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Administrative Law

◆ **Doctrine of proportionality – Meaning scope, constituents and development of doctrine - “Balancing test” and “necessity test” under doctrine of proportionality distinguished and explained – Power of judicial review, Arts. 226, 32 and 136 – Judicial review under.**

It is clear that the Indian legal system has accepted the doctrine of proportionality.

“Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise – the elaboration of a rule of permissible priorities. “Proportionality” involves “balancing test” and “necessity test”.

The doctrine of proportionality has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. (**Coimbatore District Central Coop. Bank v. Employees Assn., (2007)4 SLR 108**)

◆ **Order without affording any opportunity of hearing would be liable to be set aside and the Court has power to pass fresh order subsequent to previous after affording opportunity of hearing to the parties.**

It is true that when the Judge set aside the sale on 17.3.2006, the order was reversed by the Division Bench of the High Court since it was in breach of natural justice. That does not, however, mean that the Company Court could not pass fresh order after affording opportunity of hearing to the parties.

In the opinion of the Court, the Company Court was right in passing fresh order after hearing the parties. If the Recovery Officer could not have confirmed the sale, obviously all actions taken in pursuance of confirmation of sale, such as, issuance of sale certificate, registration of documents, etc. would be of no consequence. Since the Company was in liquidation and

Official Liquidator was in charge of the assets of the Company, he ought to have been associated with the auction proceedings, which was not done. This is also clear from the report submitted by the Official Liquidator and on that ground also, the auction-sale was liable to be set aside. **(M.V. Janardhan Reddy v. Vijaya Bank and Others; (2008) 7 SCC 738)**

◆ **Promissory Estoppel – Withdrawal from the representation which may have induced acts of commission or omission by the representees causing loss to them – When permissible – Balancing of individual rights versus larger public interest – Supervening public interest – Effect - Held -**

Supervening public interest entitles Government to change its stand and gives it the power to withdraw from a representation made by it – It may work adverse to the representees – Even applying the principles enshrined in Arts. 39(b) and (c) of the Constitution, egalitarian equality requires the Government to strike a balance between competing claims. **(M.P. Mathur v. DTC, AIR 2007 SC 414)**

◆ **Subordinate/Delegated Legislation – Validity of.**

A delegated legislation can be declared invalid by the Court mainly on two grounds: firstly, that it violates any provision of the Constitution and secondly, it is violative of the enabling Act. If the delegate which has been given a rule-making authority exceeds its authority and makes any provision inconsistent with the Act and thus overrides it, it can be held to be a case of violating the provisions of the enabling Act but where the enabling Act itself permits ancillary and subsidiary functions of the legislature to be performed by the executive as its delegate, the delegated legislation cannot be held to be in violation of the enabling Act. [See vide *State of M.P. v. Bhola* (2003) 3 SCC 1] **(Novvaads v. Secretary, Department of Municipal Administration & Water Supply & Another; (2008) 8 SCC 42)**

Administrative Tribunals Act

◆ **S. 28 – Right of election in matter of his own choice – Whether the worker has an option to choose his forum of his own choice – Held, “Yes”.**

In a case of the present nature where, inter alia, an employee maintains a writ petition not only on the ground of violation of the equality clause enshrined under Article 14 of the Constitution of India but also on

the ground of violation of the provisions of the Industrial Disputes Act, 1947, he has an option to choose his own forum. Section 28 does not bar the jurisdiction of the Central Administrative Tribunal. It saves the jurisdiction of the Industrial Tribunal. An employee who claims himself to be a workman, therefore, will have a right of election in the matter of choice of forum. It is, therefore, not correct to contend that the Central Administrative Tribunal had no jurisdiction to pass the impugned judgment. **(Telecom District Manager & Others v. Keshab Deb; (2008) 8 SCC 402)**

Arbitration and Conciliation Act

◆ Section 11 — Application for appointment of an arbitrator

An application for appointment of an arbitrator should be decided as early as possible preferably within six month from date of supply of a copy of the court's order. **(M/s. Dharmendra Construction Co. v. State of Rajasthan and others; Civil Appeal No. 4368 of 2008)**

◆ Section 11(4) — Petition under

Though the order under section 11(4) is a judicial order, having regard to section 11(7) relating to finality of such orders, and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP does not bar such a writ petition. The observations of Court in SBP that against an order under section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as Designate of the Chief Justice. Apex Court repeatedly stressed that Article 136 is not intended to permit direct access to Apex Court where other equally efficacious remedy is available and the question involved is not of any public importance; and that the Court will not ordinarily exercise its jurisdiction under Article 136, unless the appellant has exhausted all other remedies open to him. Therefore the contention that the order of the Civil Judge, Sr. Division rejecting a petition under section 11 of the Act could only be challenged, by recourse to Article 136 is untenable. Appeal allowed. **(Punjab Agro Industries Corporation Ltd. Appellant v. Kewal Singh Dhillon; Civil Appeal No. 5226 of 2008)**

◆ **S. 17 – Power of arbitrator to direct interim measures – Scope of – Under S. 17 of above Act, interim order can be passed by the arbitrator.**

The proceedings are pending before the arbitrator. Under Section 17 of the Arbitration and Conciliation Act, 1996, interim orders can be passed by the arbitrator. The appeal is disposed of with directions that: (i) within a period of ten days from the date of the present judgment, the respondent shall make an appropriate application for interim arrangement before the arbitrator; (ii) within a period of three days from the date of receipt of copy of the application, the appellant shall file the response/objection, if any; and (iii) within a period of ten days thereafter, the arbitrator is requested to dispose of the application in accordance with law. It is open to the respondent to place before the arbitrator the proposal which was filed in the court. (**Gail India Limited v. Bal Kishan Agarwal Glass Industries Limited; (2008) 8 SCC 161**)

Arms Act

◆ **S. 25 – Unlicensed pistol used in contravention of provisions of S. 5 of above Act need not to be interfered.**

The gun was obviously an unlicensed pistol and, in the opinion of the Court, it was obviously used in contravention of Section 5 of the Arms Act. The conviction of the accused appellant, under Section 25 and 27 of the Arms Act was also correctly recorded by the courts below.

In the above circumstances court did not find any merits in the appeal and case was dismissed. (**Pravin v. State of M.P.; AIR 2008 SC 1846**)

Civil Procedure Code

◆ **S.2(2) and 54 - Whether partition decree is – Preliminary or final? – Held “not a final decree.**

A decree may denote final adjudication between the parties and against which an appeal lies, but only when a suit is completely disposed of, thereby a final decree would come into being. A decree may be partly preliminary and partly final. Further, the distinction between “a final decree” and “finality of a decree” is obvious. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees

would be final decrees. Section 2(2) CPC clearly shows as to the nature of the decrees that the court may pass.

For the purposes of construing the nature of the decree one has to look to the terms thereof rather than speculate upon the court's intentions.

A bare perusal of the decree in question shows that it was a preliminary decree and not a final decree. It has not been contended that the parties have partitioned the joint properties by metes and bounds and they are in separate possession of the lands allotted to them. **(Bikoba Deora Gaikwad and Others v. Hirabai Marutirao Ghorgare; (2008) 8 SCC 198)**

◆ **Ss. 2(2), 11 and Or. 9 R. 6 – Ex parte decree – Binding effect of – When amounts to res judicata – Effect of fraud or collusion in obtaining of ex parte decree.**

An ex parte decree is as good and effective as a decree passed after contest and would operate as res judicata on the same principles as a decree passed after contest, unless the party challenging the ex parte decree satisfied the court that such an ex parte decree was obtained by fraud or collusion. **(Saroja v. Chinnusamy, (2007) 8 SCC 329)**

◆ **Section 9 – Jurisdiction**

Under section 9 of the Code of Civil Procedure, the courts shall have jurisdiction to try all suits of civil nature excepting suits of which there is a bar expressly or impliedly provided. It is well settled principle that a party seeking to oust jurisdiction of an ordinary civil court shall establish the right to do so. It is also settled law that exclusion of the jurisdiction of the civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. The provisions of law which seek to oust the jurisdiction of civil court need to be strictly construed. **(Mahant Dooj Das (Dead) through L.Rs. v. Udasin Panchayati Bara Akhara & Anr.; 2008(5) Supreme 425)**

◆ **S. 9 – For ouster of jurisdiction of Civil Court – Heavy burden of proof lies in parties who asserts that Civil Court's jurisdiction is ousted.**

In Dwarka Prasad Agarwal (D) by L.Rs v. Ramesh Chander Agarwal and Others, (2003) 6 SCC 220, a 3 Judge Bench has held that Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil courts to determine all disputes of civil nature unless the same is barred

under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil court is not to be readily inferred. A provision seeking to bar jurisdiction of a civil court requires strict interpretation. The court, it is well settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that the civil court's jurisdiction is ousted.

Thus, from the aforesaid decisions, it is now well established principle of law that the ouster of jurisdiction of a civil court is not readily accepted and heavy burden of proof lies on the party who asserts that the civil court's jurisdiction is ousted and some other court, tribunal or authority has been vested with jurisdiction. **(Mahant Dooj Das (Dead) through L.R. v. Udasin Panchayati Bara Akhara & Anr.; 2008 (4) ALJ 621)**

◆ **Execution of decree — Stay**

The amount of Rs. 2,50,000/-, as directed by the Court by its order dated 5th of April, 2004, was already deposited and the same was already invested by the Registry of this Court in a fixed deposit in a nationalized bank. The appeal can be disposed of with a direction that the entire decretal amount shall stand satisfied if the aforesaid sum of Rs. 2,50,000/- deposited by the appellant with the Registry of this Court is allowed to be withdrawn by the Bank with interest accrued thereon. The appeal shall stand allowed in part and the decree of the trial Court shall stand modified to the extent that the said decree shall stand satisfied for a sum of Rs. 2,50,000/- with interest accrued thereon. The respondent Bank was entitled to withdraw the aforesaid amount deposited in the Registry of the Court with interest accrued thereon. **(M/s. Karnataka Patrika (P) Ltd. versus Syndicate Bank and others; Civil Appeal No. 4189 of 2001)**

◆ **Injunction - Effect of influence by any of the observations made by the Courts below as well as of this Court while disposing of the application for injunction**

The order dated 5th of August, 2005 passed by the High Court of Karnataka at Bangalore in M.F.A. Nos.4120 & 4121 of 2003 by which the order of the trial court granting injunction was set aside and the application for temporary injunction filed by the plaintiff was rejected .Appeals directed . Appeals shall be disposed of by directing that the interim order of

status quo granted by this Court shall continue for a period of another one year from the date of supply of a copy of this order and in the meantime, the trial court shall dispose of the suit without granting any unnecessary adjournments to either of the parties. Trial Court, while deciding the suit, shall not be influenced by any of the observations made by the Courts below as well as of this Court while disposing of the application for injunction. **(Eshwarappa and another v. Vishalakshamma and others; Civil Appeal Nos. 5155-5156 of 2008)**

◆ **Res-judicata – Criteria to apply pointed out.**

Res-judicata is a principle of judicial administration and is based on the common law maxim of public policy aiming at finality of litigation and preventing a litigant from being tried twice over on the same issue.

In order to apply the bar of res-judicata among co-defendants must consider several criteria pointed out in the case of Mt. Munni Bibi and another v. Tirloki Nath and Others (AIR 1931 PC 114). In the said case three tests have been laid down to find out whether the decision in the former suit will operate as res-judicata, between co-defendants. Those tests are:

- (i) There must be a conflict of interest between the co-defendants.
- (ii) It must be necessary to decide this conflict in order to give relief to the petitioner.
- (iii) The question between the co-respondent must be finally decided.

(Brij Narain Singh v. Adya Prasad (Dead) through L.Rs. & Others; 2008 (105) RD 161)

◆ **S. 47 – Cost for causing delay in execution of eviction decree – Determination of.**

The question that now remains to be determined is what should be the extent of damages and exemplary costs that should be imposed upon respondent No. 3. the Court is satisfied, in view of the facts narrated in the instant case, that apart from the decretal amount, the tenant must also pay damages to the land-lord. The period for payment of damages can be broadly put into two compartments. The first compartment will be from the date of the decree i.e. 16th May, 1969 till the date of judgment in Writ

Petition No. 12541 of 1984 i.e. up to 10th February, 1987 and the second compartment will be from 10th May, 1987 till date of delivery of vacant possession of the shop to the decree-holder. For the period falling in the first compartment, the damages shall be at the rate of Rs. 50/- per month from 16th May, 1969 for the next five years; thereafter at the rate of Rs. 100/- per month for the next five years; thereafter at the rate of Rs. 200/- per month up to 10th February, 1987. In respect of the period falling in the second compartment it needs to be noticed that the tenant was agreeable to pay Rs. 300/- per month as rent. The damages, therefore, for the period from 10th May, 1987 for the next five years shall be at the rate of Rs. 300/- per month; for the next five years thereafter at the rate of Rs. 600/- per month; for the next five years thereafter at the rate of Rs. 1200/- per month and thereafter up to the date the vacant possession is given to the landlord at the rate of Rs. 1800/- per month. This apart, the tenant-respondent No. 3 shall also pay costs of Rs. 50,000/- to the petitioner-land-lord towards the cost of litigation. (**Jagdish Saran v. Ixth Addl. District Judge, Moradabad & Ors.; 2008 (4) ALJ 493**)

◆ **Ss. 47 & 11 and Or. 23 Rr. 3 & 3-A - Execution proceedings – Principles of constructive res judicata is applicable even in execution proceedings. (Lagan Jute Machineries Co. Ltd. v. Candlewood Holdings Ltd., (2007)8 SCC 487)**

◆ **S. 100 – Second Appeal – Without framing substantial question of law – Judgment would be unsustainable and liable to be set aside.**

It is now well settled by catena of decisions of Supreme Court that the High Court in second appeal, before allowing the same, ought to have formulated the substantial question of law and thereafter, to decide the same on consideration of such substantial question of law. In this case, admittedly no such substantial question of law had been formulated and thereafter, the second appeal was allowed. That being the position, we set aside the judgment of the High Court passed in second appeal was set aside and remitted the appeal back to the High Court for fresh decision after formulating the substantial question of law and thereafter, to decide it on merits. (**Bokka Subba Rao v. Kukkala Balakrishna & others; 2008 (105) RD 266**)

◆ **S. 100 – Substantial question of law must be debatable and not previously settled by law of land.**

The Apex Court in the recent case of Santosh Hazari v. Purshottam Tiwari (2004 (55) ALR 22), ruled that a point of law which admits of no two opinions may be preposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not. **(Abdul Salam (Dead) through L. Rs & Others v. Jagdish Prasad (Dead) through LR.; 2008 (105) RD 224)**

