; 2009(1) ALJ 36)**

Indian Penal Code

◆ **S. 34 – Common intention – Abduction and murder – Act committed in furtherance of common intention of all accused – Co-accused cannot escape their liability by saying that no overt act was done by them towards commission of murder.**

In Krishnan v. State of Kerala, 1996 SCC (Cri) 1375: (AIR 1997 SC 383) the Hon'ble Apex Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Sections 302/34 of the Penal Code holding:

"Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act is always to be established? I am of the view that establishment of an overt act is not a requirement of law to

allow Section 34 to operate inasmuch as this section gets attracted when 'a criminal act is done by several person in furtherance of the common intention of all' What has to be, therefore, established by the prosecution is that all the persons concerned had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur."

Therefore, in our considered opinion, the accused-appellants Suleman and Rameshwar also will be held liable for the murder of Pooran, which was committed by the appellant Ram Naresh in furtherance of the common intention of all accused to abduct Ram Larhetey. **(Ram Naresh & Ors. V. State of U.P.; 2009(1) ALJ 218 (DB)**

◆ **S. 34 – Common intention – Conditions to be satisfied for invoking aid of S. 34 – Stated.**

To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. **(Pintoo alias Kamal Kishore & Anr. Etc. v. State of Rajasthan; 2009 Cri.L.J. 748 (Raj HC)**

◆ **S. 34 – Common Intention – Each and every accused need not to be shown to have committed the over act – It is enough to show that one or more of the accused persons acted in furtherance of the common intention.**

In order to convict the person vicariously under Section 34, it is not necessary to prove that each and every one of them had indulged in such overt act of inflicting deadly injuries. It is enough if the material available on record discloses that the overt act of one or more of the accused was or was done in furtherance of common intention. The common intention shared by the appellant is evidence from the fact that he was armed with deadly weapon and inflicted two injuries on the victim. All the accused attacked the deceased and caused injuries in furtherance of the common intention to murder the deceased. In such a situation the nature of injuries inflicted by the appellant on the victim and whether those injuries were sufficient in the ordinary course to cause death pales into insignificance. The appellant was

not a curious on looker and had not accompanied the assailant who gave a deadly blow out of any ideal curiosity. Each one of them is liable for that act of murder as if the act of murder was done by each one of them. **(Paramjit Singh alias Mithu Singh v. State of Punjab Through Secretary (Home); (2009) 1 SCC (Cri) 299 (SC)**

S. 84 – Applicability of

Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Evidence Act, 1872 (in short ' Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See: Dahyabhai Chhaganbhai Thakkar v. State of Gujarat; AIR 1964 SC 1563.) In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

'Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections, whether after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case: "Would the prisoner have committed the act if there had been a policeman at his elbow?" It is to be remembered that these tests are good for cases in which previous insanity is more or less established.'

These tests are not always reliable where there is, what Mayne calls, 'inferential insanity'.

Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law.

Section 84 of the Penal Code reads as follows:

"**Act of a person of unsound mind**- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The evidence of doctors who attended the appellant-accused and the opinion expressed by them clearly goes to show that the appellant's plea relating to unsoundness of mind has no substance.

According to PW 10 when he examined the appellant on 18.7.2002 in the evening he was calm and quiet. He was neither angry nor was he shouting. This according to the doctor indicated that the appellant was normal. In the medical records it has been clearly stated that he was not cooperative and it was difficult to establish any rapport with him.

Accordingly, the trial court and the High Court have rightly held that Section 84 IPC has no application to the facts of the present case. **(Sidhapal Kamala Yadav v. State of Maharashtra; (2009) 1 SCC (Cri) 471 (SC)**

S. 96 – Private defence – Exercise of right of – Number of injuries is not always a safe criterion for determining who was aggressor.

It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of the private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution. **(Raghbir Singh v. State of Haryana; 2009 AIR SCW 499 (F) (Punjab and Haryana HC)**

S. 120A – Criminal Conspiracy – Ingredients of, stated

The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a

chain of events from which a conclusion about the guilt of the accused could be drawn. **(Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra; (2009) 1 SCC (Cri) 51)**

◈ **S. 149 – Unlawful assembly – Proof of same overt act by person constituting it – Not necessary to hold him to be member of unlawful assembly.**

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each 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. **(Raj Nath v. State of U.P.; 2009(2) ALJ 319 (SC)**

◈ **S. 149 – Unlawful assembly – Common object – Distinct from Common intention – Factor relevant to determine common object.**

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each 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. **(Raj Nath v. State of U.P.; 2009(2) ALJ 319 (SC)**

◈ **S. 149 – Unlawful assembly – Common object – Offence which members knew was likely to be committal – Word "knew" implies something more than a possibility.**

S. 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. **(Raj Nath v. State of U.P.; 2009(2) ALJ 319 (SC)**

◆ **S. 300 – Murder – Non-examination of scribe of FIR – Effect of.**

In instant case, the first informant Vishambhar Chaudhary (PW 1) is educated person, who has signed the written report Ext. Ka 1, which was scribed on his dictation by Sri Ram s/o Lakhpat. Therefore, in the opinion of the Court, non-examination of Sri Ram is not fatal to the prosecution case in instant case. **(Arjun v. State of U.P.; 2009 Cri.L.J. 618 (All HC)**

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◆ **S. 302 – Single blow – Does not rule out applicability of S. 302.**

It cannot be said that whenever a single blow is given, that would not attract Section 302 IPC. **(Shaikh Majid & Another v. State of Maharashtra & Others; (2009) 1 SCC (Cri) 366 (SC)**

◆ **S. 302 – Death sentence – number of deaths not determinative factor for awarding death sentence – Even in case of single victim death sentence can be awarded depend upon circumstances of case.**

So far State's appeal as regard sentence is concerned, it is to be noted that number of deaths in a case would not be the determinative factor for awarding the death sentence. Even in the case of single victim death sentence can be awarded taking into consideration the circumstances of the case. In the instant case looking to the background facts it cannot be said that the High Court by altering the sentence from death to life has acted inappropriately. **(Aqeel Ahmad v. State of U.P.; 2009(2) ALJ 178 (SC)**

◆ **S. 304 – Evidence Act, S. 13-B – Dowry Death – Expression "soon before her death" – Meaning of**

The expression 'soon before her death' used in the substantive S. 304-B, IPC and S. 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in S. 114, Illustration (a) of the Evidence Act is relevant. The expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence. **(Prem Kanwar v. State of Rajasthan; 2009 AIR SCW 536 (B) (Rajasthan HC)**

◆ **S. 304-B – Demand of dowry – Proof – Agreement for dowry not always necessary – Word "agreement" in S. 2 of Dowry Prohibition Act has to be inferred on facts and circumstances of each case.**

The offence alleged against the accused is under S. 304-B, IPC which makes "demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved, hardly any offenders would come under the clutches of law. When S. 304-B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence. That could be either direct or indirect. It is significant that S.

4 of the 1961 Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word "agreement" referred to in S. 2 of 1961 Act has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including S. 3, which refers to giving or taking dowry and S. 4 which deals with a penalty for demanding dowry, under the Act and the IPC. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry. **(Prem Kanwar v. State of Rajasthan; 2009 AIR SCW 536 (A) (Rajasthan HC)**

◆ **S. 304-B – Dowry death – Words "soon before her death" are to be understood in relative and flexible sense.**

The words 'soon before her death' occurring in section 304-B of the Penal Code are to be understood in a relative and flexible sense. Those words cannot be construed as laying down a rigid period of time to be mechanically applied in each case. Whether or not the cruelty or harassment meted out to be victim for or in connection with the demand of dowry was soon before her death and the proximate cause of her death, under abnormal circumstances, would depend upon the facts of each case. There can be no fixed period of time in this regard. From the evidence on record, it is clear that there was an unrelenting demand for dowry and Asha Devi was persistently subjected to cruelty and harassment for and in connection with the demands. Both her parents and her brother deposed before the court that appellant No. 1 had once again raised his demand when he had gone to their house in July 1998 to bring Asha Devi to his place. Their inability to meet his demand had caused him annoyance and anger. Asha Devi was naturally apprehensive and was very reluctant to go with him. But they somehow prevailed upon her and made her depart with him. There is thus direct and positive evidence of her being subjected to harassment. There is nothing to show that after she was brought to the appellants' place and till her death on September 6, 1998 merely about two months later the situation had radically changed, the demand of dowry had ceased and relations had become cordial between the deceased and the three appellants. In the facts and circumstances of the case, we are satisfied that in connection with the appellants' demand for dowry, Asha Devi was subjected to cruelty and that was the proximate cause of her

homicidal death. **(Deen Dayal & ors. V. State of U.P.; 2009(2) ALJ 169 (All HC)**

◈ **S. 376 – Rape – Proof of – Propromiscuous behaviour of prosecutrix would not be determinative factor in rape case.**

In rape cases the fact that the victim was previously accustomed to sexual intercourse, is not a determinative question. On the contrary, the question which is required to be adjudicated is, did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who is on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. **(State of U.P. v. Munshi; 2009(1) ALJ 243)**

◈ **S. 376(2)(g) – Gang rape – Absence of any injury is an important factor to determine, whether rape has been committal or not.**

Where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. If the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial. **(Lalliram and another v. State of Madhya Pradesh; (2009) 1 SCC (Cri) 17 (SC)**

Insurance

S. 21(8) – Enhancement of rent – For enhancement of rent, market value to be determined as on date of application for enhancement.

It will be in the interest of justice to determine the market value of the land at 75% of the circle rate. i.e. Rs. 600 per square metre (240 x 600 = 1,44,000)

Adding Rs. 1,25,000, which is cost of construction, to the above figure resultant figure of Rs. 2,69,000 is arrived at. Dividing it by 120 monthly rent comes to about Rs. 2,240.

The tenant had determined the rate at about Rs. 2,650, which was about 1/120 of Rs. 3,19,000.

Accordingly, it is directed that w.e.f. September, 1995, tenant-respondent shall be liable to pay rent @Rs. 2,240 per month (application for enhancement of rent was filed on 25.8.1995). Writ petition is accordingly disposed of and impugned judgments and orders are modified.

It is reiterated that while determining the above rent, no precise formula should be followed. However, determination of market value at a particular time always involves some guess work and the above figure may be said to be reasonable, informed guess.

The landlord petitioner also argued that due to passage of 13 years, market value of lands had risen by leaps and bounds and the benefit of the said increase should also be granted to the landlord. However, this argument is not tenable as market value has to be determined on the date of filing of the application and increased rent is payable with effect from the month next after the month of filing of the application. **(Smt. Ishtiyaq Bano Begum and Others v. Additional District Judge, Court No. 8, Shahjahanpur and Others; 2009(1) AWC 23)**

S. 64VB – Insurance cover – Insurance cover cannot be issued unless and until premium received.

Section 64VB of the Insurance Act, 1938 (Act for short) provides that no risk can be assumed unless premium is received in advance.

Having regard to the bar contained in Section 64VB of the Act, the insurer could not accept the request of the appellant to grant insurance cover with retrospective effect from a date prior to 26.8.1988 when it received the

premium. Therefore, the insurer adopted the standard, logical and obvious course of issuing the insurance policy with effect from the date on which it received the premium amount by cheque that is with effect from 26.8.1988. As the premium paid was for one year and the standard term of fire policy was one year, the policy was issued assuming risk for the period 26.8.1988 to 25.8.1989. Non-issue of the policy for the period commencing from 12.3.1988 required by the appellant, was for a good and valid reason. There was also nothing illogical or arbitrary about the insurance of a policy specifying the period of insurance cover as one year effective from the date of receipt of the premium that is from 26.8.1988 to 25.8.1989. If the appellant wanted insurance cover prospectively it should have so specified in the proposal. Having failed to do so and having sought retrospective cover, the appellant cannot make a grievance when the insurance cover is issued retrospectively from the date of receipt of the premium. **(Deokar Exports Pvt. Ltd. V. New India Assurance Co. Ltd; 2009(1) AWC 20 (SC)**

Interpretation of Statutes

◆ **Prospective or Retrospective – Determination of**

Section 6 of the General Clauses Act, inter alia, saves a right accrued and/or a liability incurred. It does not create a right. When Section 6 applies, only an existing right is saved thereby. The existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. If a new Act confers a right, it does so with prospective effect when it comes into force, unless expressly stated otherwise.

It is now well settled that a change in the substantive law, as opposed to adjective law, would not affect the pending litigation unless the legislature has enacted otherwise, either expressly or by necessary implication. **(State of Punjab & Others v. Bhajan Kaur & Others; (2009) 1 SCC (Cri) 328 (SC)**

Land Acquisition & Requisition

◆ **S. 3(f) – Land Acquisition – Public purpose – Acquiring land in support of cooperative society is public purpose.**

Section defines the expression “public purpose” for the purposes of explaining as to what is the public purpose when State acquires the land for any public purpose. Amongst others, acquiring the land in support of a Cooperative Society by the State is stated to be for the public purpose. That does not lead to the conclusion that the land of a Cooperative Society cannot

be acquired by the State and, if it is so done, it would run counter to public purpose. **(M/s. Nandpuri Sahkari Grih Nirman Samiti Ltd., Lucknow & etc. v. State of Uttar Pradesh & Ors; 2009(1) ALJ 264 LB)**

◆ **S. 23 – Compensation – Determination of – Petitioners land was taken by State without following due procedure – It would be open for petitioner to claim possession or compensation based on market value along with solatium and interest.**

It is pertinent to mention here that if property of a citizen is acquired under Land Acquisition Act, he can get market value plus solatium and interest but if same land is taken away by the State without following process of law, the amount of compensation is fixed arbitrarily. If there is agreement between the parties, then nothing is wrong but if there is no agreement, the owner is put to loss because his land has not been acquired under the provisions of any Act. Therefore, this view taken by earlier Division Benches of the Court referred to above is quite reasonable that whenever property of a citizen is taken by the State without following the procedure prescribed by law, it is open for the owner of the property to claim back possession or compensation on the market value along with solatium and interest.

While assessing the compensation, the Collector will give opportunity to the petitioners to produce evidence and then decide the market value of the land on the date of taking possession. The petitioners will also be given solatium on the market value at the rate of 30% and interest @ 12% per annum from the date of taking possession till the date of payment. **(Ram Nayan Singh & Ors. V. State of U.P. & ors.; 2009(1) ALJ 75)**

◆ **S. 28A – Redetermination of amount of compensation on basis of order of reference court enhancing compensation – Conditions mention in S. 28-A must satisfied.**

To the Statement of Objects and Reasons, for insertion of Section 28A. It was, inter alia, observed:

> "Considering that the right of reference to the civil court under S. 18 of the Act is not usually taken advantage of by inarticulate and poor people and is usually exercised only by the comparatively affluent land owners and that this causes considerable inequality in the payment of compensation for the same or similar quality of land to different interested parties, it is proposed to provide an opportunity to all

aggrieved parties whose land is covered under the same notification to seek re-determination of compensation, once any one of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act".

In Union of India and another v. Pradeep Kumari and Others; (1995) 2 SCC 736, the Court discussed the object underlying Section 28A of the Act and observed that such object would be better achieved by giving the expression 'an award' in Section 28A its natural meaning as meaning the award that is made by the Court in Part III of the Act after the coming into force of Section 28A. If the said expression in Section 28A (1) is thus construed, a person would be able to seek re-determination of the amount of compensation payable to him provided the following conditions are satisfied:

(i) An award has been made by the Court under Part III after the coming into force of Section 28A:

(ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference:

(iii) The person moving the application under Section 28A is interested in other land covered by the same notification under Section 4(1) to which the said award relates:

(iv) The person moving the application did not make an application to the Collector under Section 18:

(v) The application is moved within three months from the date of the award on the basis of which the re-determination of amount of compensation is sought: and

(vi) Only one application can be moved under Section 28A for re-determination of compensation by an applicant.

A Constitution Bench of the Court in Union of India (U.O.I.) and another v. Hansolf Devi and others; (2002) 7 SCC 273: 2003 (1) SCCD 31: 2003 (1) AWC 85 (SC), held that dismissal of an application seeking reference under Section 18 on the ground of delay also would not come in the way of the claimant for re-determination of compensation under Section 28A of the Act. Such person can be said to be a 'person aggrieved' and would be entitled to make an application to receive compensation provided the

conditions of the said section are complied with. **(Kendriya Karamchari Sehkari Greh Nirman Samiti Ltd. v. State of U.P. and Another; 2009(1) AWC 615 (SC)**

Legal Services Authority Act

◈ **Ss. 19 and 20 – Lok Adalat – Whether award/orders of Lok Adalat amenable to jurisdiction of High Court under Article 226 and 227 though orders/awards given finality Under Act – Held, "Yes".**

There can be no scope for doubt to hold that although the provisions of the Act are intended to make award of the Lok Adalat arrived at on the basis of compromise or settlement between the parties to dispute as final and the remedies of appeal, review and revision against the award of Lok Adalats are not available under law as indicated hereinbefore, but being a Tribunal of special nature, the remedy to recall the order/award passed by Lok Adalat on the ground of fraud or misrepresentation or mistake of fact cannot be held to be barred under law, as power in recall its order on the aforesaid grounds is inherent in every Court or Tribunal or statutory functionary. Similarly, the awards made by the Lok Adalat organized or established under the Act cannot be held to be immune from judicial review as the Court under Article 227 of the Constitution has ample power of superintendence over decisions of all the Courts or Tribunals throughout the territories in relation to which it exercises jurisdiction, therefore, I have no hesitation to hold that orders passed or awards made by Lok Adalats organized or established under the Act within the territorial limits of the Court, are subject to judicial review on the grounds available under Article 226/227 of the Constitution of India, otherwise person aggrieved would be left remediless. **(Dr. (Smt.) Shashi Prateek v. Charan Singh Verma and Another; 2009(1) AWC 212)**

Motor Vehicles Act & Motor Accidents

◈ **S. 89 – Appeal – Powers of Appellate Tribunal regarding granting or rejecting an application for grant of permit.**

The Tribunal, being an Appellate Forum constituted by and under Section 89 of the Act, has all the trappings of a regular appellate court and, therefore, it has all the powers, which are vested in or can be exercised by the State or Regional Transport Authority. The expression, "give a decision thereon which shall be final", occurring at the end of sub-section (1) of Section 89 of the Act, clearly manifests unambiguous legislative intent that whatever powers are vested in and exercisable by the State or a Regional

Transport Authority can be exercised, with equal force, by the Tribunal. If, therefore, the R.T.A. has the power to grant the permit as well as the power to reject to application for the grant of permit, the Tribunal, exercising its appellate power under Section 89(1) of the Act, has similar powers, while disposing of the appeal, to either grant the permit or to reject the application for the grant of permit. **(S.K. Srivastava v. State Transport Appellate Tribunal & Anr.; 2009(1) ALJ 342)**

◆ **Ss. 147, 166 and 168 – Liability of insurer – When insurance policy in respect of scooter comprehensive having seating capacity of two persons; insurer cannot disown its liability to pay compensation on death of pillion rider.**

The awarded amount is Rs. 6,90,040 and the liability to pay the same has been fixed on both the offending vehicles. The insurance company herein is insurer of the scooter. In the accident in question the pillion rider has expired. The appellant initially took the plea that the insurance company is not liable to pay the compensation on account of death of pillion rider. But when we called upon the insurance company to produce the policy of the insurance and the same was so produced, we find that it is comprehensive in nature having sitting capacity of two persons. Therefore, we do not find any genuine cause to interfere with the order impugned on such plea. **(National Insurance Co. Ltd. V. Smt. Khursheeda Bano and others; 2009(1) AWC 355)**

◆ **S. 148 – Workman Compensation Act, Ss. 3 and 4A (3) – Interest – In case of vehicular accident insurer liable to pay interest determined under W.C. Act.**

In Ved Prakash Garg v. Premi Devi and Others; 1997(8) SCC 1, the Court observed that the insurance company is liable to pay not only the principal amount of compensation payable by the insured employer but also interest thereon if ordered by the Commissioner to be paid by the insured, employer. Insurance company is liable to meet claim for compensation along with interest as imposed on insured employer by the Act. It was, however, held that it was the liability of the insured employer alone in respect of additional amount of compensation by way of penalty under Section 4A(3)(b) of the Act. In New India Assurance Co.'s case (supra) Ved Prakash Garg's case (supra) was distinguished on facts. It was observed that in the said case the Court was not concerned with a case where an accident had occurred by use of motor vehicle in respect whereof the Contract of

Insurance will be governed by the provisions of the Motor Vehicles Act, 1988 (in short the M.V. Act). A contract of insurance is governed by the provisions of the Insurance Act, 1938 (in short the Insurance Act), unless the said contract is governed by the provisions of a statute. The parties are free to enter into a contract as per their own volition. The Act does not contain a provision like Section 148 of the M.V. Act where a statute does not provide for a compulsory insurance or accident thereof. The parties are free to choose their terms of contract. In that view of the matter contracting out so far as the reimbursement of amount of interest is concerned is not prohibited by a statute. This position has been reiterated in P.J. Narayan v. Union of India and others; 2006(5) SCC 200. In the instance case the position is different. The accident in question arose on account of vehicular accident and provisions of M.V. Act are clearly applicable. We have gone through the policy of insurance and the court finds that no such exception as was the case in New India Assurance Co.'s case was stipulated in the policy of insurance. Therefore, the insurance company is liable to pay the interest. **(Kamla Chaturvedi v. National Insurance Co. and others; 2009(1) AWC 509 (SC)**

◈ **S. 163-A and 166 – Jurisdiction exercised by Tribunal in terms of S. 163-A and 166 is different.**

Under S. 163A and Section 163A, not necessary to prove any fault on part of driver of offending vehicle-But under Section 166, Tribunal required to hold full-fledged trial. **(Ramprasad Balmiki v. Anil Kumar Jain and Others; 2009(1) AWC 41 (SC)**

◈ **S. 166 – Negligence – Requirement of – Proof of rashness and negligence on part of driver of the vehicle is sine qua non for maintaining an application U/s. 166.**

Once a part of the contents of a document viz. the FIR, is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents, contained in the rest part thereof, had not been proved.