◆ S. 100 — Appeals

In the instant case all the appeals and cross objections were dismissed except with certain modifications. In three separate appeals, the first Appellate Court reversed the findings recorded by the trial Court. The first Appellate Court held that Civil Suit No.171 and 172 of 1994 are within the period of limitation as cause of action arose to them when they were excluded from the Joint Hindu Family property in the year 1992. However, in respect of the will, the first Appellate Court held that it is surrounded by suspicious circumstances and consequently decreed the suit holding that the estate of Shiv Dev Singh will vest on the coparceners The first Appellate Court recorded a finding that the execution of the Will was not proved and its execution was surrounded by suspicious circumstances. The finding recorded about the genuineness of the Will was essentially factual. The Courts below analysed the factual position in great detail. Nothing infirm in the conclusions could be shown. It would be proper for the High Court to re-hear the appeal relating to applicability of Article 129 of the Limitation Act and to decide the matter taking note of the factual position. **(Baljinder Singh v. Rattan Singh; Civil Appeal No. 598 of 2005 with C.A. Nos. 601 & 605 of 2005)**

◆ Section 115

It is well settled position in law that under section 115 of C.P.C., the High Court cannot re-appreciate the evidence and cannot set aside the concurrent findings of the courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of the facts if the findings are perverse or there has been a non appreciation or non-consideration of the material evidence on record by the courts

below. Simply because the another view of the evidence may be taken is no ground by the High Court to interfere in the revisional jurisdiction. **(Yunus Ali (Dead) through his L. Rs. V. Khursheed Akram; 2008(5) Supreme 59)**

◆ **S.115 – Revisional jurisdiction under S. 115 CPC and S. 25, Provincial Small cause Courts Act, 1887 – Relative scope-**

There cannot be any doubt whatsoever that the revisional jurisdiction of the High Court under Section 25 of the Provincial Small Cause Courts Act, 1887 is wider than that under Section 115 CPC. But the fact that a revision is provided for by the statute, and not an appeal, itself is suggestive of the fact that ordinarily revisional jurisdiction can be exercised only when a question of law arises. However, this is not to say that under no circumstances can a finding of fact be interfered therewith. A pure finding of fact based on appreciation of evidence although may not be interfered with, but if such finding has been arrived at upon taking into consideration irrelevant factors or therefore relevant fact has been ignored, the revisional court will have the requisite jurisdiction to interfere with a finding of fact. **(Mundri Lal v. Sushila Rani, (2007) 8 SCC 609)**

◆ **O. 1, R. 10(5) – Nature of – A deeming.**

The crucial expression in Order I, R. 10 is “only on the service of the summons”. It is abundantly clear that if any defendant is impleaded subsequently proceedings against him shall be deemed to have begun only from the date of service of summons. Same of course is subject to the provisions of S. 22 of the Indian Limitation Act, 1877 (in short “limitation Act”). In sub-rule (5), words “Indian Limitation Act, 1877” – are substituted by legislature as “Limitation Act, 1963” and “section 22” by “section 21”. Said provision does not in anyway dilute the significance of the expression “shall be deemed to have begun only on the service of the summons.”

In the instant case, it relates to the defendant and O. 1, R. 10(5) statutorily specifies the date on which the impleadment takes effect O. 1, R. 10(5) is a deeming provision. **(Seenivasan v. Peter Jebaraj and Another; 2008 (105) RD 2170)**

◆ **O. 6, R. 17 – Permissibility of Amendment of pleadings – It can be permissible even at appellate stage provided amendment does not work**

injustice to other parties and is necessary for determination of question in controversy.

Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors.* (AIR 1957 SC 363) which still holds good. It was held that all amendments ought to be allowed which satisfy the two conditions; (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (**North Eastern Railway, Administration, Gorakhpur v. Bhagwan Das (D) by L.Rs.; 2008 (4) ALJ 228**)

◆ **O. VI, R. 17 – Amendment contrary to pleadings, making new case and bared by limitation not permissible.**

Amendment of Pleadings-Written statement- After thirteen and a half years, filed application for amendment of the written statement and the counter claim seeking enhanced amount- No sufficient explanation for delay – No dispute about question of limitation – Making out a new case by alleging incurring damages on continuous basis, which is contrary to the pleadings made in the written statement – Held, as made by the appellants in their amendment petition was already barred, no purpose would be achieved by allowing the amendment which has already stood barred by the law if limitation – Interference declined. (**South Konkan Distilleries v. Prabhakar Gajanan Naid, Civil Appeal No. 5567 of 2008**)

◆ **O.7 R.1 and O.20, R. 6 - Balance court fees on actual damages determined by court – When payable- Held, the same is to be paid when a final decree is to be prepared.**

Damages cannot be granted without payment of court fee. In a case where damages are required to be calculated, a fixed court fee is to be paid but on the quantum determined by the court and the balance court fee is to be paid when a final decree is to be prepared. In such a situation, having

regard to Order 20 Rule 12 CPC, a preliminary decree was required to be passed. **(Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600)**

◆ **O. IX, R. 9 – Scope of – Bars a subsequent suit by the plaintiff in respect of the same cause of action.**

Submission of the Counsel for the appellant that the suit was instituted on wrong legal advice, which was dismissed in default, is a big hurdle, which the plaintiff has miserably failed to overcome. Order IX R. 9 CPC specifically bars a subsequent suit by the plaintiff in respect of the same cause of action. **(Mool Chand v. Smt. Neelam Devi and Another; 2008 (105) RD 243)**

◆ **Or. 20 R. 12 and Or. 7 Rr. 7 & 8 – Suit for possession and injunction to restrain interference with possession – No claim made for damages/mesne profits in suit.**

In appeal filed by defendant, High Court in addition to upholding decree for possession and injunction, passed directions of payment of compensation to plaintiff and granting liberty to plaintiff to file separate suit of damages/mesne profits. **(Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600)**

◆ **O. 22, R. 11 – Non-substitution of legal heir – Effect of**

Title does not pass to a person if he is in possession on the basis of agreement. Bhumidhari land in Uttar Pradesh cannot be transferred through agreement and possession under U.P.Z.A. & L.R. Act can be transferred only through registered sale deed/gift deed. Reading the whole plaint, it becomes quite clear that Viswanath Tiwari was a superfluous party. By maximum, he may be described as ‘proper but not necessary party’. Even in his absence, the suit would have been perfectly maintainable. **(Chandra Bhan Singh & Ors. v. Vijai Shanker Tiwari & Ors.; 2008 (4) ALJ 118)**

◆ **Execution of decree – Execution court has to comply with stages of (1) attachment (2) Proclamation and (3) Sale.**

When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the decree, to comply with the following stages before a property is sold in execution of a particular decree:

- (a) Attachment of the Immovable Property;

- (b) Proclamation of Sale by Public Auction;
- (c) Sale by Public Auction.

Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are O. XXI, R. 54 and O. XXI, R. 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed. **(M/s. Mahakal Automobiles and Another v. Kishan Swaroop Sharma; 2008 (105) RD 254)**

◆ **Or. 34 Rr. 1 & 5, Or. 21 R. 92 and Or. 1 R. 9 – Relative scope and applicability – Sale decree passed unde Or. 34 for enforcement of statutory charge – Decree passed due to fraud committed by judgment-debtor against an earlier vendee of the property.**

V selling property to S by registered sale deed – Some property tax remaining unpaid – Neither V nor S intimating Municipality of factum of sale as required by the State Statute, nor vendee's name mutated in municipal records – Municipality filling suit to enforce statutory charge for non-payment of proeprty tax – In said suit, V not contesting suit property and sending notice of suit to wrong address of S, despite having S's correct address – Said suit decreed and property sold by auction and bought by M, wife of V – M later selling the property to R, who in turn selling the same to the appellants – S, on learing of auction-sale of the property, filling suit for declaration and possession, but failing to implead the decree-holder Municipality – Suit of S decred up to second appeal – Sustainability – Held, purpose of implement of necessary party is to see if without it no order can be made effectively – If an effective order can be made, the suit will not be defeated – Or. 21 R. 92(4) does not take into consideration the effect of a statutory charge on a property vis-a-vis the statutory right of any person(s) having interest in the property to redeem or sell the same at any point of time – However, assuming that courts below had erred in holding that Or. 21 R. 92(4) was not applicable, exercising power to do complete justice under Art. 142 of the Constitution, Supreme Court passing directions in the spirit of Or. 21 R. 92(5) – Right of Municipality to recover the property tax not disputed by any party, nor any fraud alleged against it – Also, R and the appellants having purchased the property pendente lite and r/w S.3 TP Act,

1882 deemed to have had notice to the sale to S and were also guilty of **suppressio veri** – Also, S was liable for part of the property tax as per the State statute as well – Hence, S directed to pay the amount of property tax by way of redemption of charge in favour of the Municipality and amount available with court from auction – sale directed to be paid to appellants – Transfer of Property Act, 1882, Ss. 100, 52, 55 and 3 – Applicability – Constitution of India, Arts. 142 and 136 – Exercise of equity jurisdiction under – When warranted – Protecting interest of victim of fraud.

V, the original Defendant 3, was the owner of the suit property. He transferred his right title and interest therein by reason of a registered deed of sale in favour of one S, the original plaintiff 1 in the suit and mother of Respondents 1 and 2. The factum of sale was not intimated to the authorities of the Municipality either by V or S. The vendee's name was not mutated in the records of the municipality. Property tax in respect of premises in question had not been paid for about three years. As prescribed in the statute, property tax for two quarters was to be paid by V whereas the rest was to be paid by S. The matter relating to payment of property tax was governed by the T.N. District Municipalities Act, 1920 (“the 1920 Act”).

With a view to enforce a statutory charge in respect of unpaid property tax, as laid down in the 1920 Act, the Municipality filed a suit. S was not made a party therein. Although V entered his appearance in the suit but at the subsequent stages he did not appear. Yet again, V did not inform the court about the fact that he had sold the property in favour of S. He allegedly sent information to S in regard thereto, but admittedly, the latter was sent at a wrong address. The said suit was decreed in 1978. the Municipality filed an application for execution of the said decree. The property in question was put up on auction- sale, the upset price wherefore was fixed at Rs 20,000. However, as allegedly no buyer was available, an application for reduction of upset price was filed. It was directed to be reduced to Rs 10,000, but therefore no notice was issued to the judgment-debtor, V as was required in terms of Order 21 Rule 66 CPC. Yet again without any other order being passed for further reduction of the upset price, the suit property was sold on auction for a sum of Rs 8010 in favour of one M , original Defendant 1. Though initially it was sought to be contended that V and M were not husband and wife, during the course of litigation it was established that M was the wife of V, and this factum was not disputed before the Supreme Court. An application for withdrawal of the said auction amount was filed by the Municipality, which was allowed

and a cheque was directed to be issued in its favour. The said order was complied with.

M sold the said property in favour of one R for a sum of about Rs 41,000 by a registered deed of sale dated 22-8-1981. Having learnt that the property in question had been sold in auction, S filed a suit for declaration and possession, against M, V and others. The plaintiff-respondent, S then allegedly had no regard to the sale of the said property in favour of R. In her written statement, Defendant 1, M denied that she was the wife of the judgment-debtor, V and disclosed that she had sold the property during the pendency of the said suit. R, despite knowledge of the pendency of the suit sold the said property in favour of the appellants. R and the appellants thereafter on an application made in that behalf were impleaded as defendants in the said suit. In their written statement, the appellants raised a plea that the Municipality was a necessary party. The said suit was decreed and a first appeal and second appeal there against were both dismissed. Hence this appeal by special leave.

The appellant-defendants contended the following:

- (i) In view of the mandatory provisions contained in Order 21 Rule 92(4) CPC, the decree-holder (the Municipality) was a necessary party and in its absence the judgment and decree passed by the courts below are nullities.
- (ii) In terms of Order 1 Rule 9 CPC, non-impleadment of a necessary party would render a suit not maintainable.
- (iii) S having questioned the title of V as on the date of holding of the auction, in terms of the aforementioned provision, she was bound to implead the Municipality as a party defendant in the suit.
- (iv) The finding of commission of fraud as alleged by the plaintiff S either on the part of the Municipality or on the part of the appellants and his predecessors, would not render the auction-sale void.
- (v) Had the Municipality been impleaded as a party, it could have shown that no fraud had been committed on the court in the matter of holding of the auction.

- (vi) The plaintiff S, having not examined herself, and only an auditor having been examined on her behalf, an adverse inference should have been drawn in that regard by the courts below.

The respondent-plaintiffs contended the following:

- (i) A specific plea of fraud having been raised on the part of the auction- purchaser M, who was wife of the judgment-debtor V and the defendant in the suit, and a finding of fact in that behalf having been arrived at by the trial court as also by the appellate court, the Municipality cannot be said to be a necessary party.
- (ii) The plaintiff-respondents had rightly been held to have not raised any contention in regard to commission of fraud on the part of the Municipality; as had been held by the trial Judge as also the appellate court, it was not a necessary party to the suit.
- (iii) The suit as framed did not attract the provisions of Order 21 Rule 92 CPC, as a decree passed in favour of the judgment-debtor V was a mortgage decree, as contemplated under Order 34 Rule 1 CPC vis-a-vis the Transfer of Property Act, 1882.
- (iv) Order 21 Rule 92, in any event, must be given a contextual meaning.
- (v) The principle of caveat emptor will be applicable in this case.
- (vi) The appellants being purchasers pendente lite were bound by the decree passed by the trial Judge.

Dismissing the appeal in the terms below the court held:

If any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law, and the same is rendered a nullity. In a case of nullity, even the principles of natural justice are not required to be complied with. Once it is held that by reason of commission of a fraud, a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also a nullity it would be wholly inequitable to confer a benefit on a party who is a beneficiary thereunder.