Therefore, once a part of the FIR as relied upon by both the parties, the Tribunal could not be said to have committed any illegality in relying upon the other part of the same document, irrespective of whether the contents of the document have been proved or not. If the contents have been proved [by admission], the question of reliance thereupon only upon a part

thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise. **(Oriental Insurance Company Limited v. Premlata Shukla and Others; (2009) 1 SCC (Cri) 204 (SC)**

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◈ **Ss. 166 and 168 – Oral evidence on monthly income to be taken into consideration in order to determine compensation for death, particularly where there is no denial or rebuttal.**

In the present case there was some material even being oral evidence but cannot be overlooked. Therefore, when there is some material available before the Court, the Court would construe and come to an appropriate finding particularly in a situation when there is no denial or rebuttal. This distinguishing feature should not be escaped from the notice of the Court in arriving at a conclusion. **(New India Assurance Co. Ltd. V. Smt. Kamala Devi and Others; 2009(1) AWC 196)**

◈ **S. 166 and Second Schedule – Determination of Multiplier – Second Schedule to M.V. Act should be followed for adopting multiplier.**

Court of the view that no uniform rule can be applied in case the application is made under Section 166 of the Act, which requires determination of 'just' compensation. But, by and large, we follow the Second Schedule under Section 163A of the Act, irrespective of the fact

whether the same is guide or ready reckoner because it is part and parcel of the Act of Parliament. Therefore, in all, we cannot vary such Schedule very often unless and until an exceptional circumstance arises.

In this case, we find that both age of the deceased and multiplier were correctly determined by the Tribunal. Therefore, in a beneficial piece of legislation, the claimants should not be made to suffer without any exception, otherwise objects and reasons of the Act will be frustrated. **(New India Assurance co. Ltd. V. Smt. Pooja Gupta and others; 2009(1) AWC 189)**

◆ **Ss. 166 and 168 – Compensation for disability – Obtaining 100% compensation for permanent disability must be supported by reason.**

A claim for obtaining 100% compensation for his permanent disability must be supported by reason as has been held by this Court in National Insurance Co. Ltd. V. Mubasir Ahmed and another; (2007) 2 SCC 349: 2007(1) SCCD 198 **(Ramprasad Balmiki v. Anil Kumar Jain and Others; 2009(1) AWC 41 (SC)**

◆ **S. 166(2) – Claim Petition – Territorial jurisdiction of Tribunal – Cannot be challenged unless sufferance of prejudice established.**

Territorial jurisdiction of Tribunal to entertain claim petition under M.V. Act cannot be challenged by insurer unless sufferance of prejudice shown. **(Mantoo Sarkar v. Oriental Insurance Co. Ltd. and Another; 2009(1) AWC 496 (SC)**

◆ **Ss. 166 and 173 – Just compensation – Determination of**

In terms of Section 166 of the Motor Vehicles Act, 1988, a person who has suffered injury in an accident is entitled to just compensation. What would be a just compensation, however, would depend upon the facts and circumstances of each case. **(G. Gnanam alias Gnanamoorthy v. Metropolitan Transport Corporation; 2009(1) AWC 493 (SC)**

◆ **S. 168 – Compensation – Expression "which appears to be just" vest wide discretion in Tribunal – Yet compensation cannot be allowed to be source of profit to claimants.**

The expression "which appears to be just" in S. 168 vests a wide discretion in the Tribunal in the matter of determination of compensation. Nevertheless, the wide amplitude of such power does not empower the Tribunal to determine the compensation arbitrarily, or to ignore settled principles relating to determination of compensation. Similarly, although the

Act is a beneficial legislation, it can neither be allowed to be used as a source of profit, nor as a windfall to the persons affected nor should if be punitive to the person(s) liable to pay compensation. The determination of compensation must be based on certain data, establishing reasonable nexus between the loss incurred by the dependents of the deceased and the compensation to be awarded to them. In nutshell, the amount of compensation determined to be payable to the claimant(s) has to be fair and reasonable by accepted legal standards. **(Syed Basheer Ahamed v. Mohd. Jameel; 2009 AIR SCW 493(A) (Karnataka HC)**

◆ **Ss. 173 – and 170 – Appeal by insurer without taking permission U/s. 170 to contest case – Effect of.**

Unless the permission under Section 170 of the Act is granted to contest the case, which was available to the owner of the vehicle, the appeal filed by the appellant under Section 173 of the Act is not maintainable. **(National Insurance co. Ltd. v. Smt. Renu Mishra and others; 2009(1) AWC 702 (LB)**

U.P. Municipality Act

◆ **S. 48 – Suspension of financial and administrative power of Chairman – Ground.**

Having examined the show cause notice and the order impugned in the present writ petition, we find that only charge alleged against the writ petitioner who is the elected Chairman for suspension of his financial and administrative powers under section 48(2) of the Act is that the petitioner has not signed the salary bill of Class IV employees and had issued orders for stopping their salary.

From the record it is apparently clear that the petitioner in fact has reported to the State government vide letter dated 27.11.2007 the infirmities/irregularities which had been committed in the process of selection in question. The State Government did not examine the aforesaid matter and kept the same pending for nearly a year.

The Court is of the considered opinion that the powers of the Chairman to cancel the appointment of Executive Officer if the process of selection is found to be vitiated would include with its ambit the power to stop the salary, till the legality of the selections held is not examined by the State government.

In view of the aforesaid, the court is of the considered opinion that in the facts of the present case, the financial and administrative powers of the elected Chairman could not have been ceased so long as the State Government did not examine the legality or otherwise of the selections held by the Executive engineer on the letter of the petitioner dated 27.11.2007. **(Rohini Kumar v. State of U.P. & Ors.; 2009(2) ALJ 233 (DB of All HC)**

National Security Act

S. 3 – Preventive Detention – "Law and order" and "Public Order" – Distinction between stated.

Is one of degree and extent of reach of the act in question upon society – Law and order comprehends disorder of less gravity than those affecting public order just as public order attracts disorder of less gravity than those affecting security of Sate – Public order is synonymous with public tranquility – If public order is disturbed, it would lead to public disorder. **(Jagadish Narayan Singh v. State of Orissa & Ors.; 2009 Cri.L.J. (NOC) 146 (Ori. HC)**

Narcotic Drugs and Psychotropic Substances Act

S. 15 – Evidence – Recovery effected at midnight when people were sleeping – In such case, evidence of prosecution witnesses found to be cogent and reliable.

It may be stated here, that the recovery, in the instant case, was affected at mid-night, when the people were sleeping, and, as such, the question of availability of an independent witness, at that odd hour, did not at all arise. The evidence of the official witnesses cannot be distrusted and disbelieved, merely on account of their official status. In Akmal Ahmed v. State of Delhi; 1999(2) RCC 297 (SC): (1999 Cri.L.J. 2041), it was held that, it is now well-settled that the evidence of search and seizure, made by the police will not become vitiated, solely for the reason that the same was not supported by an independent witness. In State of NCT of Delhi v. Sunil (2000) 1 SCC 748: (2001 Cri.L.J. 504, Para 21), it was held as under:

> "It is an archaic notion that actions of the Police Officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Court cannot start with the presumption that the police records are untrustworthy. As a preposition of law, the presumption

should be the other way round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature."

In Appa Bai and another v. State of Gujarat; AIR 1988 SC 696: (1988 Cri.L.J. 848), it was held that the prosecution story cannot be thrown out, on the ground, that an independent witness had not been examined. It was further held, in the said authority that the civilized people, are generally insensitive, when a crime is committed even in their presence, and they withdraw from the victims side, and from the side of the vigilant. They keep themselves away from the Courts, unless it is inevitable. Moreover, they think the crime like a civil dispute, between two individuals, and do not involve themselves in it. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. In these circumstances, mere non-joining of an independent witness, when the evidence of the prosecution witnesses, has been held to be cogent, convincing, creditworthy, and reliable, and there was no reason, on their part, to falsely implicate, the accused, no doubt, is cast on the prosecution story. In this view of the matter, the submission of the Counsel for the appellants, being with out merit, must fail, and the same stands rejected. **(Paras & etc. v. State of Punjab; 2009 Cri.L.J. 501 (P.&H.)**

◆ **Ss. 27-A, 29 and 37 – Suspension of sentence and Bail pending appeal – Parameters of S. 37 ought to be fulfilled.**

To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned apparently the accused has been found guilty and has been convicted. Section 37 of the Act reads as follows:-

"Offences to be cognizable and non-bailable – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974) –

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences

involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on grant of bail."

The High Court has dealt with the factual position in great detail to conclude that the parameters of Section 37 are not fulfilled to warrant grant of bail by suspension of sentence. The court finds no reason to interfere in the matter. **(Ratan Kumar Vishwas v. State of U.P. & Anr.; 2009(1) ALJ 283)**

S. 36-B – Nature, scope and applicability – S. 36-B empowers High Court to deals with appeal and dispose of the same and exercise all powers conferred by Ch. XXIX and S. 374 Cr.P.C. in particular.

Though the High Court found fault with the Special Judge in analyzing the evidence and other materials, on the other hand, it is the High Court which failed to analyze the evidence in proper perspective and highlighted the minor irregularities/contradictions and acquitted the accused on flimsy grounds without assigning sound reasons. We have already pointed out that the NDPS Act being a special Act was enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances. In this regard it is apt and relevant to quote the following law laid down by the Court in Khet Singh:

"Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected

likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."

In the light of the above principles, we are satisfied that the High Court failed to consider all the relevant materials and circumstances. Further, Section 36-B of the NDPS Act empowers the High Court to deal with the appeal and dispose of the same and exercise all powers conferred by Chapter XXIX and Section 374 of the Code of Criminal Procedure, in particular. It is settled law that when the view taken either by the Sessions Judge or Special Judge was found by the High Court to be manifestly wrong and that it had led to miscarriage of justice, the High Court is entitled to interfere and set aside the same. Such recourse has not been adopted by the High Court in this case. **(State of Rajasthan v. Udai Lal; (2009) 1 SCC (Cri) 396 (SC)**

◆ **S. 42 – Applicability of**

In the instant case, Ranjit Singh, SI, was present on the bridge of canal, in the area of village Bakhlor, in connection with a special picket, when at about 1.30 a.m., one vehicle Tata 407 came there, from the side of village Moro, which was going towards Bakhlor side. It was, at that time, that the appellants were found traveling in the said vehicle. Tirath Singh, accused, was driving the same. Piara, accused, was sitting by his side, in the cabin, and Darbara Ram and Narpinder Singh, accused were sitting on the tarpaulin in the body of the vehicle, in which bags, containing poppy-husk were lying. The recovery was affected from a vehicle, at a public place. Thus, the provisions of Section 43 were applicable, and not the provisions of Section 42. In this view of the matter, the trial Court, was right, in holding that the question of compliance of the provisions of Section 42, did not at all arise, as the same were inapplicable. **(Paras & etc. v. State of Punjab; 2009 Cri.L.J. 501 (P.&H.)**

◆ **Object of Act, discussed.**

In order to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances, Parliament enacted the Narcotic Drugs and Psychotropic Substances Act in the year

1985. This is a special Act and it has been enacted with a view to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances. **(State of Rajasthan v. Udai Lal; (2009) 1 SCC (Cri) 396 (SC)**

Negotiable Instruments Act

◆ **S. 138 – Dishonour of Cheque – Jurisdiction of Court to trial of offence.**

The offence under S. 138 can be completed only with the concatenation of a number of acts. The acts which are components are as follows:-

(1) Drawing of the cheque;

(2) Presentation of the cheque to the bank;

(3) Returning the cheque unpaid by the drawee bank;

(4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;

(5) Failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five acts is sine qua non for the completion of the offence under S. 138. One of the components of the offence under S. 138 was giving notice in writing to the drawer of the cheque demanding payment of the cheque amount. The said action took place within jurisdiction of court at 'M'. Therefore, Court at 'M' had jurisdiction to try the case. **(Shamshad Begum, Smt. V. B. Mohammed; 2009 AIR SCW 775 (Karnataka HC)**

◆ **S. 138 – S. 482 – Quashing of proceedings – quashing of proceeding on ground that complainant had already taken recourse to arbitration proceeding – Not proper.**

Since when the cheques were dishonoured, a separate liability arose in terms of Section 138 of the Act, whereas the arbitration proceedings were under the agreement signed between the parties. It was submitted by him that the commencement and the continuance of the arbitration proceedings could in no way affect criminal proceedings taken separately.

In support of his submissions, Mr. Adhyaru, referred to the decision of the Court in Trisuns Chemical Industry v. Rajesh Agarwal and Ors.; [(1999) 8 SCC 686, where the same question arose in relation to arbitration proceedings taken during the continuance of a complaint filed under sections 415 and 420 of the Code of Criminal Procedure. In the said decision, it was held that merely because arbitration proceedings have been undertaken, the criminal proceedings could not be thwarted.

The Court is also of the view that there can be no bar to the simultaneous continuance of a criminal proceeding and a civil proceeding if the two arise from separate causes of action. The decision in Trisuns Chemical Industry's case (supra) appears to squarely cover this case as well. **(M/s. Sri Krishna Agencies v. State of A.P. & Anr.; 2009 Cri.L.J. 787 (SC)**

◆ **Ss. 138, 143 – Dishonour of cheque – Trial – is summary trial, but for any other reason it is undesirable to try the case summarily, procedure of warrant case can be adopted.**

Under the second proviso to sub-section (1) of S. 143 of the Act, in two contingencies the learned Magistrate can decline to try the case by following Ss. 262 to 265 of the said Code. The first contingency is in a case where at the commencement of or in the course of a summary trial, it appears to the learned Magistrate that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed. The second contingency is when for any other reason; it is undesirable to try the case summarily. The second proviso further lays down that such order can be passed by the learned Magistrate after hearing the parties and after recording reasons to that effect.

In the present case, obviously the first contingency had not arisen. There is no finding recorded by the learned Sessions Judge or learned Magistrate that it is undesirable to try the case summarily. Therefore rejection of prayer to adopt procedure of warrant case would be proper. **(Tanaji Dinakar Wadakar v. Veer Chaphekar Nagari Sahakari Pat Sanstha Ltd.; Pune & Ors.; 2009 Cri.L.J. (NOC) 216 (Bom)**

Precedents

◆ **Hypothesis or implication arising out of particular case – Cannot form ratio decidendi.**

Hypothesis or implication arising out of a particular case cannot form ratio decidenti. The term 'judgment' and 'decision' are used, rather loosely, to refer to the entire judgment or the final order or the ratio decidendi of a judgment. It is a ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. A case is only an authority for what it decides and not what logically flows from it. A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention of the Judge, and inferring from it a proposition of law which the Judges have not specifically laid down in the pronouncement. **(New India Assurance Co. Ltd. V. Smt. Pooja Gupta and Others; 2009(1) AWC 189)**

Appreciation of evidence – Precedent – Value of

In the matter of appreciation of evidence in a criminal case, principle of precedent is not applicable as the case is to be decided on facts. **(Lalliram and another v. State of Madhya Pradesh; (2009) 1 SCC (Cri) 17 (SC)**

Prevention of Corruption Act

Ss. 7, 13(1)(d) r/w S. 13(2) – Cr.P.C. – S. 389 – Suspension of sentence pending appeal, release of appellant on bail – Power of – Parameters and consideration for exercise of

The respondent who was working as Patwari Halqa was convicted by the learned Special Judge, Nawanshahr, Punjab for offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of corruption Act, 1988 (in short "the PC Act") and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000 with default stipulation. Against the judgment in question the respondent filed the aforesaid criminal appeal which was admitted. After admission of the appeal, the respondent filed an application in terms of Section 389(1) of the Code of Criminal Procedure, 1973 (in short "the Code") read with Section 482 of the Code for suspension of the judgment of the learned Special Judge.

The High Court by order dated 27.1.2005 stayed the conviction. According to the appellant, the view expressed by the Court in K.C. Sareen v. CBI; (2001) 6 SCC 584: 2001 SCC (Cri) 1186, was not kept in view. The High Court dismissed that application only on the ground that the review of the order was not permissible.

It is submitted by the learned counsel for the appellant State that the suspension of the conviction is clearly unsustainable. It is pointed out that the High Court noted that the Collector, Nawanshahr had given a notice for dispensing his services as Patwari Halqa, Musapur.

In the said judgment of K.C. Sareen case the court has held that it is only in very exceptional cases that the court should exercise such power of stay in matters arising out of the Act. The High Court has in the impugned order nowhere pointed out what is the exceptional fact which in its opinion required it to stay the conviction. The High Court also failed to note the direction of the Court that it has a duty to look at all aspects including ramification of keeping such conviction in abeyance. The High Court, in the opinion, has not taken into consideration any of the above factors while staying the conviction. It should also be noted that the view expressed by the Court in K.C. Sareen case was subsequently approved and followed by the judgment of the court in Union of India v. Atar Singh; (2003) 12 SCC 434: 2004 SCC (Cri) Supp 461.

Above being the position the order of the learned Single Judge, directing the suspension/stay of the conviction as well as the order refusing to recall the said order cannot stand and are set aside. **(State of Punjab v. Navraj Singh; (2009) 1 SCC (Cri) 98 (SC)**

◈ **S. 19(1) – Sanction for prosecution –Plea that sanction is only by under Secy. To Govt. and, therefore, it is not sanction in eye of law – Not tenable.**

In the instant case, it cannot be contended that there is no sanction at all. In fact it is the very sanction order which is sought to be quashed by the petitioner, though on several grounds. It is for this reason, the learned senior counsel appearing for the petitioner contended that the sanction of the nature at Annexure. A and B is not a valid sanction in the eye of law and, therefore, there is no sanction at all. That again is a question which can be answered only on further examination and as to whether it is a valid sanction or not. To say that is not a sanction even before is begging the question.

Though it is sought to be contended that the sanction is only by an Under Secretary to the Government and therefore it is not a sanction in the eye of law as contemplated under the provisions, it is overlooking the very order which reads that it is ‘by order and in the name of the Governor of Karnataka’. There is a presumption of official acts to have done in the proper

manner and in accordance with the procedure. When the order itself recites that it is 'by order and in the name of the Governor of Karnataka', there is no question of doubting the genuineness of such order by the court, unless something more is pointed out. I find the sanction order is one accorded by the Governor in the normal course of business transaction. **(T.A. Ramababu v. State of Karnataka & Ors.; 2009 Cri.L.J. 629(Kar. HC)**

Protection of Woman from Domestic Violence Act

◈ **S. 29 – Whether an appeal against order of maintenance passed by Magistrate would be maintainable U/s. 29 of above Act – Held, "Yes".**

The word 'order' used in S. 29 connotes all types of orders passed by the Magistrates under the 2005 Act including orders granting interim maintenance under sub-section (1) of Section 23 as well as ex-parte interim maintenance granted under Sub-section (2) of S. 23. Since the word 'order' has not been qualified by any suffix or prefix in Section 29, the clear legislative intent is that each and every type of order, irrespective of its description and nature, passed by a Magistrate has been made appealable to the Court of Session Judge under Section 29. the remedy of filing an appeal U/s. 29, therefore, being an alternative and equally efficacious remedy, petition U/s. 482, Cr.P.C. would not be all maintainable. It was not open to the petitioner to have by passed the appeal forum by straightway approaching High Court u/s. 482 Cr.P.C. **(Manish Tandon v. Richa Tandon & Ors.; 2009(1) ALJ 347)**

Registration Act

◈ **Ss. 23 and 25 – Nature of – Mandatory**

Where a document which requires registration is not presented for registration within the time prescribed, it will not be open to the parties to have it registered in an indirect manner by simply adopting the device of referring to it or making it a part of a later document which could be presented for registration. Even if there is any agreement between the parties for the postponement of the registration after the execution, it cannot be permitted to be enforced, when the time for presentation has expired.

In the light of the provisions of sections 23 and 25 of the Act, which are mandatory in nature. **(G. Kadambari v. District Registrar of Assurances, Hyderabad; 2009(106) RD 248 (A.P. H.C.)**

Will – Person presenting a Will for registration has no legally enforceable right to get a will registered.

Since the registration of "Wills" is optional in nature and there is no obligation upon the registering authority to register "Wills", it does not appeal to reason to compel the registering authority to register the same when the act does not provides for its mandatory registration. The person presenting a "Will" for registration as such has no legally enforceable right to get a "Will" registered. **(Rama Pati Tiwari v. Distt. Registrar, Allahabad; 2009(106) RD 318 (Alld. H.C.)**

S. 77 – Applicability of – Not applicable where the document presented for registration is a Will.

The provisions of section 77 of the Act enabling a party presenting a document for registration to maintain a suit in the event its registration is refused by the registering authority and the District Registrar, would not be applicable where the document presented for registration is a "Will". Therefore, by a necessary implication section 77 of the Act providing for a suit for a decree directing for the registration of documents is confined only to documents which are set out for compulsory registration under section 17 of the Act and not to any other document covered by section 18 of the Act. **(Rama Pati Tiwari v. Distt. Registrar, Allahabad; 2009(106) RD 318 (Alld. H.C.)**

Rent Laws

S. 2(2) – Applicability of Act.

On the touchstone of the provisions quoted above once this admitted fact that the first assessment of the building in question has been shown to be 1-4-1986, then in such contingency once first date of assessment is available, then by legal fiction, said date has to be treated as date of construction, and the admission by any one in respect of the date of construction would in no way wipe out the effect of deeming provision, the date of occupation of the premises in question could have been taken into account only in the contingency when three dates as provided for were not available. Here, in the present case the first date of assessment is available, and in this background, finding of fact has been returned that the building in question was assessed for the first time in the year, 1986, as such the conclusion which have been drawn to the effect that the provisions of U.P. Act No. XIII of 1972 are not applicable, are rightful conclusion and warrants no interference by the Court.

(Raj Kumar Rajpoot v. Smt. Usha Devi Lahauti & Ors.; 2009(1) ALJ 296)

◆ **S. 21 – Application for release of premises – Locus Standi – Anyone of co-owner/landlord can file release application – Consent of other co-owners landlord not necessary.**

In any case, even if partition is ignored, respondent is co-owner and release application maybe filed by a co-owner also vide Gopal Das v. ADJ, 1987(1) ARC 281: (1987 All LJ 494) (FB). Moreover, the Supreme Court in AIR 2004 SC 1321 "India Umbrella Manufacturing Co., M/s. v. Bhagabandei Agarwalla" and AIR 2006 SC 1471 "Mohinder Prasad Jain v. Manohar Lal Jain" has held that even one of the landlords can file eviction proceedings against tenant and he need not show the consent of the other landlords. No other brother, sister or father of the respondent ever raised any objection against the partition. **(Achal Kumar Chaddha v. Santosh Kumar Kesharwani; 2009(1) ALJ 294)**

Right to Information Act

◆ **S.8 (h) – Exemption from disclosure of information – Any information which may impede process of investigation or apprehension or prosecution of offender need not be supplied in terms of S.8 (h).**

From the statutory provision of section it is clear that there is any information which may impede the process of investigation or apprehension or prosecution of offenders need not be supplied.