A decree passed in terms of Order 34 Rule 1 CPC is somewhat different from a decree passed in an ordinary money suit. If in terms of the provisions of the statute the original vendee plaintiff-respondents are found to be liable to pay the property tax, at an appropriate stage, they can redeem the charge. The plaintiff-respondents did not claim any relief against the Municipality. Its right, title and interest over the property having regard to the statutory charge there over has not been denied or disputed. Non-joinder of a proper party in terms of Order 1 Rule 9 would not render a suit not maintainable. It is true, the purpose of impleadment of a necessary party is to see as to whether without it no order can be made effectively. If an effective order can be made, the suit will not be defeated. A decree which is passed in terms of Order 21 Rule 92(4) does not take into consideration the effect of a statutory charge on a property, vis-a-vis the statutory right of any persons having interest in the property to redeem or sell the same at any point of time. (Paras 16, 25 and 27) (**T. Vijendradas v. M. Subramanian, (2007) 8 SCC 751**)

Constitution of India

◆ **Art. 15(5) – Reservation for SC/ST in education institution – Principal of creamy layer would not be applicable.**

So long as ‘creamy layer’ is not applied as one of the principles of equality, it cannot be applied to Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. For the purpose of reservation, the principles of ‘creamy layer’ are not applicable for Scheduled Castes and Scheduled Tribes. Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. (**Ashoka Kumar Thakur v. Union of India; 2008 AIR SCW 2899**)

◆ **Art. 19(1)(a) – Right to advertise – provisions prescribing regulations for erection of hoardings, if they do not regulate advertisement, would not be violative of Art. 19(1)(a).**

Writ petitions were filed in the High Court challenging the validity of Sections 326-A to 326-J of the Chennai City Municipal Corporation Act, 1919 (4 of 1919) and the Chennai City Municipal Corporation (Licensing of Hoardings and Levy and Collection of Advertisement Tax) Rules, 2003 (for short “the Advertisement Rules”). The High Court dismissed the said writ

petitions. Directions were issued to the authorities concerned for removal of unauthorized hoardings. It was pointed out that no licence was to be granted and/or renewed in respect of any hoarding which was not in conformity with the provisions of the Chennai City Municipal Corporation Act, 1919 (4 of 1919) and the Advertisement Rules. A committee was constituted to oversee the operation of the removal of illegal and unauthorized hoardings in the city of Chennai. The authorities were directed to remove and demolish all hoardings erected on or in front of any places of historical or aesthetical importance, popular places of worship as enlisted by the Committee as well as on or in front of the educational institutions and hospitals. If applications were made by hoarding owners within the time prescribed by the court, the said applications were to be decided and if the hoardings were found to be illegal, they were to be removed without further notice. It was also directed that no civil court must entertain any application against demolition or removal of the unauthorized hoardings and the writ petitions challenging the demolition were to be placed before the Bench of the Chief Justice of the High Court.

The present appeals and the writ petitions assailed the said judgment of the High Court. It was contended that the Advertisement Rules were violative of Article 19(1)(a) of the Constitution.

It was further submitted that the Advertisement Rules used the expression “obstruction” which referred to physical obstruction. Challenge was also made to Rule 6 and Rule 10 of the Advertisement Rules. It was argued that the right to regulate being exercised in the instant case was restrictive and not regulatory.

The Supreme Court has held that Very narrow and stringent limits have been set to permissible legislative abridgement of the right to free speech and expression, and this was doubtless due to the realization that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible.

In the present case, the relevant provisions appear to be not restrictive but are regulatory. There is no ban on advertisement hoardings but obstructive and destructive ones are to be prohibited. The Chennai City Municipal Corporation Act, 1919 (4 of 1919) and the Chennai City Municipal Corporation (Licensing of Hoardings and Levy and Collection of

Advertisement Tax) Rules, 2003 do not regulate advertisement. They regulate putting up of any hoarding which is found to be objectionable, destructive or obstructive in character. It cannot be said that there is infringement of freedom of speech. **(Novvaads v. Secretary, Department of Municipal Administration & Water Supply & Another; (2008) 8 SCC 42)**

◆ **Art. 21-A – Right to education – To be implemented on priority basis.**

Free and compulsory education is now a fundamental right u/A. 21-A. The State is duty bound to implement this Article on a priority basis. There has been grave laxity in its implementation. This laxity adversely affect almost every walk of life. Nothing is more important for the Union of India that to implement this critical Article. Union of India directed to set a time-limit within which Article 21-A is going to be completely implemented.

The most important fundamental right is Article 21-A, which, in the larger interest of the nation, must be fully implemented. Without Article 21-A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. In order to give effect to the constitutional right under Article 21-A, it is imperative that the Central Government pass suitable legislation.

The Parliament should criminally penalize those parents who receive financial benefits and, despite such payments, send their children to work and penalize those employers who preclude children from attending school or completing homework. It has become necessary that the Government set a realistic target within which it must fully implement Article 21-A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. **(Ashoka Kumar Thakur vs. Union of India; 2008 AIR SCW 2899)**

◆ **Article 32**

Petition under Article 32. The present writ petition is instituted by the petitioners as pro-bono publico and is in the nature of Public Interest Litigation. The petitioners have approached the Court by invoking Article 32 of the Constitution praying for an appropriate writ, direction or order, restraining respondent No. 2 State of Karnataka and respondent No. 4 Sree

Swarna Energy Limited, from constructing a Mini Hydro Power Project at Rajolibanda Diversion Scheme by quashing and canceling the Power Project. A prayer was also made to direct the State of Karnataka to regulate water at RDS anicut and to ensure smooth flow of water in the RDS canal to the extent of full allocated water of 15.9 TMC to the State of Andhra Pradesh. By way of interim relief, a prayer was made to grant stay against construction of Power Project at RDS. In the light of the scheme as envisaged by the makers of the Constitution as also by Parliament under the Act XXXIII of 1956 in connection with water disputes between inter-States, it is clear that such disputes cannot be made subject matter of petition either in a High Court under Article 226 or in this Court under Article 32 of the Constitution. Probably, Article 262 is the only provision which enables Parliament to oust and exclude jurisdiction of all Courts including the Supreme Court. It is also pertinent to note that Clause (2) of Article 262 contains non-obstante clause — the present petition under Article 32 of the Constitution is not maintainable and is liable to be dismissed, no further action is called for. **(Atma Linga Reddy and others v. Union of India and others; Civil Appeal No. 197 of 2005)**

◆ **Article 32 — Petition under — Request for directing**

The case of the petitioner was that he is an under-trial prisoner lodged in District Jail, Bareilly since more than ten years i.e. since August, 1998. He has approached this Court for enforcement of fundamental rights guaranteed under Articles 14, 19, 20 and 21 of the Constitution of India — it was the case of the petitioner that he was implicated as an accused in as many as 48 cases in six different States for commission of offences punishable under Sections 406, 409 and 420 read with Section 120B of the Indian Penal Code, 1860 (IPC) and also under Section 138 of the Negotiable Instruments Act, 1881. According to the prosecution case, crores of rupees had been collected by the Company from the general public. Proceedings were initiated by the accused by filing an application under Section 482 of the Code in the High Court for quashing of criminal proceedings. A prayer was also made that all cases be tried by one Court. Considering the relevant provisions of the Code, particularly relating to framing of charge and conduct of trial, Court held that in the light of various provisions and the scheme of the Code, no direction could be given by a Court to consolidate all cases against the accused and to be tried by one Court. Such a direction would be contrary to express provisions of the Code. Even in exercise of inherent powers under Section 482, the High

Court could not direct an authority to act contrary to law. No retrospective effect has been given to the said provision and as such Section 436A does not directly apply to the facts of the case. The hard reality equally important also cannot be lost sight of the fact that the petitioner is in jail since more than ten years. It would, therefore, be appropriate if limited relief is granted to the petitioner. The ends of justice would be served if this Court partly allows the petition and issue the directions. **(Pramod Kumar Saxena Appellant versus Union of India and others; Writ Petition (CRL) No. 58 of 2007)**

◆ **Article 136 — Interference**

In execution proceeding the executing court allowed the execution petition accepting the calculations made by the judgment-debtor including interest over interest on the amount awarded by the Arbitrator. Feeling aggrieved, a Civil Revision Case was filed by the Union of India before the High Court in which the core challenge was that whether interest over the interest was payable or not. The observation made by the High Court in the impugned order would show that the question raised in the revision case would very well be adjudicated in the appeal pending before the appellate court. No interference was called for under Article 136 of the Constitution. **(Union of India v. M/s. Harbans Singh Tuli & Sons Built Pvt. Ltd.; Civil Appeal No. 5630 of 2002 with C.A. Nos. 5631 & 7314 of 2002 & 7315-7316 of 2001)**

◆ **Article 226**

Petition was filed under section 226. Summary dismissal. Appeal filed. Laxmi Vishnu Textile Mills operating 2 cotton mills. There were large number of workers in the mill and there was considerable profit in the business. By the passage of time, however, the Company started incurring losses and things turned worse in later eighties. Proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985. The High Court dismissed the writ petition observing that it was not a fit case to interfere with by an order dated February 12, 2007 in exercise of extraordinary jurisdiction under Article 226 of the Constitution. The said order is challenged by the appellant in this appeal. The very width of the power under Article 136 is a warning against its 'freewheeling exercise save in grave situations'. Circumspection and circumscription must, therefore, induce the Court to interfere with the decision under challenge only if the extraordinary flaws or grave injustice or other recognized grounds are made

out. No secured or unsecured creditor has come forward making grievance that though he was entitled to more amount, he has not been paid such amount. So far as workers are concerned, Court dealt with rights of Representative-Union in detail and held that the Representative Union has preferential right to appear in the proceedings under the Act. Hence, taking any view of the matter, in Court's opinion, this is not a fit case to exercise discretionary and equitable jurisdiction under Article 136 of the Constitution. **(Shivanand Gaurishankar Baswanti v. Laxmi Vishnu Textile Mills and others; Civil Appeal No. 4324 of 2008)**

◆ **Art. 226 – Writ jurisdiction – Findings of Asstt. Registrar, Society regarding validity of election of office bearer are finding of fact and same cannot be interfered with in writ jurisdiction.**

The Assistant Registrar decided the validity of the election pleaded by the parties and he has recorded categorical findings of fact. The petitioner is trying to raise highly disputed questions of facts which cannot be decided in the writ jurisdiction. There is a consistent view that only genuine dispute can be referred to the Prescribed Authority. **(Committee of Management, Yuvak Laghu Madhyamik Vidyalaya, Majhwalia No. 1, Deoria & Anr. v. State of U.P. & Ors.; 2008 (4) ALJ 821)**

◆ **Art. 226 – Contractual liabilities can not be agitated in writ petition U/A. 226.**

The respondents has raised the question of jurisdiction. According to him, this is a contractual matter and cannot be agitated in the writ petition under Article 226 of the Constitution of India.

The repeated judgments of the Court as well as Hon'ble Apex Court are clear on the point that contractual liabilities cannot be agitated in the writ petition under Art. 226 of the Constitution of India. **(Raghunath Prasad Jaiswal v. Life Insurance Corporation of India, Mumbai & Ors.; 2008 (4) ALJ 686)**

◆ **Art. 226 – Abuse of the process of the court/law – Similar core issues in repeated writ applications.**

Maintainability – Res judicata, Art. 226 – Multiple writ petitions on same core issues are Impermissible. **(Udyami Evam Khadi Gramodyog Welfare Sanstha v. State of U.P., (2008) 1 SCC 560)**

◆ **Art. 226, 50 – Judicial activism – Taking over functions of legislature or executive would not be justified.**

The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegation is true, it does not justify the judiciary in taking over the functions of the legislature or executive, firstly because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly because the judiciary has neither the expertise nor the recourses for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfill their expectations, or by other lawful means e.g. peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs.

The worst result of judicial activism is unpredictability. Unless Judges exercise self restraint, each Judge can become a law unto himself and issue directions according to his own personal fancies, which will create chaos.

The people must know that Courts are not the remedies for all ills in society. The problems confronting the nation are so huge that it will be creating an illusion in the minds of the people that the judiciary can solve all the problems. No doubt, the judiciary can make some suggestions/recommendations to the legislature or the executive, but these suggestions/recommendations cannot be binding on the legislature or the executive, otherwise there will be violation of the seven Judge Bench decision of the Supreme Court in 2002 AIR SCW 1841, and violation of the principle of separation of powers. The judiciary must know its limits and exercise judicial restraint. The people must also realize that the judiciary has its limits and cannot solve all their problems, despite its best intentions. The problems facing the people of India have to be solved by the people themselves by using their creativity and by scientific thinking and not by using judicial crutches like PILs. These problems e.g. poverty, unemployment, price rise, corruption, lack of education, medical aid and housing, etc.) are so massive that they can only be solved by certain historical, political and social forces that can only be generated by the people themselves using their creativity and scientific thinking. **(A Regd. Society v. Union of India; 2008 AIR SCW 3164)**

◆ **Article 311 – Applicability of**

Services and posts of non-teaching staff of Secondary Schools and Intermediate Colleges recognized under U.P. Intermediate Act, 1921, run and managed by private committee of Management are not services and posts in connection with affairs of Union of India or of any States as contemplated under provisions of Art. 309 of Constitution, therefore, the provisions of Art. 309 of Constitution has no application with recruitment of employees of such institution. Thus appointment on Class IV post of institution cannot be governed and regulated by rules framed by Governor of Uttar Pradesh under proviso to Art. 309 of Constitution, instead thereof the appointment/recruitment of Class IV employees in educational institution recognized under U.P. Intermediate Education Act, are governed by the Regulation 100 to 107 of Chapter III framed under the said Act. Therefore despite Rule-2 of said Rules have overriding effect upon other Service Rules even then such overriding effect of said Rules is confirmed to only those Rules which have been framed by the Governor of the State under proviso to Art. 309 of Constitution cannot travel beyond the aforesaid rule-making power of the Governor. (**Smt. Shikha & Anr. v. State of U.P. & Ors.; 2008 (4) ALJ 442**)

◆ **Art. 311 – Punishment for misconduct – Dismissal from service – Proportionality of**

Where the petitioner, a Ticket Collector in Railways was charged for unauthorisedly using retiring room of Railways only for one night, such a conduct would not amount to not maintaining absolute integrity, not maintaining devotion to duty and this conduct cannot be said to be unbecoming of a railway servant. Therefore, unless and until it is a misconduct it cannot be said that petitioner had violated any provision of Conduct Rules. If authorities were of opinion that petitioner had violated any provision of Service Rules some minor punishment should have been awarded. But as in view of definition of misconduct it cannot be said that act of petitioner was in any way misconduct as defined. It is not the case of the authorities that except this action of the petitioner any point of time there was any complaint against petitioner regarding discharging of his official duty. It was also clear from the record that petitioner had not been afforded proper opportunity which was necessary to follow the principle of natural justice. In such circumstances, awarding punishment of dismissal from service to petitioner is wholly disproportionate and cannot be

sustained. (**Smt. Urmila Varma v. Presiding Officer, Central Govt., Industrial Tribunal-cum-Labour Court, Kanpur & Ors.; 2008 (4) ALJ 635**)

Consumer Protection Act

◆ Section 2 – Any defect in construction activity – Denial of comfort and service to a Consumer.