From the facts on record it is clear that the petitioner is facing prosecution with reference to the first information report, referred to above, the information asked for by the petitioner qua the place of his arrest in the facts of the case is squarely covered by Section 8(h) and, therefore, we are satisfied that there is no right of the petitioner to ask for such information under the Right to Information Act, 2005. **(Vikram Simon v. State Information Commissioner and Others; 2009(1) AWC 70)**

Service Law

◆ **Appointment on compassionate ground – Shiksha Mitra – There is no scheme for compassionate appointment on past of Shiksha Mitra.**

The petitioner claims compassionate appointment on the ground that his wife who was appointed as Shiksha Mitra for the Session 2002-03 and continued thereafter, died on 22.5.2008 and after her death the petitioner has

moved an application seeking compassionate appointment but neither any decision has been taken thereafter nor he has been provided compassionate appointment. He, therefore, prayed that this application be directed to be decided by the respondent No. 4.

It is not disputed by the petitioner that there is no provision either statutory or otherwise providing for any scheme of compassionate appointment to the heirs of the person who died while working as Shiksha Mitra. It is well-settled, if there is no scheme for providing compassionate appointment the same cannot be claimed or granted as held by the Apex Court in Indian Drugs and Pharmaceuticals Ltd. v. Devki Devi and others, 2006 (5) SCC 523: 2006(7) AWC 7188 (SC) and the same has been followed in the case of State Bank of India v. Somvir Singh; JT 2007 (3) SC 398: 2007 (2) AWC 1552 (SC), wherein the Apex Court held as under:

"There is no right whatsoever nature to claim compassionate appointment on any ground other than one, if any, conferred by the employer by way of scheme or instructions as the case may be." **(Apatesh Rai v. State of U.P. and Others; 2009(1) AWC 764 (All HC)**

◆ **U.P. Government Servants (Discipline and Appeal) Rules, cannot First Proviso to Rule 4(1) – Suspension – Suspension of a Govt. Servant be sustained if charges not so serious as to result in imposition of major penalty.**

In the present case, the court does not find that the Competent Authority has made any objective consideration of the material on record, or has arrived at a conclusion that the charges against the petitioner are so serious as are likely to result in imposition of major penalty against the petitioner.

Unless the Competent Authority arrives at such a conclusion on objective consideration of the material on record for the reasons to be recorded, the suspension order passed by the Competent Authority would be vitiated.

In view of the aforesaid discussion, the impugned suspension order cannot be sustained. **(Shyam Singh Yadav v. State of U.P. and others; 2009(1) AWC 690 (All HC)**

◆ **Suspension – Suspension if prolonged unreasonably without holding enquiry or by prolonging enquiry itself – Cannot be sustained and liable to be quashed.**

The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplated or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided and absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained. **(Smt. Anshu Bharti v. State of U.P. and others; 2009(1) AWC 691 (All HC)**

◈ **Salary – Payment in excess – Whether recoverable? – Held, "No" if no fraud and misrepresentation has been done by petitioner.**

The Court is of the view that the amount having been paid to the petitioner voluntarily by the respondents without there being any fraud or misrepresentation by the petitioner, it is not open to the respondents to recover any amount from the petitioner.

For the reasons given, hereinabove, the writ petition succeeds and is allowed. The order dated 7.9.2006 (Annexure-4 to the writ petition) is hereby quashed. The respondents are directed to refund the amount of Rs. 24.710 recovered from the petitioner forthwith. **(Shiv Prakash Richariya v. State of U.P. and Others; 2009(1) AWC 113)**

◈ **Seniority interse – Determination of – In determining seniority, only regular service and not ad-hoc service to be counted.**

The main question that arises for consideration in this appeal is whether the period of ad hoc services rendered by the respondents is to be included for calculating the seniority. This question was considered by a three-Judge Bench of this Court in State of Haryana v. Haryana Veterinary & A.H.T.S. Association and another; 2000(8) SCC 4, wherein this Court took the view that for calculating 8/18 years service required for giving higher scale of pay and for determination of seniority only regular service rendered by the employee is to be counted and not ad hoc service. **(State of Punjab and another v. Ashwani Kumar and Others; 2009(1) AWC 106 (SC)**

◈ **Constitution of India – Article 311(2) – Disciplinary enquiry – Procedure for.**

The principles regarding disciplinary enquiry can be stated as follows:-

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

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

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

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

Where the respondent who was temporary forest guard was dismissed from service on basis of enquiry report wherein no witnesses were examined and apparently there was not even a presenting officer and the enquiry officer himself inspected the areas in the forest and after taking note of certain alleged deficiencies secured some answers from the delinquent by putting some questions, thus the Enquiry Officer himself has acted as the Investigator, Prosecutor and Judge, such a procedure is opposed to principles of natural justice. Moreover, the respondent was not furnished with the required documents and copy of enquiry report and the department's witnesses were not examined in his presence. Consequently, it was held that the order of dismissal of respondent from service passed on basis of enquiry report was liable to be quashed. **(State of Uttaranchal & Ors. V. Kharak Singh; 2009(1) ALJ 257)**

◆ **Constitution of India, Articles 16 and 14 – Promotion for the post of Supdt. Engineers – Sole criteria is merit.**

Under the Regulations the Post of Chief Engineer I and II as also of Superintending Engineer are considered as 'higher' posts and sole criteria for promotion to these posts is 'merit'. Promotion to the post of Executive Engineer from the post of Assistant Engineer, on the other hand, is based on 'seniority subject to rejection of unfit'. It is in the light of criteria of merit that selection to the promotional post of Superintending Engineer was to be made and names of eligible and qualified Executive Engineers were to be placed in different Categories i.e. I, II (and III) on the basis of marks obtained by them as per entries reckoned in ACRs for 10 years. Executive engineers who find place in Category-I is considered 'most suitable' for the promotional post of Superintending Engineer. Once a person finds his placement in a particular Category (for instant Category-I), he retains his original seniority irrespective of marks obtained by him. In other words, after selection and placement of Executive Engineers in a particular category, there will be re-arrangement on the basis of inter se seniority. But the said exercise was to be undertaken only in the same category and not in the other category. Thus, if any Executive Engineer who has been placed in Category-I and is available for the promotional post of Superintending Engineer, no Executive Engineer who in included in Category-II can be considered for such promotion even if such Executive Engineer, who is in Category-II, is senior to an Executive Engineer, who because of his marks and ranking, got entry and placement in Category-I. **(U.P. Power Corporation Ltd. V. Ayodhya Prasad Mishra & Anr.; 2009(1) ALJ 83)**

◆ **Constitution of India – Article 16 – Recovery of Salary – When not permissible.**

Where the incumbent did not satisfy the essential minimum statutory requirements for grant of additional benefit, the Supreme Court has permitted the recovery of excess pay. But where the petitioners fulfilled all the requisite qualifications, they had been selected from open market competition and had been offered appointment in terms of Govt. Order and during the period of training they were paid minimum of pay scales, it was held that salary paid to the Sub Inspector, Civil Police/ Platoon Commander PAC (Petitioner) for the period they had undergone the training subsequent to their appointment on the post cannot be recovered. **(State of U.P. & Ors. V. Nagesh Upadhyay & Anr.; 2009(1) ALJ 165)**

◆ **Fundamental Rules – F.R. 56(2) – Compulsory retirement – Order of compulsory retirement passed on basis of opinion formed on single**

adverse entry without taking into consideration representation pending there against – Unsustainable.

Fundamental Rule 56 provides for compulsory retirement and sub-rule (2) thereof enables the competent authority to consider the entire service record including the entries prior to promotion or adverse entries, which have not attained finality inasmuch as the representation against which has not been decided provided the representation is also considered alongwith adverse entry by the competent authority. For proper appreciation thereof the Fundamental Rule 56(2) is reproduced as under:

"(2) In order to be satisfied whether it will be in the public interest to require a Government servant to retire under Clause (c) the appointing authority may take into consideration any material relating to the Government servant and nothing herein contained shall be construed to be excluded from consideration –

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency may or before he was promoted to any post in an officiating or substantive capacity or on ad hoc basis; or

(b) any entry against which a representation is pending, provided that the representation is also taken into consideration alongwith the entry; or

(c) any report of the Vigilance Establishment constituted under Uttar Pradesh Vigilance Establishment Act, 1965.

Fundamental Rule 56(2) as stands today has been substituted by for consideration of certain material by the competent authority for forming the opinion as to whether a Government servant deserves to be retired premature or not, it is incumbent upon the authority concerned to observe the said procedure in letters and spirit. When law requires something to be done in particular manner, it is well-settled that the said procedure has to be observed and non-compliance thereof shall vitiate the order.

From the discussions made above and from the record placed before us, it is apparent that the procedure prescribed under Fundamental Rule 56(2)(b) has not been followed at all and the adverse entry for the year 1986-

87, which was against the petitioner-respondent, was considered without taking into account the representation, which was pending at that time.

In this view of the matter, it is evident that the case of the petitioner-respondent was not considered in accordance with law and the impugned order of compulsory retirement was not passed after observing the procedure prescribed under Fundamental Rule 56. The impugned order of compulsory retirement, therefore, cannot sustain and the same has rightly been set aside by the Hon'ble single Judge. **(State of U.P. and Another v. Durga Prasad Sharma; 2009(1) AWC 632)**

Specific Relief Act

◆ **S. 31(1) – Suit for cancellation of void document – Maintainability of – By virtue of S. 31 not only voidable document is permissible, but cancellation of void document is also permissible – Hence, suit for cancellation of void document would be maintainable before civil court, mere declaration by revenue court is not sufficient.**

Though word 'void' has been used before word 'voidable', there is no substantial difference between declaring an instrument as void or cancelling the same, since by virtue of S. 31 not only cancellation of voidable document is permissible but cancellation of void document is also permissible and hence it cannot be said that suit cancellation of void document is not maintainable before civil court as its cancellation is not necessary and mere declaration which may be granted by revenue court is sufficient. **(Smt. Kalawati & Anr. V. IInd Additional District Judge, Shahjahanpur & Anr.; 2009(2) ALJ 162 (All HC)**

◆ **S. 31(1) – Jurisdiction – Suit for cancellation of void document or for declaration that the document is void is maintainable before the civil court.**

In the Full Bench authority of the Court in Ram Padarath v. Second ADJ, Sultanpur; (1989) RD 21, it has been held that suit for cancellation of a void document or for declaration that the document is void is maintainable before the Civil Court if plaintiff has prima facie title and is recorded tenure holder. Supreme Court has approved the said authority in Bismillah v. Janeshwar Prasad; AIR 1990 SC 540, and Shri Ram v. 1st Addl. Distt. Judge; AIR 2001 SC 1250.

At this juncture, section 31(1) of Specific Relief Act, 1963 which is quoted below may also be noticed:

> "31. When cancellation may be ordered – (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

In the above section, the word "void" has been used before the word "voidable". Under the aforesaid section, there is no substantial difference between declaring an instrument as void or cancelling the same. By virtue of this section, not only cancellation of voidable document is permissible but cancellation of void document is also permissible.

Accordingly, it cannot be said that suit for cancellation of void document is not maintainable before the Civil Court as its cancellation is not necessary and a mere declaration, which may be granted by Revenue Court, is sufficient.

Accordingly, writ petition is allowed, impugned order passed by Revisional Court is set aside. It is held that suit is maintainable before the Civil Court. **(Smt. Kalawati v. IInd Addl. Distt. Judge, Shahjahanpur; 2009(106) RD 304 (Alld.H.C.)**

Transfer of Property Act

◆ **S. 58 – Mortgage – Inference of**

Supreme Court has in several cases held that if sale and agreement to repurchase are embodied in separate documents, it cannot be a case of the mortgage and in such cases relating to re-conveyance time is always the essence of the contract. **(Gauri Shankar Prasad and others v. Brahma Nand Singh; (2009) (106) RD 299 (SC)**

◆ **Ss. 114 and 106 – Relief against for forfeiture of tenancy – When available.**

Section 114 confers a power on Court to grant an equitable relief to defaulting lessee. In order to claim benefit under this section, it has to be shown by tenant that one of terms of the lease was that the landlord will have a right of re-entry if rent for any specified period remained unpaid and he has to show further that forfeiture has been incurred as provided U/s. 111(g), S. 114 thus postulates existence of determination of lease by forfeiture as a

condition precedent and provisions contained in this Section will have no application where lease has been determined by service of a notice to quit under S. 106. The relief U/s. 114 is confined to those cases only which are strictly covered U/s. 111(g) and not to those cases which fall U/s. 106 of said Act. A monthly tenancy is determinable by one month's notice by either party and if the tenancy is terminated by serving one month's notice under S. 106, there is no forfeiture of tenancy and in that event S. 114 cannot be applied. Thus a notice U/s. 106 by no means could be treated as one under S. 111(g).

Further S., 114 applies to those cases where the landlord invokes his rights under what is known as forfeiture clause and determines the lease by forfeiture and sues for ejectment of the tenant. In such a case, the subsisting tenancy cannot be determined by serving a notice simpliciter U/s. 106 of the Transfer of Property Act, and it can only be determined where the landlord forfeits the tenancy by serving notice U/s. 111(g). In such an event, S. 114 can be pressed into service but where the tenancy runs from month to month and the same has been determined by a valid notice U/s. 106 then S. 114 shall have no application. Similarly in cases, where lease period has already come to an end, the possession of tenant lessee would be that of holding over month by month under provisions of S. 116, in such a situation also tenancy can be determined by simpliciter notice U/s. 106.

Thus, where notice had been sent to petitioner terminating his tenancy clearly and categorically mentioning that from date of receipt of notice after expiry of the period of 30 days, tenancy would come to an end, and therefore, the petitioner should hand over peaceful vacant possession of premises in question and at no point of time, any authority had been exercised by landlord by invoking forfeiture clause for non-payment of rent and demand of rent was made only in addition to the demand of vacant possession, the provisions of S. 111(g) read with S. 114 of Act would not be applicable or attracted, as there was no forfeiture of lease on account of nonpayment of rent, rather tenancy has been terminated in plain and simple manner as enshrined U/s. 106. **(Raj Kumar Rajpoot v. Smt. Usha Devi Lahauti & Ors.; 2009(1) ALJ 296)**

Tort

Compensation – Interest – Fixation of rate – Factors to be considered.

In the year 2003, in *Abati Bezbaruah v. Geological Survey of India; (2003) 3 SCC 148: 2003 SCC (Cri) 746*, it was held that the question as to what should be the rate of interest, in the opinion of the court, would depend upon the facts and circumstances of each case. Award of interest would normally depend upon the bank rate prevailing at the relevant time. **(Dharam Pal & Others v. U.P. State Road Transport Corporation; (2009) 1 SCC (Cri) (SC)**

◆ Strict liability – Principle of – Question of strict liability is inbuilt under law of avoid any accidents.

The question of strict liability is inbuilt under the law to avoid any accident, if not, by other measures. Therefore, taking into account all aspects of the matter we are of the view that the defendants-appellants cannot avoid the liability. Hence, the Court uphold the judgment and order passed by the court below, impugned in this appeal. **(U.P. Power Corporation and Another v. Bijendra Singh; 2009(1) AWC 421)**

U.P. Consolidation of Holdings Act

◆ S. 42-A – Scope of – Only an error apparent on the face of record can be corrected.

Section 42-A of this Act read as follows:

"**Correction of clerical or arithmetical errors** – Notwithstanding anything contained in any law for the time being in force, if the Consolidation Officer or the Settlement Officer, Consolidation, is satisfied that a clerical or arithmetical error apparent on the face of the record exists in any document prepared under any provision of this Act, he shall, either on his own motion, or on the application of any person interested, correct the same."

On a plain reading of the aforesaid provision, it is clear that under the said section only an error apparent on the face of record can be corrected. Firstly, there should be an error in the order and the said error should be apparent. The said section does not empower the consolidation authorities after the close of the consolidation operation to reconsider a matter on any other ground.

In the guise of correction of clerical or arithmetical errors, consolidation authorities cannot re-open a matter. A very limited jurisdiction under section 42-A of the Act has been given to the consolidation authorities

which can be exercised on the fulfillment of the fact that there is a clerical or arithmetical error apparent on the face of the record. In other words, the said section does not empower consolidation authorities to entertain any application and decided dispute so raised therein on merits, afresh. **(Arun Kumar Pandey v. Deputy Director of Consolidation, Azamgarh and Others; (2009 (106) RD 522)**

◈ **S. 48 – Restoration application against ex-parte revisional order – Should be allowed if notices not issued to respondents so that they were not present and heard.**

In the present case, respondent Nos. 2 and 3 have not been issued notice and have not been heard while their chak have been affected by the impugned order dated 29.5.2008.

Court does not find any error in the order of Deputy Director of Consolidation allowing the restoration application and recalling its earlier order dated 29.5.2008 which has been passed without hearing to the respondent Nos. 2 and 3. **(Sarifuddin v. Deputy Director of Consolidation, Bijnor and others; 2009(1) AWC 272)**

U.P. Cooperative Societies Act

◆ **U.P. Industrial Disputes Act, Ss. 4K and 10 – Employment – Dispute between employer cooperative society and its employee – Labour Court has no jurisdiction to decide employment dispute between employer cooperative society and its employee.**

U.P. Cooperative Societies Act and the Regulations framed thereunder are complete code and labour court has got no jurisdiction to decide the disputes between Cooperative societies and their employees.

Accordingly, impugned award is set aside on the ground that labour court had no jurisdiction to adjudicate the dispute. **(Sahkari Ganna Vikas Samiti Ltd. v. Jitendra Mohan and Another; 2009(1) AWC 479)**

U.P. Dacoity Affected Areas Act

◆ **S. 2(b) – Scheduled offence – Cognizance of – Only special court under U.P. Dacoity Affected Areas Act can take cognizance – C.J.M. would have no jurisdiction to pass order for investigation of Scheduled Offence on application U/s. 156(3).**

As would appear from sub-section (3) of Section 156 Cr.P.C. only that Magistrate can pass the order for investigation, who is empowered under section 190 Cr.P.C. to take cognizance of the offence. In view of section 7 of the Act, Addl. Chief Judicial Magistrate or any other Magistrate has no jurisdiction to take cognizance of any scheduled offence and only the special court constituted under this Act can take cognizance of any scheduled offence. Therefore, the learned lower Revisional Court, is perfectly right in holding that the Addl. Chief Judicial Magistrate, Hamirpur had no jurisdiction to pass the order for investigation on the application moved by the applicant Rajjan Prasad under section 156(3) Cr.P.C. **(Rajjan Prasad v. State of U.P. & Ors.; 2009(2) ALJ 290)**

U.P. Govt. Servants (Discipline and Appeal) Rules

◆ **Rule 9(4) – Non-reasoned order of punishment of Govt. Employee is unsustainable.**

When the rule framing authority itself has made separate provision making it obligatory upon the disciplinary authority to record reasons at two different stages, one, when it disagrees with the findings of the Inquiry Officer and, secondly, when it decides to pass an order of punishment after considering the reply given by the delinquent employee against the findings

of disagreement of the disciplinary authority, then it is obligatory upon the disciplinary authority to follow such procedure strictly. This Court would not read the aforesaid provision in such a manner so as to make one or the other exercise nugatory by reading the order in the manner as suggested by learned standing counsel. The reasons contained in the disagreement note constitute the ex parte view taken by the disciplinary authority against the findings recorded by the Inquiry Officer. When it is communicated to the delinquent employee and he submits its reply, the disciplinary authority is benefited with the explanation given by the delinquent employee. In order to find out as to whether it would like to stick to its earlier view of disagreement with the finding of the Inquiry Officer or the same needs to be changed, modified, partly or wholly in the light of explanation given by the delinquent employee, it has to apply its mind again. The reasons, therefore, are required to be recorded by the disciplinary authority as to why the explanation given by the delinquent employee is or is not satisfactory. The purpose and objective of reasons to be recorded under sub-rule (2) and (4) of Rule 9 are different. They are to be recorded at different stages with slightly different material inasmuch as at the former stage, the stand of the delinquent employee is not available to the disciplinary authority while in the later case it is available. The court, therefore, is clearly of the view that non-observance of Rule 9(4) is fatal since its compliance is mandatory. If the delinquent employee after communicating its disagreement note and Inquiry Officer's finding to the delinquent employee and after receiving the reply failed to pass a reasoned order imposing punishment upon the delinquent employee, such order would not be tenable in law and has to be set aside. **(Sanjeev Kumar v. State of U.P. & Others; 2009(1) AWC 457)**

U.P. Industrial Disputes Act

◈ **Ss. 2(s), 25B and 25F – Applicability of these Ss. on part-time workman.**

The question for consideration, which has been hotly debated, is the status of a part-time employee and as to whether such an employee falls within the definition of "workman". Section 2(s) of the Act deals with the definition of "workman" whereas Section 25B talks about "continuous service".