Any defect Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. If the service is defective or it is not what was represented then it would be unfair trade practice as defined' in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard, quality or grade. (**Faqir Chand Gulati versus M/s. Uppal Agencies Pvt. Ltd. & another; 2008(5) Supreme 76**)

◆ S. 14(1) [as it stood prior to insertion of Cl. (hc) w.e.f. 15-3-2003] and Ss. 18 & 22(1) – Directions – Validity of – Issuance of direction to issue corrective advertisement to neutralise the effect of the misleading advertisement – Held, not permissible. (Godfrey Phillips India Ltd. v. Ajay Kumar, (2008) 4 SCC 504)

◆ Ss. 14(1)(d), 18 and 22(1)- Compensation – Condition precedent for grant of compensation, held, is loss or injury suffered due to negligence of the opposite party.

In the absence of allegation or material on record to show negligence, grant of compensation, held, improper. (**Godfrey Phillips India Ltd. v. Ajay Kumar, (2008) 4 SCC 504**)

◆ Ss. 23, 21(a), 22(1) and 2(1)(c)(iii) & (o) – Medical Service – Compensation for deficiency in – Mitigating circumstances – Acting in good faith for the benefit of patient, albeit in excess of patient's consent.

Unmarried woman aged 44years, on laparoscopic examination with her consent, found to be suffering from endometriosis – However, without her consent, while she was still under general anesthesia and there was no medical emergency, the doctor performing an abdominal hysterectomy

(removal of uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes) as in the doctor's opinion that would provide permanent relief to the patient and was likely to be acceptable to the patient while here mother had allegedly already consented to such a course – In such circumstances, the said surgery although amounted to a tortious act of assault and battery and, therefore, deficiency in service, the doctor having acted in good faith for benefit of the patient, directed to forego the fee charged for surgery and pay Rs. 25,000 to the patient as compensation. **(Samira Kohli v. Dr. Prabha Manchanda, (2008) 2 SCC 1)**

◆ **Negligence – Resort to radical surgery in preference to conservative treatment, if on facts amounted to.**

Held, the doctor could not be said to be negligent merely because of such preference – Tort Law – Negligence – Medical practitioners – Consumer Protection Act, 1986, Ss. 2(1)(c)(iii) & (o) – Medical service – Deficiency in – Negligence. **(Samira Kohli v. Dr. Prabha Manchanda, (2008) 2 SCC 1)**

◆ **Insurance – Lapse of policy due to non-payment of premium in time – Repudiation of claim – Permissibility.**

Held, as grace period is one month therefore, State Commission was not justified in holding that payment was made within the grace period – Condition 3 of policy, relating to revival of discontinued policy, shows that it can be revived during th lifetime of the insured – In the instant case, the cheque was admittedly received by Corporation after death of the insured – Further, revival takes effect only after the same is approved by the Corporation and is specifically communicated to the life insured. **(LIC of India v. Jaya Chandel, (2008) 3 SCC 382)**

Contempt of Court Act

◆ **S. 2(b) – Taking undue advantage of observations made by Supreme Court also amount to inference with order passed by Supreme Court in imparting justice.**

Respondent 1 herein appeared as a private candidate in the Intermediate Examination conducted by U.P. Board of High Schools and Intermediate Education from Janta Inter College, Azamgarh (U.P.). His result was withheld. A provisional marksheet was purported to have been issued to him without showing that his result for Intermediate Examination had been withheld. On the basis of the said purported provisional

marksheets, he pursued further studies and completed his graduation as also post-graduation. He was also employed as a teacher. The Principal of the college informed him that his result in the Intermediate Examination has been cancelled. Questioning the said order, a writ petition was filed. The said writ petition was allowed by a learned Single Judge of the High Court. Aggrieved, the petitioner herein preferred a special appeal before a Division Bench which was summarily dismissed. The petitioner herein approached this Court under Article 136 of the Constitution of India. In Civil Appeal No. 4034 of 2001 arising out of the said special leave petition, this Court in its judgment dated 3.9.2003, while allowing the same. Made the observations as:

Indisputably, taking advantage of the said observations, contemnor Respondent 1 filed an application on 28.9.2003 before contemnor Respondent 2 with a prayer to permit him to appear at the Intermediate Examination as a private candidate. No action was taken thereupon. He filed a writ petition before the Allahabad High Court which was marked as CMWP No. 2088 of 2004. The same was finally disposed of, directing:

“Having heard Shri S.K. Yadav, learned counsel for the petitioner as well as learned Standing Counsel appearing for Respondents 1 and 2 State and on perusal of the record, this writ petition is disposed of with a direction to the Secretary. U.P. Board of High Schools and Intermediate Education, Allahabad, Respondent 2, to pass suitable order on the application of the petitioner dated 28.9.2003 in accordance with law as expeditiously as possible preferably within a period of two months from the date of filing of a certified copy of this order along with a copy of the application dated 28.9.2003 before the said Respondent 2.”

On a plain reading of the said order, it would be evident that the fraud practiced by the alleged contemnor Respondent 1 was not condoned by this Court. His result was declared to be set aside. The judgment of the Allahabad High Court was expressly reversed. An observation, however, was made only to the effect that in the event, any rule permits contemnor Respondent 1 to appear at the examination, the Board would be free to take a decision thereon. It now stands admitted that there does not exist any rule in terms whereof, contemnor Respondent 1 could appear at the examination. Even otherwise his application was confined to only

appearing at the examination. On what basis the certificate was granted has not been disclosed. It is not an ordinary mistake, as was submitted by Mr. Dwivedi. The said certificate, if had not been withdrawn, would have restored the status of contemnor Respondent 1. He would have got back his service. He would have claimed even other benefits from the college, where he had been serving. The conduct of contemnor Respondent 1 is, therefore, not free from blemish. He made a representation before this Court. The basis of said representation, it now transpires, is non-existent. What he could have done was to search out the relevant rule, which was applicable in this case. He filed a writ petition before the High Court only because no action was taken. He did not inform the High Court that there did not exist any rule. The Court, therefore, are of the opinion that contemnor Respondent 2 must have issued the certificate on extraneous consideration. Contemnor Respondent 1 is a beneficiary of the said illegal and fraudulent certificate.

Submission of the learned counsel appearing on behalf of contemnor Respondent 1 that the contempt petition is not maintainable is not correct. Although no direction had been issued by this Court, evidently the earlier certificate was directed to be cancelled. If that be so, contemnor, Respondent 1 could not have been indulged in any act which would amount to act of camouflage of the record thereof. Taking undue advantage of the observations made by this Court also amounts to interference with the order passed by this Court in imparting justice. **(Ram Preeti Yadav v. Mahendra Pratap Yadav and Others; (2008) 3 SCC (Cri) 158)**

◆ **S.2(b) of Contempt of Courts Act - Willful disobedience – Selection process completed as directed by the High Court but selected person not appointed on the ground that the post stood abolished – Held, no contempt committed. (Balakrushna Behera v. Satya Prakash Dash, (2008) 1 SCC 318)**

Contract Act

◆ **S. 23 – Power to enter into agreement -**

When the first agreement for sale was executed Respondent did not possess any power to enter into the agreement Such power was given but again withdrawn -On the two dates which are relevant the respondent had no legal right in respect of the suit property

The suit for specific performance on the basis thereof was incompetent. **(Abdul Khader v. Abdul Wajid, Special Leave Petition (C) No. 2770 of 2006)**

◆ **S. 55 – Time whether of the essence of the contract.**

Sale of immovable property – General presumption according to Constitution Bench decision in Chand Rani case, (1993)1 SCC 519 that time is not the essence unless contrary intention is expressed in unequivocal language. **(Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar, (2008)4 SCC 464)**

Criminal Trial

◆ **Bride burning credibility of oral dying declaration – discarding of evidence of witness deliberately favouring the defence**

In the present case the dying declaration recorded by Special Judicial Magistrate PW 5 and PSI PW 7 the deceased clearly unequivocally attributed burned injuries caused to her to the appellants (A1, A2 and A3). PW 1 father of the victim corrected himself in a calculated manner so as to oblige the accused for some unknown reasons. The High Court was right in relying upon the evidence of Special Judicial Magistrate (PW 5) and the dying declaration of the deceased discarding the testimony of PW 1 father of the victim. There is no ground to interfere with the order of conviction of sentence recorded by the Trial Court and confirmed by the High Court. **(Vikas v. State of Maharashtra, (2008) 2 SCC 516)**

◆ **Conviction based on circumstantial evidence – Requirement for.**

It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. However, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstance. **(Sattatiya v. State of Maharashtra, (2008) 3 SCC 210)**

◆ **Consideration of circumstantial evidence**

Where the evidence is of a circumstantial nature, circumstances from which the conclusion of guilt is to be drawn should in the first

instance be fully established, and the facts, so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and they should be such as to exclude hypothesis than the one proposed to be proved. In other words, there must be chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. **(Vinay D. Nagar v. State of Rajasthan, (2008) 2 SCC (Cri) 666)**

◆ **Injured Witness – Value of Evidence.**

Evidence of such witness lends more credence as normally he would not falsely implicate a person thereby protecting the actual assailant. **(Vijay Shankar Shinde v. State of Maharashtra, (2008)2 SCC 670)**

◆ **Non-explanation of injuries on accused by prosecution – Inference.**

In a murder case non-explanation of injuries sustained by accused at about the time of occurrence or in the course of altercation is a very important circumstance from which the court can draw following inferences : (1) that prosecution has suppressed genesis and origin of the occurrence and has thus not presented the true version; (2) that witnesses who have denied the presence of injuries on 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 person of the accused, it is rendered probable so as to throw doubt on the prosecution case. **(Babu Ram v. State of Punjab, (2008)3 SCC 709)**

◆ **Testimony of – Conviction on basis of – Permissibility**

Where testimony of sole eyewitness PW 2 was not shaken although he was cross-examined at length and the same was corroborated by evidence of PW 1 (who did not support the prosecution version in toto), held, conviction based on sole testimony of PW 2 was not liable to be interfered with. **(Kunju v. State of Tamil Nadu, (2008)2 SCC 151)**

Criminal Procedure Code

◆ **S. 98 – Custody of major girl to her father is not against her welfare.**

The custody of a girl with her father, even if, she is major is not against her welfare from any stretch of imagination of a reasonable person.

Her custody with her father would provide her a healthy, fair and moral atmosphere to live in, whereas such atmosphere cannot be expected if she is kept in Nari Niketan or where she is left free to go to any place of her choice. The objections raised by the learned counsel for the opposite party No. 4 are therefore, rejected. **(Niki Gupta v. State of U.P. & Ors.; 2008 (4) ALJ 420)**

◆ **S. 125 — Application under**

Order of maintenance modified to the extent that the High Court reduced the amount of maintenance from Rs.2,000/- to Rs.750/- to appellant No.1-wife and from Rs.1,000/- to Rs.750/- to appellant No.2- daughter. The High Court also directed that the amount of maintenance would be payable to the applicants-appellants not from the date of the application but from the date of the order. The said order was challenged by the appellants in the present appeal. Ends of justice would be served if the court holds that both the appellants are entitled to an amount of Rs.1000/- each per month as maintenance. The appellants would be entitled to the said amount of maintenance from the date the Amendment Act, 2001 came into force. i.e. September 24, 2001. So far as the order of payment of 'interim' maintenance passed by the Magistrate is concerned, the same was in consonance with law and no interference is called for. **(Shail Kumari Devi and another v. Krishan Bhagwan Pathak @ Kishun B. Pathak; Civil Appeal No. 4666 of 2008)**

◆ **S.125 – Maintenance – Entitlement to – Muslim husband's marriage with sister of existing wife – Legality of – Such marriage held, irregular (fasid) and not void (batil)**

The bar of unlawful conjunction (jama bain-almahramain) renders a marriage irregular and not void. Consequently, under the Hanafi law as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance under the provision of Section 125 Cr.P.C. **(Chand Patel v. Bismillah Begum, (2008) 4 SCC 774)**

◆ **Maintenance of Rs. 2,00,000/- — Failure to pay to the wife — Revision case — Dismissal by High Court — Appeal against**

The High Court was not justified in rejecting the said revision case without going into the merits of the case and only on the ground that since

the payment of maintenance of Rs.2,00,000/- (Rupees Two Lakhs) as directed earlier was not deposited, the Civil Revision case must be dismissed. The High Court to decide the Civil Revision case on merits and in accordance with law if, within a period of six weeks, the husband pays the balance amount of Rs. 76,000/- and also go on paying the wife at the rate of Rs.7,000/- per month till the final order is passed by the High Court in the Civil Revision case. **(Sanjay Narain Appellant v. Mrs. Monika Civil Appeal No. 5647 of 2008)**

◆ **S. 154(1), 154(2), 154(3), 157(1), 190(1)(a) and 200 – Inaction of police to record FIRs, and in cases FIR recorded on court directions, apathy to investigate the case – Directions issued by Supreme Court to State Government.**

The grievance in the present writ petition is that the occurrence had taken place in the month of May and, in that very month, on 11.5.2008, the written report was submitted by the petitioner before the officer in charge of the police station concerned, who sat tight over the matter. Thereafter, when an application to the Superintendent of Police was moved, a first information report (for short “FIR”) was registered. Even thereafter, steps were not taken either for apprehending the accused or recovery of the minor girl child.

It is a matter of experience of one of us (B.N. Agrawal, J.) while acting as Judge of the Patna High Court, Chief Justice of the Orissa High Court and Judge of this Court that in spite of law laid down by this Court, the police authorities concerned do not register FIRs unless some direction is given by the Chief Judicial Magistrate or the High Court or this Court. Further, experience shows that even after orders are passed by the courts concerned for registration of the case, the police does not take the necessary steps and when matters are brought to the notice of the inspecting Judges of the High Court during the course of inspection of the courts and Superintendents of Police are taken to task, then only FIRs are registered. In a large number of cases investigations do not commence even after registration of FIRs and in a case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable dispatch. At times it has been found that when harsh orders are passed by the members of the judiciary in a State, the police becomes hostile to them, for instance, in Bihar when a bail petition filed by a police personnel, who was the accused was rejected by a member of the Bihar

Superior Judicial Service, he was assaulted in the courtroom for which contempt proceeding was initiated by the Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.