A bare perusal of the two definitions would reveal that their applicability is not limited to only full-time employees but all that is required is that the workman claiming continuous service must fulfill the specific

conditions amongst others laid down in the two provisions so as to seek the shelter of Section 25F. **(Div. Manager, New India Assurance Co. Ltd. V. A. Sankaralingam; 2009(1) AWC 334 (SC)**

◆ **S.2 (z) – Workman – Teachers of School are not workman – But class III and IV employees are.**

Respondent No. 4 is a private education institution and not an industry, hence no industrial dispute can be raised under the provisions of U.P. Industrial Disputes Act, 1947. It is settled that in an educational institution the teachers may not fall within the ambit of definition of workman as given in Section 2(z) of the U.P. Industrial Disputes Act, 1947 but class III and IV employees are workmen. Even if the petitioner wants to raise this objection he could do so before the labour court to whom the reference may be made. **(Ryon International School Karmachari Sangh v. State of U.P. and Others; 2009(1) AWC 111)**

◆ **S. 11-A – Power of labour's court to declare seasonal workman in Sugar Mill as permanent workman – Labour court cannot grant such declaration.**

In the instant case, it has been submitted on behalf of the appellant that even when the seasonal workmen are employed during the off season they are paid the same wages as are paid to them during the crushing season, which is one of the basic distinctions between them and permanent workmen who are on the rolls of the sugar mills. It is also an admitted position that, in terms of the policy followed by the sugar mills, promotions are given from one category to the next higher category depending on the number of vacancies as are available at a given point of time. Even in the instance case, of the 39 workmen referred to in the terms of reference, 13 had been made permanent by the appellant which supports the case of the appellant that promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour Court. **(U.P. State Sugar & Cane Development Corporation Limited v. Chini Mill Mazdoor Sangh & Ors.; 2009(1) ALJ 246)**

U.P. Imposition of Ceiling on Land Holdings Act

◆ **S. 5(6) – Ceiling – Exclusion of Surplus land – Mere fact that land being cultivated would not exclude land from ceiling of grove land.**

Mere fact that the land was being cultivated would not exclude the land from the category of grove land. It has only to satisfy the test that the trees were planted on land before 24.1.1971.) **(Narendra Pal Singh Gahlot v. Upper Commissioner (Judicial) Moradabad Division, Moradabad and others; 2009(1) AWC 46)**

S. 10(2) – Declaration of Surplus Land.

A father and son having separate holding, residing separately but if help each other in their period of difficulty or whenever necessity arises, would not mean that they constitute one unit and entire thing belong to the father or the son, as the case may be. In Indian society and in common practice, if the sons or daughters or even brothers or other relatives needs help, the first helping hand would be that of normally the relatives or friends and, therefore, for purpose of land, if father's land was mortgaged with respect to the petitioner son that itself would not justify the conclusion that the entire holding belong to father in his own right though ostensibly in the name of the petitioners. The petitioners gave their statements that they were all residing separately. Mere non-production of ration-card cannot justify an inference that statements given on oath by petitioners were false unless some evidence was produced by State to show the said averment to be incorrect. From a bare reading of the appellate order, it was evident that it has solely proceeded on assumption as if onus was upon petitioners to show that holding was separate, ostensibly in their names and did not belong to their father. Therefore, holding of father and son cannot be consolidated for purpose of declaring surplus land. **(Shishu Pal Singh & Ors. V. Prescribed Authority/Upper Zila Adhikari, Moradabad & Ors.; 2009(1) ALJ 161)**

U.P. Kshettra Panchayat and Zila Parishad Adhiniyam, 1961

S. 14 – Terminating membership of Kshetra Panchayat – Validity of.

An elected member of the Kshettra Panchayat or an elected office bearer namely; the Pramukh, cannot be removed from the office otherwise; than by adopting the procedure prescribed under the Act and the Rules framed thereunder, if any. The authority and jurisdiction to take an action of termination of membership or removal from the office of Pramukh can also not be taken by the State or any of its authority unless such a power is conferred under the Act and the provision is made for taking such an action. The scheme of the Act in question reveals that the State Government as having no jurisdiction and authority to either terminate the membership of

the petitioner or to declare that consequently he ceases to hold the office of the Pramukh. The State has not been able to indicate any provision under which the impugned order could have been passed. Recourse to Section 13(f) could not have been made because it only lays down and enumerates disqualification for membership. Section 13(1) is one of the disqualifications given under Sec 13 and Sec. 14 is the provision which lays down the manner and the authority of the State Government to decide a dispute regarding membership for disqualification. It having been established that no such dispute has ever been raised or decided, the order of termination of membership cannot be made referable to the aforesaid provision of Section 14. It was also not a case of passing of no confidence motion under Section 15. Thus, the order cannot be sustained as the State Government has exceeded its authority under the Act in passing the said order, as there is no provision under which such an order can be passed. **(Ram Manohar Singh v. State of U.P. & Ors.; 209(2) ALJ 336 (DB of All HC)**

U.P. Land Revenue Act

S. 14A(4) and 28 – Whether Chief Revenue Officer can exercise powers of Collector in matters of Land Revenue cases U/s. 28 – Held, "Yes".

From the G.O. it is quite clear that Chief Revenue Officer have been re-designated as C.R.O., A.D.M. (Land Revenue). This clearly amounts to conferring the power upon them to hear the cases under Land Revenue Act. In fact by virtue of the aforesaid G.O. it is evident that the main duty of Chief Revenue Officer is to hear the cases under Land Revenue Act.

In a recent Full Bench authority in Civil Misc. Writ Petition No. 40986 of 2001. Brahm Singh v. Board of Revenue and Others, decided on 29.4.2008 it has been held that all Additional Collectors are entitled to exercise the power of Collector under Section 14A (4) of U.P. Land Revenue Act.

Accordingly Court does not find any force in the contention of learned counsel for the applicant in recall/modification application that Chief Revenue Officer is not Additional Collector and cannot exercise the powers of Collector in respect of matters under section 28 of the Land Revenue Act. **(Bahraich Deen v. Board of Revenue, U.P., Lucknow and Others; 2009(1) AWC 326)**

◆ Proceedings under – Summary in nature and do not decide any right or title of the partition.

From the perusal of the notice dated 16.9.2006 it transpires that the notice has been issued under sections 33/39 of U.P. Land Revenue Act requiring the petitioners to produce the relevant material in support of their case. It is settled law that the proceeding under the U.P. Land Revenue Act are summary in nature and it do not decide any right or title of the parties and the writ petitions are not generally maintainable in such matters. **(Smt. Indra Mishra and Others v. State of U.P. and Others; 2009(106) RD 479)**

U.P. Panchayat Raj Act

◆ S. 12-J(2) – Temporary vacancy in office of Pradhan – Provisions of S. 12-J(2) empowering District Magistrate to make temporary arrangement – Not unconstitutional.

In the present case, the petitioner has not been able to show any lacuna in the provisions of Section 12-J(2) of the Act nor has he challenged the vires of the aforesaid provision. The said provisions are not unconstitutional or ultra constitutional rather are intra constitutional.

The Legislature in its legislative wisdom was well conscious of its intention while vesting the District Magistrate with the judicious discretion to nominate a person to fill up temporary post of Pradhan during his incapability or death or in case both Pradhan & Up-Pradhan were not available. Had the legislature intended to provide for holding a meeting of members of the Gaon Panchayat for election of a Pradhan temporarily as provided in section 12-J(2).

It may not be forgotten that section 12-J(2) of the Act provides discretion upon the Prescribed Authority for making a workable system and implementations of Govt. Schemes etc. for a temporary phase immediately. If the democratic principles for election of a Gram Pradhan for temporary period to tide over a short period are required to be followed for electing the Gram Pradhan from elected members, then as observed in the aforesaid judgment, why not by election of Gram Pradhan by the villagers themselves. What is the guarantee that a person elected by the members amongst themselves in the meeting would follow the expectations of the people of the village. The temporary appointment is only for welfare of the village till regular election of Pradhan or Up-Pradhan is made. The court is of the firm opinion that personal opinion of His Lordship in the aforesaid judgment

cannot be read into provisions of section 12-J(2) of the Act which has been enacted by the legislature in its wisdom without establishing any lacuna in the aforesaid provision and challenging the vires of the provision by the petitioner. **(Jaglal Ram Krishna v. State of U.P. & Ors.; 2009(2) ALJ 260 (All HC)**

◆ **S. 95(1)(g)(ii) – U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquires Rules, Rules 6, 7 and 8 – Removal of Pradhan on the basis of (1) Enquiry was not held (2) reply submitted by petitioner was not adjudicated and (3) opportunity of hearing was totally denied – Removal liable to be quashed.**

Once a Full fledged procedure has been provided for under the Rules for holding enquiry, providing procedural safeguards in consonance with principle of natural justice and in case formal enquiry was being held by the Senior Project Officer, Neda, then in that event, he ought to have fixed date, time and place for holding enquiry and proceeded ahead to hold inquiry as per Rules envisaged. In the present case, it is clearly reflected that the order impugned has been passed on the basis of the report submitted by Senior Project Officer, Neda without undertaking the requisite exercise. The most surprising feature is that reply submitted by petitioner has not at all been dealt with by the District Magistrate, and the order impugned does not reflect as to what evidence was led consideration of which prompted the District Magistrate to take such action. The fact of the matter is that enquiry was not at all held; reply submitted petitioner has not been adjudicated and the opportunity of hearing has been totally denied.

The order impugned dated 27.6.2008 passed by the District Magistrate is hereby quashed and set aside, and the District Magistrate is directed to see and ensure that proceedings undertaken against petitioner are concluded strictly as per provisions contained under Rules 6, 7 and 8 of 1997 Rules. **(Mohd. Ahsan v. State of U.P. & ors.; 2009(2) ALJ 110 (All HC)**

◆ **S. 125(2) – Whether Distt. Magistrate required to seek opinion of Gram Panchayat through meeting on member to be nominated as temporary Pradhan? – Held, "No".**

Court of the opinion, there is no lacuna in Section 12J which is required to be filled up the Court. The provision of Section 12J sub-clause (2) is clear that temporary Gram Pradhan is to be nominated by the prescribed

authority. Nothing can be added by reading in between the lines or to give strength one's own opinion. The prescribed authority has power to nominate any person under the Act which cannot be said to be arbitrary and the Registrar has acted in its wisdom as conferred under the Act. **(Smt. Kusma Devi v. State of U.P. and Others; 2009(1) AWC 145)**

U.P. Prevention of Cow Slaughter

S. 3 – Attempt of cow slaughter – More transportation of cow, bull or bullock from one place to another place within state of U.P. or carrying them on foot – Does not amounts to "attempt" of slaughtering.

Mere transportation of cow, bull or bullock from one place to another place within the State of Uttar Pradesh or carrying them on foot cannot amount to 'attempt' of slaughtering and this act at the most can be said to the 'preparation' of slaughtering, which is not punishable under Cow Slaughter Act or any other law for the time being in force. The offence of 'abetment' of slaughtering would also not be made out in such case, as the accused persons at the time of their arrest were neither offering the bullocks to any other person for slaughtering, nor they were providing any other kind of aid to any person for the offence of slaughtering. Mere transporting the cow, bull or bullock or carrying them on foot from one place to another place within the State of Uttar Pradesh cannot be said to the 'abetment' of any offence under Cow Slaughter Act, unless these cattle are either offered to any other person for slaughtering or any other kind of aid is provided to any person for the offence of slaughtering. **(Kailash Yadav & Ors. V. State of U.P. & Anr.; 2009(2) ALJ 263 (All HC)**

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

S. 2 –Applicability of

There is no finding of Rent Control and Eviction Officer that either petitioner is not paying Rs. 2,200 per month as rent or current rent cannot be more than Rs. 2,000 per month.