On the other hand, there are innumerable cases that where the complainant is a practical person, FIRs are registered immediately, copies thereof are made over to the complainant on the same day, investigation proceeds with supersonic jet speed, immediate steps are taken for apprehending the accused and recovery of the kidnapped persons and the properties which were the subject-matter of theft or dacoity. In the case before us allegations have been made that the Station House Officer of the police station concerned is pressurizing the complainant to withdraw the complaint, which, if true, is a very disturbing state of affairs. We do not know, there may be innumerable such instances.

In view of the above, we feel that it is high time to give directions to the Governments of all the States and Union Territories besides their Director Generals of Police/Commissioners of Police as the case may be to the effect that if steps are not taken for registration of FIRs immediately and copies thereof are not made over to the complainants, they may move the Magistrates concerned by filing complaint petitions to give direction to the police to register case immediately upon receipt/production of copy of the orders and make over copy of the FIRs to the complainants, within twenty-four hours of receipt/production of copy of such orders. It may further give direction to take immediate steps for apprehending the accused persons and recovery of kidnapped/abducted persons and properties which were the subject-matter of theft or dacoity. In case FIRs are not registered within the aforementioned time, and/or aforementioned steps are not taken by the police, the Magistrate concerned would be justified in initiating contempt proceeding against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment like sentence of imprisonment against them inasmuch as the disciplinary authority would be quite justified in initiating departmental proceeding and suspending them in contemplation of the same.

Keeping these facts in mind, we are of the view that notices should be issued to the Government of all the States and Union Territories besides the Director Generals of Police/Commissioners of Police, as the case may be. **(Lalita Kumari v. Govt. of Uttar Pradesh & Others; (2008) 3 SCC (Cri) 17)**

◆ **S. 173(8) – Order for further investigation.**

When a final report was submitted within 2 days of the commencement of the investigation, when no reasons were mentioned why no case was disclosed against the applicant and other accused especially as the deceased had died in the jail premises with 14 injuries on his dead body, (which fact was even mentioned in the FIR) and which negated the case of the deceased having committed suicide by banging his head against the wall, and which were not explained at all in the final report submitted by the local police it could not be said that no grounds for further investigation existed. Nor could such an interference be reached that the earlier final report had been submitted after a thorough investigation and that the final report had not been submitted in a motivated manner because police officials were arraigned as accused. (**Kare Singh v. State of U.P. & Ors.; 2008 (4) ALJ 554**)

◆ **S. 204 – Revision against order of summoning accused to face trial for offence which being interlocutory would not be maintainable.**

Present revision is against the summoning order passed by the learned Magistrate in a complaint case. In the opinion of the Court the said order is an interlocutory order within the meaning of Section 397(2) Cr.P.C. and in view of the case law mentioned the proper remedy for the revisionists is to approach this Court by filing an application under S. 482 Cr.P.C.

The summoning order is an interlocutory order within the meaning of Section 397(2) Cr.P.C. and revision against the same is not maintainable and the present revision is liable to be dismissed on this ground alone.

The court finds that even on merit there is no need for interference in the impugned order because a bare perusal of the impugned order shows that it has been passed by the learned Magistrate after considering the statements of the complainant and witnesses under S. 200 and 202 Cr.P.C. and the allegations made in the complaint. As such Court finds no illegality in the impugned order and the impugned order requires no interference. (**Hari Ram Raikawar & Anr. v. State of U.P. & Anr.; 2008 (4) ALJ 718**)

◆ **S. 228 – Framing of charge – Documents produced by accused in defence cannot be looked into.**

The Court at the stage of framing charge exercises a limited jurisdiction. It would only have to see as to whether a prima facie case has

been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the Court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily not consider as to whether the accused would be able to establish his defence, if any. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on records at the trial. The refusal by Court to look into documents filed by the accused along with his application for discharge is proper. **(Hem Chand v. State of Jharkhand; AIR 2008 SC 1903)**

◆ **Ss. 246(6) and 244 – Scope of – Whether power of Magistrate to entertain supplementary list of witnesses should be fettered U/s. 246(6) or 244 of Cr.P.C. – Held - No.**

The discretion of the Magistrate is nowhere fettered by any of the provisions contained in Cr.P.C. In Section 244(1) Cr.P.C., the expression used is, “the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution”. Similarly, in Section 246(6) Cr.P.C., the expression used is, “the evidence of any remaining witnesses for the prosecution shall next be taken”. Therefore, the Magistrate has discretion, before he closes the trial, to summon the witnesses if it advances the cause of justice. However, there is a word of caution that the discretion which has been conferred on the Magistrate under Section 244(2) and Section 246(6) Cr.P.C. should only be used in appropriate cases for reasons to be recorded. The discretion should not be used fancifully and for a mala fide purpose to harass the accused. It is quite possible that sometimes when the complainant fails to substantiate the allegation, he may resort to dilatory tactics and thereby harass the accused by giving supplementary list to prolong the continuance of the case. This should be checked but in case it is found that in fact the application for summoning the additional witnesses is made for bona fide purpose and to substantiate the allegations made in the complaint, then the Magistrate may exercise such power in appropriate case.

The power of the Magistrate should not be fettered either under Section 244 or under Section 246(6) Cr.P.C. and full latitude should be given to the Magistrate to exercise the discretion to entertain a

supplementary list of witnesses. But while accepting the supplementary list, the Magistrate shall exercise his discretion judiciously for the advancement of the cause of justice and not to give a handle to the complainant to harass the accused. **(Sayeeda Farhana Shamim v. State of Bihar and Another; (2008) 8 SCC 218)**

◆ Section 311

The application of the appellant was rejected seeking re-examination of the witnesses already examined in terms of Section 311. Before the High Court challenge was to the order passed by the learned Judicial Magistrate, Chandigarh. The application was rejected by the Trial Court on the ground that the complaint was filed on 19.12.1996. The evidence was closed on 11.3.2004. Under Section 313 Cr.P.C. examination was over on 12.7.2004. The High Court concurred with the view of the Trial Court. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. The trial court ought to have permitted the prayer of the appellant. That being so, the rejection of the prayer by trial court was not proper and the High Court should not have declined to interfere. **(Godrej Pacific Tech Ltd. v. Computer Joint India Ltd.; Criminal Appeal No. 1181 of 2008)**

◆ **S. 313 – Examination of accused by court – Dispensing with his personal attendance – Held, exemption from personal attendance is statutorily given in summons cases can be extended to other cases, if it works hardship on accused.**

The object of examination of an accused under S. 313 is for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. Thus the provision is mainly intended to benefit the accused and as its corollary to benefit the Court in reaching the final conclusion. The provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The one category of offences which is specifically exempted from the rigour of S. 313(1)(b) is 'summons cases'. Remaining present personally is therefore the general rule. However if remaining present involves undue hardship to accused the Court can alleviate the difficulties of the accused. Particularly in view of revolutionary change in technology of communication and transmission and

the marked improvement in facilities for legal aid in the country. The provisions of Ss. 243, 247 and 233 enabling the accused to put in written statements most of which are prepared by the counsel also supports such view. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in a specified manner, in special contingencies, be afforded the same worth. A pragmatic and humanistic approach is therefore warranted in regard to special exigencies. The word 'shall' in Cl. (b) to S. 313(1) is therefore to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in S. 313 in a substantial manner.

Manner of applying for exemption from personal attendance and the manner of answering the questionnaire supplied by the Court to advocate of accused prescribed.

If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters;

- (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
- (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
- (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets

of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning. The court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused.

If the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code. (**Keya Mukherjee v. Magma Leasing Ltd. & Anr.**; AIR 2008 SC 1807)

◆ **Ss. 315(1) proviso (b) & 313 – Burden of proof on accused – Mode of discharging.**

An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. (**Krishna Janardhan Bhat v. Dattatraya G. Hedge**, (2008)4 SCC 54)

◆ **S. 344 – Perjury – Essential ingredients for invocation.**

For exercising the powers under the section the court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence. The second condition is that the court must come to the conclusion that in the interest of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. (**Mahila Vinod Kumari v. State of Madhya Pradesh**; (2008) 8 SCC 34)

◆ **Ss. 378/386 – Appeal against acquittal**

There cannot be any dispute in regard to the legal proposition that an appellate court while entertaining an appeal from a judgment of acquittal would not ordinarily interfere therewith, if two views are possible. But

when there were very serious infirmities in the judgment of the trial court both in regard to the legal propositions as also appreciation of evidence and there were non- consideration of material facts and consideration of irrelevant facts, the appellate court's interference with the judgment of acquittal would be warranted. Which matter deserves interference at the hands of the appellate court would depend upon the fact situation of each case. Legal proposition must be applied having regard to the fact of each case. **(Animireddy Venkata Ramana v. Public Prosecutor, High Court of A.P.; (2008) 2 SCC (Cri) 600)**

◆ **Ss. 399 to 401 – Revision – Speaking order – Necessity**

On plainest consideration of justice, Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind – Absence of reasons renders judgment unsustainable. **(Ran Singh v. State of Haryana, (2008) 4 SCC 70)**

◆ **Sections 420, 467, 488 and 471 — Trial under — Acquittal**

Though various points were urged in support of the appeal, the primary stand was that by non-reasoned order — right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. **(State of Himachal Pradesh v. Shish Ram; Criminal Appeal No. 1091 of 2008)**

◆ **S. 437 – Fresh bail application – When required.**

The applicant submits that the order granting bail to the applicant was not under Section 307 IPC, but only under Sections 420/504/506 IPC, it is provided that if the applicant appears before the Court concerned within three weeks in pursuance of the summoning order dated 27.9.2007 and applies for bail under Section 307 IPC, his prayer for bail shall be considered and decided expeditiously in accordance with law.

Applicant submits that the applicant should not be required to obtain fresh bail under the newly added section. This relief cannot be granted in view of the decision of the Apex Court in Hamida v. Rashid alias Rasheed and others, 2007 (58) ACC 577: (2007) 4 All LJ 206) wherein it has been

mentioned that without surrender prayer for bail in the newly added section cannot be considered. **(Bankey Lal Sharma v. State of U.P. & Anr.; 2008 (4) ALJ 557)**

◆ **S. 439(2) – Applicability – Held, application for cancellation of bail must be premised on the factors envisaged under S. 439(2).**

Application for cancellation of bail was filed by S, wife, on a misstatement that the passports had not been surrendered. Various contentions, in regard to purported suffering of the wife was taken into consideration which were wholly irrelevant. Where as cancellation of bail must be premised on the factors envisaged under S. 439(2). **(Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel, (2008)4 SCC 649)**

Evidence Act

◆ **S. 3 – Evidence of eye-witness – Clearly making accusations against accused – Minor variations in their testimony would not corrode credibility of prosecution version.**

The trial court and the High Court have analyzed in great detail the evidence of PWs 3 & 4, which clearly bring out the accusations against the accused appellant. There are certain minor variations which do not in any way corrode the credibility of the prosecution version. The trial court and the High Court were, therefore, justified in placing reliance on their evidence and holding the accused appellant guilty. **(Ram Swaroop v. State of Rajasthan; AIR 2008 SC 1747)**

◆ **Adverse Possession – A heavy burden lies on the shoulders of the plaintiff to gain the benefit on the basis of adverse possession.**

The submission made by the Counsel for the defendant/respondents that a heavy burden lies on the shoulders of the plaintiff to gain any benefit on the basis of adverse possession. The witnesses examined on behalf of the plaintiff are also of no help. Findings regarding adverse possession by the two Courts is absolutely legal and nothing has been brought on record to establish the right of adverse possession by the plaintiff. Court do not find any error of law in the two judgments while discarding the case of the plaintiffs adverse possession and thus refrain from interfering in the findings of fact. **(Mool Chand v. Smt. Neelam Devi and Another; 2008 (105) RD 243)**

◆ **Evidence of a child witness – Rejection – Not only on ground that child witness is an easy pray to tutoring.**

The evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy pray to tutoring. **(Mohd. Kalam v. State of Bihar, 2008(5) Supreme 25)**

◆ **S. 3 – Child witness – Acceptance of testimony**

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. **(Golla Yelugu Govindu v. State of A.P.; AIR 2008 SC 1842)**

◆ **S. 9 – Test identification parade – Holding of – Not an obligation on investigating agency, accused does not have a right to claim holding of T.I. parade.**

The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and

significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

Apart from the clear provisions of Section 9 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. **(Md. Kalam alias Abdul Kalam v. State of Rajasthan; AIR 2008 SC 1813)**

◆ **S. 24/27 – Evidentiary value of extra judicial confession**

There cannot be any doubt that extra-judicial confession is evidence of weak nature. It must also be noticed that therein, not only the confession made by the appellant was found to be unbelievable, even the recovery of the dead body, pursuant to the disclosure statement made, was also found to be so. **(Ponnusamy v. State of Tamil Nadu; (2008) 2 SCC (Cri) 656)**

◆ **S.32(1) – Dying Declaration – Consistent multiple dying declarations – Reliability of such dying declarations**

There is no reason to doubt veracity of dying declarations especially since there is consistency between them – Also, there is no reason why the doctor or other witnesses should make a false statement about dying declaration – There is no allegation of enmity between accused and these persons – Analysing evidence of PWs 4,6,8 and 9, the inevitable conclusion, as was rightly observed by trial court and High Court, is that appellant had fired the shot which resulted in the death of the deceased. **(Bijoy Das v. State of W.B., (2008) 4 SCC 511)**

◆ **S. 61 – Documentary evidence – Document to be proved in manner laid down in Ss. 67 to 73.**

(Bank of India v. M/s. Allibhoy Mohammed & Ors.; 2008 (4) ALJ (NOC) 848 (Bom)

◆ **S. 63 – Secondary evidence – Cannot be accepted unless sufficient reason given for non-production of original.**

S. 63 of the Evidence Act provides for leading secondary evidence. Secondary evidence cannot be accepted without sufficient reason being given for non-production of the original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced. The prior permission of the Court is required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. To sum up, when anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents and there must be evidence of their loss. **(Bank of India v. M/s. Allibhoy Mohammed & Ors.; 2008 (4) ALJ (NOC) 848 (Bom)**

◆ **S. 115 – For invoking of doctrine of promissory estoppel – Clear, sound and positive foundation must be laid by party in petition itself.**

In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expression without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Govt. would not be sufficient to press into aid the doctrine. The Courts are bound to

consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must forever be presented in the mind of the Court. (**State of Arunachal Pradesh v. Nezone Law House, Assam; 2008 AIR SCW 3211**)

◆ **Previous statement of accomplice**

Previous statement of an accomplice or a complainant can be treated as corroborative and can be accepted as corroboration. (**Mohd. Kalam v. State of Bihar; 2008(5) Supreme 25**)

Family Court Act

◆ **S. 19 – Appeal against interlocutory order – Maintainability of – No penalty attached to said order, Hence order would not be appealable either U/s. 19 of Family Court Act, or U/s. 47 of Guardians and Wards Act and S. 26 of Hindu Marriage Act.**

The procedural law i.e. The Family Courts Act, 1984 promulgated about three years after the judgment of the Supreme Court in Shah Babulal Khimji, does not give any room for the purpose of appeal from any interlocutory order. Secondly, neither the subjective law i.e. The Guardians and Wards Act, 1890, under which the application was made, provides any scope of appeal from such type of order nor any similar provisions under different Act i.e. Section 26 of the Hindu Marriage Act, 1955 provides any scope of appeal from an interim order. Lastly, express intention of the legislature is to be understood from its plain reading at first and in case any vacuum arose, the same is to be understood by the implied intention from such Act as well as parallel Act, if any. In this case neither the express intention nor the implied intention of the legislature speaks that an appeal can be preferred from the order impugned. (**Smt. Varsha Lakhmani v. Hitesh Wadhva; 2008 (4) ALJ 446**)

Guardians and Wards Act

◆ **Ss. 7 and 17 – Custody of minor child – Grant of – Claim of father vis-a-vis mother – Relevant considerations – Remarriage of mother after divorce – Effect of – Interest and welfare of child – Importance of – Wishes of child – Relevance of – Visiting/meeting rights of parent who is not given custody of child**

Under the Hindu Law the father is the natural guardian of minor after the age of six years and also the father ought to be the guardian of the person and property of minor under ordinary circumstances, the paramount consideration in grant in custody of minor child should be the interest and welfare of the child – Factors such as capacity of the father to look after the child's need and to arrange for his upbringing and his position to give personal attention to the child's overall development, must be taken into account – Wishes of child are of relevance in deciding grant of custody of child – Remarriage of mother cannot be taken as a ground for not granting custody of child to her – In present case, High Court set aside the order of trial court which granted custody of child to mother – High Court granted custody of child to father, without interviewing the child, merely on the ground of remarriage of mother – Child, who appeared to be intelligent and capable of expressing his preference, interviewed by Supreme Court – Child expressing his willingness and desire to live only with his mother – Child admitting that mother would provide him good education – Mother drawing pension of Rs 6000 p.m. And also having land and properties in her name – There was no adverse effect of remarriage of mother on child – Child living with mother for the last several years – His separation with mother at this stage would affect the mental condition, education and academic brilliance and future of child – In these circumstances, held, grant of custody of child to mother by trial court was proper – Mere fact that mother had married again after divorce would not deprive her of her parental right of custody – However, further held, the child should also get sufficient exposure to his natural father – Accordingly, father permitted to have custody of child from mother during important festivals and school vacation – Mother should not prevent father from coming to see the child during weekends and also not prevent the child from receiving any gift that may be given by his father – Hindu Law – Hindu Marriage Act, 1955, S. 26 – Hindu Law – Hindu Minority and Guardianship Act, 1956, Ss. 13 & 6 – Family Law – Family Courts Act, 1984, S. 7(1) Expln. (g). (**Lekha v. P. Anil Kumar**, (2006) 13 SCC 555)

◆ **Ss. 7 and 25 – Custody of the minor girl aged 12 years claimed by the father – Wishes of the child.**

Appellant mother, a paediatrician, claiming to be in a better position to take care of the needs of the minor and provide proper upbringing and better education, as also counsellings, guidance and company during the period of adolescence – Family Court interviewed the girl, who preferred to

stay with respondent father, a lawyer – Girl's paternal aunt, who was staying with the father, looking after her – Respondent, the natural guardian, financially stable and not in any way disqualified from being guardian of the minor – Disposing of respondent's applications under Ss. 7 and 25 of the Guardians and Wards Act and S. 6 of the Hindu Minority and Guardianship Act, Family Court directing that custody of the child be given to respondent father and also giving other suitable directions.

Supreme Court with a view to ascertain the preference of the minor girl interviewed her alone and found her highly intelligent, doing well in her studies and in a position to make an intelligent choice with regard to her custody. She expressed no animosity towards her mother but preferred to be with the father with whom she felt more comfortable. **(Sheila B. Das v. P.R. Sugasree, (2006) 3 SCC 62)**

◆ **Ss. 17 and 7 – Custody of minor child – Relevant considerations – Welfare of child is most relevant.**

The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously

in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration. (**Mausami Moitra Ganguli v. Jayant Ganguli; (2008) 7 SCC 673**)

◆ **Custody of the minor child – Appeal filed by respondent for custody of his minor child – Dismissed – Welfare of the child a paramount consideration.**

In the instant case, on overall considerations the court held that the Courts below were not right or justified in granting custody of minor child to respondent without applying relevant and well-settled principle of welfare of the child as paramount consideration. The trial Court ought to have ascertained the wishes of child as to with whom he wanted to stay. it would not be proper on the facts and in the circumstances to give custody of child to his father-respondent. The appeal deserves to be allowed and accordingly allowed. The application filed by the respondent for custody of his son was ordered to be dismissed. (**Ratan Kundu and another v. Abhijit Kundu; Civil Appeal No. 4960 of 2008**)

Hindu Law

◆ **Mitakshara Coparcenary property and joint family property – Distinction of**

Mitakshara Coparcenary carries definite concept. It is a body of individuals created by law unlike a joint family which can be constituted by agreement of parties. (**Hardeo Rai v. Shakuntala Devi; 2008 AIR SCW 3435**)

◆ **Hindu Succession Act, 1956 Ss. 8, 19 and 4 – Discontinuance of coparcenary – Nature of interest of succeeding heirs.**

In such circumstances, held, the property ceases to be joint family property – All the succeeding heirs succeed to their respective shares not as joint tenants but as tenants-in-common – The property devolves upon them not per stripes but per capita with the right to alienate the share, particularly when the property has been partitioned and entries made in the revenue record of rights. (**Bhanwar Singh v. Puran, (2008) 3 SCC 87**)

Hindu Marriage Act

◆ **S. 13(1)(1a)(1b) – Whether a marriage which is otherwise dead emotionally and practically should be continued for name sake**

Appellant filed matrimonial case — on grounds of cruelty and desertion under Section 13(1)(1a)(1b) of the Hindu Marriage Act for dissolution of the marriage. Despite holding that the respondent had proved his case on grounds of cruelty and desertion, the trial court did not grant a decree — for divorce, but thought it appropriate to pass a decree of judicial separation instead. Supreme Court held when a marriage is dead emotionally and practically and there is no chance of its being retrieved, the continuance of such a marriage will amount to cruelty. Out of 16 years of marriage, the appellant and respondent had been living separately for 14 years. Any further attempt at reconciliation was held to be futile. Hence, it was in the interest of both the parties to sever the matrimonialties since the marriage had broken down irretrievably. Direction was given for dissolution of marriage in exercise of powers under Article 142 of Constitution. (**Satish Sitole v. Ganga; Civil Appeal No. 7567 of 2004**)

◆ **Hindu Marriage Act, 1955 S.13(1)(i-a) - “Mental cruelty” - Instances of – Certain illustrative, though not exhaustive instances of conduct that may amount to mental cruelty in the matrimonial context, enumerated.**

No uniform standard can ever be laid down for guidance, yet it is deemed 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:

On consideration of the complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make it possible for the parties to live with each other, could come within the broad parameters of mental cruelty;

On a comprehensive appraisal of the entire matrimonial life of the parties, if 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.

Mere coldness or lack of affection cannot amount to cruelty; but 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;

Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time, may lead to mental cruelty;

A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse;

Sustained unjustifiable conduct and behaviors of one spouse actually affecting the 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;

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 to mental cruelty; the conduct must be much more than jealousy, selfishness, possessiveness which cause unhappiness and dissatisfaction and emotional upset, but may not be a ground for grant of divorce on the ground of mental cruelty;

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 to divorce on the ground of mental cruelty;

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;

If a husband submits himself for an operation of sterilisation 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;

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

Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty;

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. (**Samar Ghosh v. Jaya Ghosh, (2007)4 SCC 511**)

◆ **S. 13-B(2) – Mutual consent divorce petition – Statutory waiting period of six months can be waived and hearing can be prepared, in case of mutual consent divorce petition – Provision can be regarded as directory.**

The requirement of six months period was not mandatory and could be waived since the very purpose of liberalized concept of divorce by mutual consent would be frustrated, especially when the parties live separately and there was no chance of re-union.

Court of view that the provision of sub-section (2) of S. 13B of the Hindu Marriage Act, 1955, is directory in nature and not at all mandatory since the legislative intent was only to ensure that the time-gap provided therein allowed the parties a chance of reconciliation and nothing else. (**Smt. Subhasree Datta & Anr. V. Nil; AIR 2008 Cal 144**)

◆ **Cross petition – One party filed petition or divorce and other party filed petition for restitution of conjugal rights – Held, “those two petition being inseparable has to be heard decided together.**

Whenever cross petitions are filed in the family courts then those petitions should be consolidated as early as possible and both the petitions should be treated and should be heard together. In the Hindu Marriage Act, S. 21A provides for deciding two petitions, if filed by one party under S. 13 for divorce and filed by another party under S. 10 for judicial separation or vice versa then both the petitions are required to be tried and required to be heard together. The same principle is required to be followed when one party to marriage files petition under S. 13 and another files petition under S. 9 because of the simple reason that the two matters cannot be decided separately. Reason for it is that if the Court will proceed to decide two matters separately then the Court is bound to decide the two matters separately and on the basis of evidence available on record of each case and cannot consider the evidence recorded in one case in another case. In that

situation, if one party successfully proves his/her case in one petition and fails to adduce evidence in another case then there will be two contradictory decrees. When there are cross petitions, one under S. 9 and another under S. 13, then either of the petition can be allowed and not both the petitions. The two petitions, one under S. 13 and another under S. 9 of the Act in facts are inseparable and, therefore, cannot be decided separately. **(Prakash v. Smt. Kavita; 2008 (4) ALJ (NOC) 889 (Raj) = AIR 2008 Raj 111)**

Hindu Minority & Guardianship Act

◆ S. 6-A – Custody of minor – Determination of.

From a bare reading of the provisions of S. 6-A of the Act it is clear that the custody of the minor who is below 5 years should ordinarily be with the mother. The word ‘ordinarily’ does not mean ‘necessarily’. Once the matter is before the Court under S. 6 of the Act, the Court would consider all aspects of the matter including the provisions relating to the welfare of the minor. The Court can also consider the provisions of Section 19 of the Guardians and Wards Act. In view of the aforesaid, this Court is of the opinion that the detention of the child by the father of the opposite party was neither illegal nor could it be said to be without any authority of law. This Court is also of the opinion that the applicant has misused the process of the Court by invoking the writ jurisdiction of habeas corpus. **(Amit v. Nirmal Sahu; AIR 2008 All 105)**

Hindu Succession Act, 1956

◆ Section 14(1) – Application of section

Section 14(1) – Hindu Succession Act, 1956 has application only when a female Hindu is possessed of the property on the date of the Act under semblance of the right. There were no indications, either in the will or externally, to indicate that the property had been given to the female Hindu in recognition of or in lieu of her right to maintenance. It was held that the situation falls within the ambit of subsection 2 of section 14 of the Act and that the restricted life estate granted to the female Hindu could not be enlarged into an absolute estate. **(G. Rama v. T.G. Seshagiri Rao (dead) through L.Rs.; 2008(5) Supreme 187)**

Indian Succession Act

◆ S. 63 – Proof of execution of will in a case where no attesting witnesses found – Mode of.

Party must have taken steps to compel attendance of attesting witnesses but no such steps taken. On mere statement of party made through counsel that witness is won over. Relaxation of mode of proof by Court would not be proper. **(Babu Singh v. Ram Sahai; 2008 AIR SCW 3429)**

◆ **Ss. 278 & 232 – Limitation Act – Article 137 – Grant of letter of administration – Right to apply for grant of letters of administration is a continuing right which can be exercised at any time after death of the deceased but Article 137 of Limitation Act is clearly applicable to petition for grant of letters of administration.**

Article 137 is clearly applicable to the petition for grant of Letters of Administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the Court to perform a duty because of the nature of the proceedings it is a continuing right. The Division Bench of the Delhi High Court referred to several decisions.

Though the nature of the petition has been rightly described by the High Court, it was not correct in observing that the application for grant of probate or Letters of Administration is not covered by Article 137 of the Limitation Act. Same is not correct. **(Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Others; 2008 (105) RD 262)**

◆ **S. 372 – production of succession certificate by claimant heir – Necessity of.**

The procedure prescribed under the Act is for the purpose that only the heir, who is entitled to receive the benefit, can come forward and claim the amount. No impostor or any unauthorized person can claim the benefit, which accrues upon the death of an employee. The department thus was perfectly justified in insisting upon the production of the succession certificate before making payment, which has accrued consequent upon the death of the deceased. The relief prayed for by the petitioner through the instant petition, thus, cannot be granted unless he is granted a succession certificate by the competent court. **(Mansha Ram Mishra v. State of Uttar Pradesh & Ors.; 2008 (4) ALJ 426)**

Indian Penal Code

◆ **S. 96 – Right of private defence – When available factors to be considered.**

In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. **(Narain Singh v. State of Haryana; 2008 AIR SCW 2641)**

◆ **Ss 120-B read with Ss 420, 467, 471A read with Ss 5(1)(d) and 13(1)(d) of Prevention of Corruption Act, 1988 — Charge under**

The question which is required to be answered in this case is whether the power which independently lies with Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised. — this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, the continuance of the same after the compromise arrived at between the parties would be a futile exercise. **(Nikhil Merchant v. C.B.I. & another; Criminal Appeal No. 1302 of 2008)**

◆ **Ss 143, 147, 148, 341, 323, 324 and 302 read with section 324 and 34 — Trial under.**

In the present case the trial Court went to a dream world imaginations and imagined certain irrelevant aspects to discard the otherwise cogent and credible evidence of eye-witnesses. One of the most untenable conclusions recorded by the trial Court was as to why only witnesses from a particular locality were chosen, as in a procession "there must have been persons other than the inhabitants of Gandhigram". Same cannot certainly be a ground to discard the otherwise cogent and credible evidence. The reasons indicated by the trial Court to direct acquittal have been rightly found to be vulnerable by the High Court. The judgment of the High Court does not suffer from any infirmity to warrant interference. **(Valson and another v. State of Kerala; Criminal Appeal No. 572 of 2001 Date of Decision 8/1/2008)**