District Judge also held that it was *mala fidely* let out to Shyamji Shukla for a rent of Rs. 2,200 per month. The Court completely fails to understand that in case a landlord can let out the building for more than Rs. 2,000 per month and he actually lets out that on such rent then what mala fides are involved. Every landlord is entitled to let out the building at the maximum possible rent. If in this process any malice is involved then the action of the Legislature in taking out the building fetching rent of more than

Rs. 2,000 per month from the purview of the Rent Control Act also becomes malicious. Application of the Act is not ousted by the landlord by letting the building on more than Rs. 2,000 per month rent. The Act has been made inapplicable by the Legislature itself, if building can be let out for more than Rs. 2,000 per month rent. No landlord is supposed to let out the building which in open market can be let out for more than Rs. 2,000 per month at less than Rs. 2,000 per month so that the Rent Control Act may continue to apply on the said building. The authority in Jagannath v. Rent Control and Eviction Officer, 2001 (2) ARC 149: 2001 (2) awc 1671, cited by learned counsel for allottee has got no application to the facts of the case. Action of the landlord in letting the building for more than Rs. 2,000 per month may be objectionable, if it is found that actually building has not been let out for more than Rs. 2,000 per month but it is falsely shown to have been let out. In the instant case, there is no such allegation or finding. Kanpur is most expensive city of State of U.P. and a building situate on ground floor having more than three rooms and one store, latrine, kitchen, bathroom and open courtyard can certainly be let out for more than Rs. 2,000 per month.

Accordingly second writ petition is allowed. Allotment order and revisional orders are set aside. **(Shyamji Shukla v. State of U.P. and Another; 2009(1) AWC 727)**

◆ **Ss. 2(2) and 24(2) – Applicability of Act on reconstructed house – When Act 13 of 1972 applied to old building, it was applicable to new building after reconstruction of old one.**

Under S. 24(2) of the Act. It is provided that newly constructed accommodation should be let out to the tenant and the Act should continue to apply to the new building.

On the same principle, it is to be held that in case under agreement, tenant voluntarily vacates the tenanted accommodation for demolition and new construction and after demolition and new construction, newly constructed premises is let out to the tenant, the Act would continue to apply to the building in dispute. **(Prakash Chand Mehta v. IIIrd Additional District Judge, Moradabad and others; 2009(1) AWC 77)**

◆ **S. 2(2); Explanation I – Applicability of Act – Determination of**

Once this admitted fact that the first assessment of the building in question has been shown to be 1.4.1986, then in such contingency once first date of assessment is available, then by legal fiction, said date has to be

treated as date of construction and the admission by any one inrespect of the date of construction would in no way wipe out the effect of deeming provision, the date of occupation of the premises in question could have been taken into account only in the contingency when three dates as provided for were not available. Here, in the present case the first date of assessment is available, and in this background, finding of fact has been returned that the building in question was assessed for the first time in the year 1986, as such the conclusion which have been drawn to the effect that the provisions of U.P. Act No. XIII of 1972 are not applicable, are rightful conclusion and warrants no interference by the Court. **(Raj Kumar Rajpoot v. Smt. Usha Devi Lahauti and Others; 2009(1) AWC 229)**

◆ **Ss. 3(a) and 21(1)(a) – Release – Release of residential accommodation can be granted on ground and proof of bonafide need against statutory tenant.**

In the instant case the petitioner has argued that release application under S. 21 of the Act can be filed only against contractual tenants and not statutory tenants. Under the definition of tenant given under Section 3(a) of the Act no such distinction has been drawn.

Even otherwise, acceptance of argument of learned counsel for the petitioner will not make any difference. Statutory tenant means a tenant whose tenancy has been terminated but his possession is protected by the Act. In the instant case the Act prescribes for eviction of the tenant in case need of the landlord is bona fide, i.e., through release application under S. 21 of the Act. Accordingly on proof of bona fide need of the landlord protection granted to the tenant by the Act stands withdrawn rather eviction is mandated. **(Jai Prakash v. Smt. Chhama Srivastava; 2009(1) AWC 292)**

◆ **S. 3(e) – Prescribed Authority – Distt. Judge can authorize Judicial Officer or Judicial Magistrate to act as P.A.**

Under Section 3(e), District Judge is authorized to appoint any civil judicial officer or Judicial Magistrate to exercise the powers of Prescribed Authority and different such officers may be authorized in respect of different areas or cases or classes of cases. Accordingly, even for a single case, a Judicial Officer or Judicial Magistrate may be authorized by the District Judge to act as prescribed authority. In an earlier authority of the Court in Awadh Kumar Pradhan v. 1st Civil Judge, Kanpur; 1982 ARC 530, it has categorically been held that even a single case under Section 21 of the

Act can be transferred to a Judicial Officer, who may not have any power to decide such cases through the earlier general order of District Judge. Hon'ble N.D. Ojha, J. in the said authority of Awadh Kumar Pradhan held that principles of Section 24(5), CPC would apply in such situation. **(Ram Chandra v. XIIth Additional District and Sessions Judge, Moradabad and Others; 2009(1) AWC 225)**

◆ **Ss. 20(2)(a) and 30 – Whether deposit U/s. 30(1) valid to save eviction of tenant? – Held, "No".**

Even if all the pleas taken by the tenant's petitioners are accepted still deposit under Section 30 will not be valid after the date of death of original landlord as tenants did not seek substitution of the heirs of original landlord in the case under Section 30 of the Act. Rent deposited under Section 30(1) of the Act can be withdrawn only by the person in whose name it is deposited. The heirs of original landlord after the death of original landlord could not withdraw the said rent. **(Smt. Rafeeqan and others v. Jia-ul-Nabi and others; 2009(1) AWC 73)**

◆ **Ss. 20(2)(a), 20(4) and 30(1) – Suit for eviction on ground of default – When rent sent through money order not accepted by landlord, tenant no more remains in default/arrears of rent.**

The notice of termination of tenancy and demand of rent was sent on 10.12.1991, which returned with the endorsement of refusal. Post-man was also examined by the landlord. The Post-man stated that even though on the envelop address of house of tenant was mentioned but he was not available at his house, hence notice was served upon him at his shop. Courts below held that on the endorsement of refusal, post-man did not get the signature of any witness, hence service of notice through refusal was not proved. In the opinion of the Court this finding is utterly erroneous in law. Endorsement of refusal by the post-man was sufficient. There is no requirement that endorsement of refusal must be got witnessed in writing by some independent person.

Accordingly, findings of the court below that notice was not served are set aside.

However, trial court held that entire rent alongwith water tax, interest and cost of the suit had been deposited on the first date of hearing. The trial court noted the argument of the landlord that still there was deficiency of about Rs. 43, however, trial court held that water tax was not payable, hence

there was no deficiency in deposit. This finding was reversed by the revisional court and revisional court held that water tax was payable. However, revisional court held that even after including the water tax, entire amount as required by Section 20(4) of the Act had been deposited on the first date of hearing.

Even if it is assumed that there was some deficiency in the deposit, it will not make much difference. Firstly, Supreme Court has held that negligible deficiency is to be ignored (vide Kailash Chandra v. Mukundi Lal; AIR 2002 SC 829: 2002 (2) AWC 912 (SC).Secondly, rent due till December, 1991 was sent through money-order, which was refused on 16.11.1991. In the Full Bench authority of Indrasant v. Din Ilahi, 1968 AWR 167, followed in subsequent Full Bench authority of Gokaran Singh v. 1st Additional District and Sessions Judge, Hardoi and others; 2000(1) ARC 653, it has been held that if rent is sent by money-order by the tenant and is refused by the landlord, then rent remains in arrears but the tenant does not remain in arrears of rent. In view of this, at the time of notice dated 10.12.1991, tenant was not in arrears of rent even for a single month. Accordingly, notice was bad and suit was liable to be dismissed on this ground alon. **(Ram Swarup v. Uma Shankar; 2009(1) AWC 635)**

◆ **S. 21(1)(a), r/w Rule 16(1)(d) – Release – Part release of accommodation to be mandatorily considered.**

It is not disputed that the issue regarding part of release of the accommodation to satisfy the need of the landlord-respondent has not been considered, therefore, the Court is of the view that matter needs reconsideration to view of Rule 16(1)(d) of Rules, 1972 which is mandatory in nature. The Court as well as the Apex Court has also taken the same view. **(Smt. Saroj Mishra and Others v. Smt. Chandrakanti Sinha and Others; 2009(1) AWC 519)**

U.P. Zamindari Abolition and Land Reforms Act

S. 286 – Auction Sale – Effect of approval of auction sale conducted U/s. 286 to sub-div. officer. Sub div. officer has no power under U.P.Z.A. & L.R. Act.

After notification dated 17.1.1976 it has to be accepted that the power to approve the auction sale conducted under Section 286 of the U.P.Z.A. & L.R. Act vests with the Collector and Sub-Divisional Officer cannot exercise the power of the approval.

In the present case it is admitted position that Collector has not approved the auction sale and learned single Judge has rightly set aside the auction and also its confirmation by Sub-Divisional Officer and all other consequential action on that ground. **(Ram Awadh Tiwari v. Sudarshan Tiwari and Others; 2009(1) AWC 310)**

Workman Compensation Act

Ss. 4A and 17 – Liability of insurer giving interest and penalty for – In absence of contract of insurance between employer and insurer would not be liable for interest and penalty.

The principle that insurance coverage is not mandatory under the Act, 1923, like other law or laws prevailing in the field but there is no prohibition in contracting out either for the principal sum or for interest and/or penalty. In other words, in absence of any clause in the contract regarding interest and/ or penalty, the insurance company is not liable to pay any sum on account of interest and/or penalty. Therefore, payability to that extent lies with the employer.

The Court of the view that there is other reason for which the interest and/or penalty cannot be directed to be paid by the insurance company. Section 4A(3) of the Act, 1923 says that where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall direct the employer to pay the interest on the amount of arrears. In addition thereto, if there seems to have no justification for the delay in paying the amount of arrears and interest, a further sum by way of penalty will be directed to be paid. Therefore, the Court has to see whether any such occurrence is available on the part of the employer or not. The payment of interest and/or penalty is arising out of the fault of the employer and without determination of such fault the insurance

company cannot be held liable. **(U.P. State Road Transport Corporation v. Smt. Alaka and Others; 2009(1) AWC 204)**

Words and Phrases

◈ **Expression "Appeal" explained.**

It is well settled that the Appeal is the creature of the statute and it is deemed as continuation of the suit proceeding. **(M.D. Dubey v. Prashu Ram Pandey; 2009 (106) RD 262 (Alld. H.C.)**

◈ **"Arrest" – Meaning and origin**

The term "arrest" has neither been defined in the Code of Criminal Procedure, 1973 nor in the Penal Code, 1860 nor in any other enactment dealing with offences. The word "arrest" is derived from the French word "arrater" meaning "to stop or stay". It signifies a restraint of a person. "Arrest" is thus a restraint of a man's person, obliging him to be obedient to law. "Arrest" then may be defined as "the execution of the command of a court of law or of a duly authorized officer." **(Union of India v. Padam Narain Aggarwal and Others ;(2009) 1 SCC (Cri) 1 (SC)**

◈ **"Not sufficient ground for proceeding against the accused"**

It is trite that the words "not sufficient ground for proceeding against the accused appearing in the section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible. **(Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra; (2009) 1 SCC (Cri) 51 (SC)**

Expression "Waqf" – Meaning of

Wakf would mean taking out something out of one's ownership and passing it on the God's ownership dedicating its usufruct-without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure – for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes. **(Faqruddin (Dead) through LRs v. Tajuddin (Dead) through LRs.; 2009 (106) RD 440)**

"Mutwalli"

It is beyond any doubt or dispute that a Mutawalli is the temporal head. He is the manager of the property. Office of Sajjadanashin, however, is a spiritual office. It has to be held by a wise person. He must be fit for holding the office. **(Faqruddin (Dead) through LRs v. Tajuddin (Dead) through LRs.; 2009 (106) RD 440)**

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