◆ **Sections 279, 337, 338 and 304A and Motor Vehicles Act, 1988 — Section 185 — Trial under — Acquittal appeal**

State of Himachal Pradesh preferred an appeal before the Himachal Pradesh High Court which by the impugned judgment set aside the judgment of acquittal passed by the trial court and directed conviction of the respondent for offences punishable under Sections 279, 337, 338 and 304(A) IPC and

imposed various sentences, which were directed to run concurrently — the evidence of PWs 1, 3 & 4 clearly show that the vehicle was being driven at a very high speed. Evidence on record show that more than 50 persons were there in the truck and the appellant was driving the same at a very high speed. One of the witnesses has stated that the truck was being driven as if it was an aeroplane. Therefore, the conviction as recorded cannot be faulted. **(Kuldeep Singh v. State of Himachal Pradesh; Criminal Appeal No. 1106 of 2008)**

◆ **S. 299 – Murder or culpable homicide not murder – Determination of – Court to keep in focus keywords used in Ss. 299 and 300.**

The academic distinction between ‘murder’ and ‘culpable homicide not amounting to murder’ has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done -

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted

is sufficient in the ordinary course of nature to cause death; or

KNOWLEDGE

- (c) with the knowledge that the act is likely to cause death. (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

(Daya Nand v. State of Haryana; AIR 2008 SC 1823)

◆ **S. 300 – Murder – If a person snatches weapon carried by someone else and brutally kills another – Held, it cannot be said that he did not have any intention to cause death.**

If a person snatches a weapon carried by someone else and brutally kills another, it cannot be said that he did not have any intention to cause death. Whether the accused had any intention in kill the deceased must be Judged upon taking into consideration the fact situation obtaining in each case. **(Nishan Singh v. State of Punjab; AIR 2008 SC 1661)**

◆ **S. 300, Exception-4 – Applicability of Exceptin-4 to S. 300.**

For bringing in operation of Exception 4 to section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. A sudden fight implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. A fight suddenly takes place, to which both parties are more or less to be blamed. A fight is a combat between two or more persons with or without weapons. In instant case, there was no fight at all, what to say of sudden fight. When the deceased and his mother were going to their house after purchasing vegetables, the accused met them in the market and began to hurl abuses to deceased and when he and his mother asked the accused not to abuse, he immediately stabbed chhuri in the chest of deceased,

thereby causing his instantaneous death. In this case, no fight had taken place between the deceased and the accused. No provocation was given by the deceased and it was the accused himself who after hurling abuses to the deceased, pierced a chhuri in his chest with great force, thereby causing spindle shaped stab wound 3 cm x 1.5 cm x chest cavity deep. It has come in evidence that the deceased was disabled person. The accused without any justification and taking undue advantage, caused the death of deceased by stabbing him in the chest. Hence Exception 4 to section 300 IPC is not attracted in this case. **(Sanjay v. State of U.P.; 2008 (4) ALJ 509)**

◆ **Section 302 read with section 34 — Conviction as under**

Under the provisions of Section 34 IPC the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them — for applying Section 34 it is not necessary to show some overt act on the part of the accused — the accusations were not established so far as the present appellant is concerned. No evidence was led to show sharing of common intention. The appeal deserves to be allowed. **(Shashi Mohan v. State of M.P.; Criminal; Appeal No. 1093 of 2008)**

◆ **Section 302 read with section 34 — Conviction under — Upheld by the DB — Challenged in appeal**

The point for determination in the present appeal was that whether the medical evidence is contrary to the ocular evidence. The over insistence on witnesses having no relation with the victims often results in a dwelling house the most natural witnesses would be the inmates of that house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing .The evidence of PWs and eye witnesses clearly established that accused caught hold of deceased and on their exhortation appellant shot at the deceased. Therefore, Section 34 has application The medical evidence was clearly in line with what has been stated by eye-witnesses according to the eye witnesses gunshot injury was

caused on the right temple but the injury was found on the upper eyelid and everted wound on the right oricle margin. Therefore, it can never be said that medical evidence is contrary to the ocular evidence. **(Vinay Kumar Rai & another v. State of Bihar; Criminal Appeal No. 371 of 2006 with Crl. A. No. 382 of 2006)**

◆ **Section 302 — Conviction under — Questioned**

Whether an act is in furtherance of the common intention is an incident of fact and not of law. Appellants call in question legality of the judgment rendered by a Division Bench of the Allahabad High Court upholding the conviction of the appellants for offence punishable under Section 302 of the Indian Penal Code, 1860 .So far as the appellant was concerned, the High Court also upheld his conviction for offence punishable under Section 307 read with Section 34 IPC. The two other appellants were found guilty of offence punishable under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC . The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view of the facts involved. **(Aizaz & others v. State of U.P.; Criminal Appeal No. 193 of 2005)**

◆ **S. 302 – Sentence – It is mandatory to impose fine in addition to substantive sentence of imprisonment for offence punishable U/s. 302.**

However, the learned Trial Court has committed illegality in passing the sentence, as no fine has been imposed, whereas it is mandatory to impose fine in addition to the substantive sentence of imprisonment for the offence punishable under Section 302 IPC, as the language used in Section 302 IPC, is, “and shall also be liable to fine”. Where the expression used by the legislature in the Sections for which conviction is recorded is “and shall also be liable to fine”, the Court is under obligation to impose fine also in addition to the substantive sentence of imprisonment. No discretion is left to the Court to levy or not to levy fine and imposition of both imprisonment and fine is imperative in such case, as held by Hon’ble Apex Court in the case of Zunjarrao Bhikaji Nagarkar v. Union of India and others (AIR 1999 SC 2881), in which reference has been made to the case of Rajasthan Pharmaceuticals Laboratory. Bangalore v. State of Karnataka (1981) 1 SCC 645): (AIR 1981 SC 809). **(Sanjay v. State of U.P.; 2008 (4) ALJ 509)**

◆ Section 302 — Conviction under

In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide — when the factual scenario is considered in the background of the legal principles set out, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years would meet the end of justice. **(Kandaswamy v. State of Tamil Nadu; Criminal Appeal No. 1111 of 2008)**

◆ Section 302

Challenge by the State of Punjab in this appeal is to the acquittal of the respondent from the charge of commission of offence punishable under Section 302 of the Indian Penal Code, 1860. The learned Sessions Judge, Faridkot, had convicted the respondent for the said offence and awarded death sentence. In view of the award of the death sentence, reference was made to the High Court under Section 366 of the Code of Criminal Procedure, 1973. The acquittal as directed by the High Court cannot be faulted. Even though it may be possible hypothetically to take a different view on the evidence, this court not inclined to interfere with the view of the High Court. **(State of Punjab v. Kulwant Singh @ Kanta; Criminal Appeal No. 493 of 2001)**

◆ S. 302 – Benefit of doubt – Death resulting from gunshot injuries

Fatal injuries allegedly inflicted by the accused on his brother – Single – barrelled 12 bore gun and two empty cartridges recovered from accused – Experts report finding that the said cartridge which caused the injury was not fired from the single- barrelled 12 bore gun said to have been used by the accused – based upon the report of the forensic science laboratory as per ballistic expert's opinion - accused is entitled to benefit of doubt. **(Puran Singh v. State of Uttaranchal, (2008)3 SCC 795)**

◆ S. 302 – Death sentence – Award of – When warranted.

Accused brutally murdering three innocent defenceless children and causing injuries to all other helpless inmates of the house – Accused staying as a paying guest (for a sum of Rs. 500 for food and meals) for a continuous

period of 4 years – No provocation or reason for committing this ghastly act at a time when children would have been sleeping and would not have been in a position to defend themselves – Medical evidence indicating brutality – Several incised wounds (muscle-deep or bone-deep) were caused to the deceased persons – Considering the brutality, diabolic, inhuman nature and enormity of the crime (i.e. Multiple murders and attacks), the mindset of the accused could not be said to be amenable to any reformation – Therefore, it came under the rarest of rare case where not awarding a death sentence would have caused a failure of justice. (**Prajeet Kumar Singh v. State of Bihar, (2008) SCC 434**)

◆ **Common Intention – Ss. 302/149 – Appreciation of evidence – Major discrepancy between FIR and testimony of PWs – Effect.**

In FIR one of the accused was stated to be only a member of the mob not having any arms in his hand and other accused persons were stated to have run towards deceased with jambiyas but it was nowhere specifically stated that they had caught hold of the deceased – Other PWs also had not stated before police about holding the deceased – But after five years, PWs stated before court that these accused had caught hold the deceased while other accused assaulted him – In the circumstances, held, it would not be safe to convict these accused as prosecution failed to prove its case against them beyond reasonable doubt. (**Mallanna v. State of Karnataka, (2007)8 SCC 523**)

◆ **Section 302/149, 148 and 307/149 — Acquittal by High Court — Unlawful assembly – Once a membership of an unlawful assembly is established it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused.**

Mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unlawful assembly or such which the members of the unlawful assembly knew were likely to be committed. In the instant case the trial Court rightly held that the accused persons formed unlawful assembly and committed murders by going at the place of incident with fire arm and causing fire arm injuries. On the other hand, the High Court erred in acquitting those persons and the same deserves to be set aside. (**State of U.P. v. Kishanpal & others; Criminal Appeal No. 936 of 2003**)

◆ **Ss. 302, 363, 376 and 201 – Conviction under – Whether award of death sentence on facts and circumstantial evidence would be warranted – Held - Yes.**

Two young girls, N and G, less than ten years of age, were the victims of the sexual assault and animal lust of the appellant-accused. They were not only raped but were murdered by the appellant-accused. Case was based on circumstantial evidence. Trial court considering all the circumstances awarded death sentence to the appellant under Section 302 IPC while imposing custodial sentences under Sections 363, 376 and 201 IPC. The appellant questioned correctness of the judgment before the High Court and a reference was made by the trial court in view of the death sentence imposed. After analyzing the evidence, the High Court found the evidence to be cogent and credible and affirmed the death sentence looking into the ghastly acts committed by the appellant.

It was not the first occasion when the appellant was convicted for rape of minor girls. Earlier, the appellant was convicted for kidnapping a minor girl and committing rape on her. Thereafter the accused was again convicted for having raped a minor girl of less than nine years of age. He was released after completion of the sentence and thereafter continued his degraded acts. The raping of the two girls, one aged about five years and the other about ten years formed the subject-matter of consideration in the instant appeal.

Prosecution relied on the following circumstances to fasten the guilt on the appellant-accused:

1. Last seen.
2. Motive.
3. Seizure of bloodstained clothes which were on the person of the accused at the time of arrest.
4. Chemical analyst's report which showed that shirt and pant of the accused were stained with Blood Group 'A' which was the blood group of both the deceased.
5. Blood in the nail clippings of the accused was of 'A' group which was the blood group of both the deceased.
6. Recovery of dead body of G at the instance of the accused.
7. The accused pointing out the places where rape was committed on N and G where the earth was found stained

with blood of 'A' group and other incriminating articles were seized.

8. Extra-judicial confession to PW 11.
9. Recovery of frocks of both the deceased girls at the instance of the accused.
10. the accused pointing out the well wherein he had thrown N.
11. False explanation by the accused.

The prosecution had established that both the girls were missing since about 6 p.m. on 13.12.1999 and the appellant-accused was seen in the company of the girls till morning of 14.12.1999 and soon thereafter dead body of N was found and thereafter the dead body of G was found. The post-mortem of N was conducted on 14.12.1999 between 9.30 p.m. to 10.30 p.m. and post-mortem of G was conducted on 14.12.1999 between 10.30 p.m. to 11.30 p.m. The evidence of doctor, PW 9, clearly showed that the girls according to him were murdered within 36 hours and the rape was committed on them within 48 hours before the time of post-mortem. Therefore, the time given by the doctor fitted with the prosecution case of timings relating to last seen. The prosecution was able to establish the accusations.

The case at hand falls in the rarest of rare category. The depraved acts of the accused called for only one sentence that is death sentence.

Looked at from any angle, the judgment of the High Court, confirming the conviction and sentence imposed by the trial court, does not warrant any interference. **(Mohan Anna Chavan v. State of Maharashtra; (2008) 3 SCC (Cri) 193)**

◆ **S. 304 Pt. II – Appreciation of Evidence.**

Merely because of inconsistency between the statement made in FIR lodged by one PW and the evidence of other PW and the evidence of other PWs as regards role played by accused in committing murder of deceased, cogent and credible evidence of the other PWs cannot be discarded. **(State of Rajasthan v. Nana, (2007)9 SCC 398)**

◆ **S. 304, Part – II – Culpable homicide not amounting to murder – Solitary injuries – Gunshot fired by accused hit deceased on waist – Offence not murder, accused liable to be convicted only U/s. 304, Part-II.**

Considering the evidence on record in the background of the principles of law, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part II, IPC. The conviction is accordingly altered. (**Daya Nand v. State of Haryana; AIR 2008 SC 1823**)

◆ **Ss. 304-A and 279 – Sentence of imprisonment in rash and negligent driving – While considering the quantum of sentence to be imposed for offence of causing death by rash and negligent driving, are of the prime consideration should be deterrence.**

The appellant was the driver of a bus bearing Registration No. AP 10 Z 5260. He was driving the said bus on Bangalore-Hindupur Road. On 10.1.1999, at about 2.00 p.m. when the bus was passing through a village commonly known as Kamalapura, it dashed against a child by name Shantha, as a result whereof she died. Shantha was about 7 years old at that time. A criminal prosecution under Sections 279 and 304-A of the Penal Code, 1860 was initiated against him. He was found guilty of the said offences. He was sentenced to one year's simple imprisonment and to pay a fine of Rs. 1000 for commission of the offence punishable under Section 304-A and simple imprisonment for one month and to pay a fine of Rs. 500 for the offence punishable under Section 279 of the Penal Code. The appeal preferred there against by him was dismissed. The High Court, however, by reason of the impugned judgment modified the sentence directing:

“The order of sentence passed against the revision petitioner for the offence punishable under Section 304-A IPC is modified. He shall undergo simple imprisonment for six months and pay a fine of Rs. 5000. In default of payment of fine amount, he shall undergo simple imprisonment for one month. Out of the fine amount of Rs. 5000, deposited by the revision petitioner-accused, a sum of Rs. 4000 shall be paid to PW 6, Gowramma and remaining Rs. 1000 shall be credited to the State exchequer.”

In the opinion of the Court six months' simple imprisonment and a direction to the appellant to pay a fine of Rs. 1000 for commission of the offence punishable under Section 304-A and simple imprisonment for one month and to pay a fine of Rs. 500 for the offence punishable under Section 279 of the Penal Code cannot be said to be shocking.

The Court may, in this connection, notice that in *Dalbir Singh v. State of Haryana* (2000) 5 SCC 82: 2004 SCC (Cri) 1208) the court opined:

“Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles.”

(B. Nagabhushanam v. State of Karnataka; (2008) 3 SCC (Cri) 61)

◆ **S. 376 – Sentence – Father raping his daughter is an unpardonable act, sentence of life imprisonment affirmed.**

The prosecutrix is the daughter of the appellant-accused. On 5.2.2004 the appellant took the prosecutrix (PW 4) aged around 13 years on his cycle to Raghogarh to purchase clothes for her. At around 3 p.m., the prosecutrix was coming back with him on his cycle when on the way, the appellant stopped his cycle near “Bawdi Kheda Ashram”. The appellant then took the prosecutrix to a dilapidated house situated there and removed the clothes of the prosecutrix. When the prosecutrix cried, the appellant slapped her and forcibly committed rape on her. The High Court affirmed

the conviction, under Section 376 IPC and sentence of imprisonment for life and fine of Rs. 1000 with default stipulation as recorded by the Sessions Judge.

No sympathy or leniency is called for. It is an unpardonable act. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. Charged of raping his own daughter under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber. He not only depicts the law but, it is a betrayal of trust. The accused's lustful acts have indelible scar not only physically but also emotionally on the victim. There can never be more shocking, depraved and heinous crime than when the father is charged of having raped his own daughter.

Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. The case at hand is a sad reflection on the present day society where a most platonic relationship has been soiled by the pervert and degrading act of the father. It shows to what bottomless pit of depravation and lust a person can go down. The custodian of the trust has betrayed the same. The sanctity of father and daughter relationship gets polluted. It is not only a loathsome sin, but also abhorrent. **(Siriya alias Shri Lal v. State of Madhya Pradesh; (2008) 8 SCC 72)**

◆ **Section 376 — Acquittal under — Appeal against**

The teacher-PW 16 referred to the certificates which indicated that the date of birth of PW 1 was 5.3.1974 and the date of birth of PW2 was 1.2.1974. Exhibits P.16 & P.17 are the certificates. The High Court referred to the evidence of the lady doctor PW 24 with reference to the X- Ray report which indicated that the age of PWs. 1 & 2 fell between 14 to 16 years. The High Court observed that there was possibility of two years variation and therefore it was to be taken that the victims were more than 16 years of age. The High Court accepted that there was sexual intercourse and rejected the plea of false implication — the High Court's conclusions in this regard are not only fallacious but contrary to the evidence on record. The High Court recorded a further finding that the two certificates may not relate to the victims though it specifically recorded that there was no such challenge raised by the accused. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is

without any foundation. There was no basis for coming to such a conclusion — judgment of the High Court is clearly unsustainable and set aside. The judgment of the trial Court is restored. **(State of Karnataka v. Bantara Sudhakara @ Sudha and another; Criminal Appeal No. 288 of 2001)**

◆ **Sections 376(1) read with section 511, 324 and 452 –Appropriate punishment for heinous crimes.**

Since the only question involved in this appeal is whether learned Single Judge was justified in reducing the sentence, as imposed by the High Court on the respondent, the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance **(State of Madhya Pradesh v. Pappu & Ajay; Criminal Appeal No. 1213 of 2008)**

◆ **Ss. 376, 363 and 366 – Date of birth – Basis of proof.**

The trial court found that the prosecutrix was aged about 16 years and, therefore, the consent of the prosecutrix was of no consequence. The High Court held that there was consent and additionally, the girl was more than 16 years of age. With reference to the evidence of a doctor (PW 9) it was held that since the medical evidence shows that the age of the girl was above 14 years and below 16 years with an error margin of one year, the school leaving certificate and the school register were of no consequence. Accordingly, it directed acquittal.

Undisputedly, the school records revealed the date of birth of the victim to be 4.6.1976. This was the position as indicated in the school leaving certificate (Ext. 25) and the school register. The High Court noted that in the school register the date of birth was indicated to be 4.6.1976. It also noticed that the father of the victim stated that the girl was 14 years old. The High Court held that the correct date of birth is not recorded and only the school leaving certificate indicated that the date of birth of the

victim was 4.6.1976. The evidence of the witnesses indicated that the entry was made on the basis of the horoscope. The High Court held that since the horoscope was not produced the prosecution has failed to establish its case. No reason has been indicated by the High Court to discard the documentary evidence produced i.e. school leaving certificate and the school register.

The headmaster of the school also deposed and produced the records before the trial court. The High Court held that the entry in the school register was not in the handwriting of the headmaster and he could not have deposed about the date of birth. There was no basis for the High Court to conclude that the entry cannot be taken to be above suspicion. On the basis of the evidence of the headmaster and the original school leaving certificate and the school register which were produced, the High Court came to an abrupt conclusion that normally for various reasons the guardians do understate the age of their children at the time of admission in the school. There was no material or basis for coming to this conclusion. The High Court in the absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive.

Interestingly, no question was put to the victim in cross-examination about the date of birth. The High Court also noted that no document was produced at the time of admission and a horoscope was purportedly produced. There is no requirement that at the time of admission documents are to be produced as regards the age of the student. Practically, there was no analysis of the evidence on record and abrupt conclusions, mostly based on surmises, were arrived at. The inevitable conclusion is that the judgment of the High Court is unsustainable, deserves to be set aside. (**State of Maharashtra v. Gajanan Hemant Janardhan Wankhede; (2008) 8 SCC 38**)

◆ Sections 409, 420, 467, 468 and 471

The allegation in the FIR was that the appellant was a Clerk in Government High School, Rurke Kalan. He had forged signature of respondent who was the Head Master-cum-Drawing and Disbursing Officer and embezzled substantial amount of more than Rs. one lakh between 1979 and 1986. As stated in the FIR, the said fact came to light when audit was carried out and report was submitted. Hence, the complaint in the instant case, an FIR was lodged against the appellant in August, 1986. But it was during the course of trial that it came to light that signatures of respondent

were also taken and were sent for examination and a report was received showing that the signatures on the basis of which amount was withdrawn tallied with the signatures of respondent. The Magistrate had power and jurisdiction to entertain applications filed by the appellant- accused under Section 319 of the Code and to issue summons to respondent By adding him as accused. The said order could not be said to be illegal, unlawful or otherwise objectionable. Whether an order passed by a Court could be recalled? The order passed by the Magistrate issuing summons to respondent could not be said to be unlawful or even improper. Mens rea can only be decided at the time of trial and not at the stage of issuing summons. Moreover, a point as to need or necessity of sanction can be taken during the conduct of trial or at any stage of the proceedings. Hence, proceedings could not have been quashed on the ground of want of sanction in the present case. The order of the Revisional Court deserves to be set aside even on that ground. **(Bholu Ram v. State of Punjab & another; Criminal Appeal No. 1366 of 2008)**

◆ **S. 439(2) – Bail — Cancellation of bail.**

When a person to whom bail has been granted either tries to interfere with the course of justice or attempts to tamper with evidence or witnesses or threatens witnesses or indulges in similar activities which would hamper smooth investigation or trial, bail granted can be cancelled. Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and is not to be lightly resorted to — even though the re-appreciation of the evidence as done by the Court granting bail is to be avoided, the Court dealing with an application for cancellation of bail under Section 439 (2) can consider whether irrelevant materials were taken into consideration — since the High Court has not indicated any reasons for directing cancellation of bail, the impugned order cannot be maintained and is set aside. The matter is remitted to the High Court to decide the matter afresh and dispose of the application filed. **(Manjit Prakash & others v. Shobha Devi and another; Criminal Appeal No. 1113 of 2008)**

Interpretation of Statutes

◆ **External aids – Object statute would be relevant factor only language is not clear.**

Interpretation of a statute would not depend upon a contingency. It has to be interpreted on its own. It is a trite law that the court would ordinarily take recourse to the golden rule of literal interpretation. It is not a case where we are dealing with a defect in the legislative drafting. We cannot presume any. In a case where a court has to weigh between a right of recovery and protection of a right, it would also lean in favour of the person who is going to be deprived there from. It would not be the other way round. Only because a speedy remedy is provided for that would itself lead to the conclusion that the provisions of the Act have to be extended although the statute does not say so. The object of the Act would be a relevant factor for interpretation only when the language is not clear and when two meanings are possible and not in a case where the plain language leads to only one conclusion. **(Karnataka State Financial Corporation v. N. Narasimahaiah; AIR 2008 SC 1797)**

◆ **Interpretation of subordinate/Delegated Legislation – Delegated Legislation to be read in the context of the primary statute under which it is made.**

It is well settled that a delegated legislation would have to be read in the context of the primary statute under which it is made and, in case of any conflict, it is primary legislation that will prevail. **(Novvaads v. Deptt. Of Municipal Admn. And Water Supply; (2008) 8 SCC 42)**

◆ **Subordinate/Delegated Legislation – Interpretation of – Delegated Legislation to be read in the context of the primary statute under which it is made, in case any conflict, primary legislation will prevail.**

It is well settled that a delegated legislation would have to be read in the context of the primary statute under which it is made and, in case of any conflict, it is primary legislation that will prevail.

The expression “obstruction” means “something that impedes or hinders”. The expression, however, has varied sets of meaning and is not necessarily confined to physical obstructions only.

It has been held that “obstructing” the police, includes anything which makes it more difficult for the police to carry out their duties and is not confined to mere physical obstructions, vide [*Hinchliffe v. Sheldon* (1955) 1 WLR 1207: (1955) 3 All ER 406 (DC)] **(Novvaads v. Secretary, Department of Municipal Administration & Water Supply & Another; (2008) 8 SCC 42)**

◆ **Taxing statute – Residuary entry – Recourse to, should be as last resort.**

It is now a well settled principle of law that in interpreting different entries, attempts shall be made to find out as to whether the same answers the description of the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort. (**M/s. Mauri Yeast India Pvt. Ltd. v. State of U.P. & Anr. and M/s. Kothari Fermentation and Biochem Ltd. v. State of U.P. & Anr.**; 2008 (4) ALJ 163)

Juvenile Justice (Care & Protection of Children) Act

◆ **S. 2(k) – Juvenile – Who is – Question to be determined on basis of materials brought on records by parties.**

The 2000 Act is indisputably a beneficial legislation. Principles of beneficial legislation, however, are to be applied only for the purpose of interpretation of the statute and not for arriving at a conclusion as to whether a person is juvenile or not. Whether an offender was a juvenile on the date of commission of the offence or not is essentially a question of fact which is required to be determined on the basis of the materials brought on records by the parties. In absence of any evidence which is relevant for the said purpose as envisaged under S. 35 of Evidence Act, the same must be determined keeping in view the factual matrix involved in each case. For the said purpose, not only relevant materials are required to be considered, the orders passed by the Court on earlier occasions would also be relevant. (**Jyoti Prakash Rai v. State of Bihar**; AIR 2008 SC 1696)

◆ **S. 20 – Plea as to Juvenility can be raised by juvenile at any stage and can get his age determined.**

(**Smt. Lali v. State of U.P. & Anr.**; 2008 (4) ALJ (NOC) 876 (ALL))

Land Acquisition Act

◆ **S. 23 – Determination of market value – No deductions towards development charges could be made**

After the acquiring/requiring body takes over the ownership of the land it is for it to develop or not develop the land and to what extent and, all investment made for the same are to be borne by it and not by the erstwhile owner. It may, which it does charge from the new purchaser while selling of the land in plots and the price includes the betterment charges for the roads,

parks etc. with interest. The concerned Authority i.e. NOIDA once it charges from the new/subsequent purchaser all such charges cannot also be charged under the garb of deduction while awarding compensation to the erstwhile owner and gain double benefit. In such circumstances such deductions are unjustified and are required to be reversed. In the instant case the land in question was earmarked for 'Park' and development of the land has been shown to have taken place nor any amount has been spent for the same then there cannot be any justification for deduction from the market price for the payment of compensation to the petitioners. **(Jagdish Chandra & Ors. v. New Okhla Industrial Development Authority, NOIDA & Anr.; 2008 (4) ALJ 450)**

Motor Vehicles Act & Motor Accidents

◆ **Compensation – Determination of – Must be “just and reasonable”, reiterated – In case of young children, held nothing can be assumed with reasonable certainty.**

The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are the claimants, relevant factor would be age of parents. **(Oriental Insurance Co. Ltd. v. Syed Ibrahim, (2007) 11 SCC 512)**

◆ **S. 147 – Whether Pillion-rider would be covered under insurance policy –Held - No.**

The deceased was traveling as a pillion-rider on a scooter. She fell down from the scooter and succumbed to the injuries sustained by her. In regard to the said accident, a claim petition was filed before the Motor Accidents Claims Tribunal. The appellant insurer in its written statement, inter alia, raised a contention that she being a pillion-rider and, thus, a gratuitous passenger, the insurance policy did not cover the risk of injury or death of such a passenger and, thus, it was not liable to reimburse the owner of the scooter therefore.

By reason of the impugned award, the Tribunal inter alia found that the accident had taken place due to rash and negligent riding of the scooter

by Respondent 1 to the claim petition. As regards liability of the appellant insurer it was held that as the existence of the insurance policy in respect of the offending scooter was admitted, it was also liable. The High Court dismissed the appeal of the Insurance Company there against. Hence, the appellant was before the Supreme Court there against by special leave.

The question that arose before the Supreme Court was whether a pillion-rider on a scooter would be a “third party” within the meaning of Section 147 of the Motor Vehicles Act, 1988.

Answering the question in the negative and allowing the appeal, the Supreme Court has held that a distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle. In terms of Section 147 of the Act a contract of insurance must be taken by the owners of the vehicle only in regard to reimbursement of the claim to a third party. Section 147 is imperative in nature. When, however, an owner of a vehicle intends to cover himself from other risks, it is permissible to enter into a contract of insurance in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof. The liability of the insurer to reimburse the owner in respect of a claim made by the third party, thus, is statutory whereas other claims are not.

The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third-party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.

A gratuitous passenger in a goods carriage would not be covered by a contract of insurance entered into by and between the insurer and the owner of the vehicle in terms of Section 147 of the Act. Tilak Singh case, (2003) 2 SCC 223, extended the said principle to all other categories of vehicles. In Tilak Singh case, on facts it was held that the Insurance Company concerned owed no liability towards the injuries suffered by the deceased who was a pillion-rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger. **(Oriental Insurance Company Ltd. v. Sudhakaran K.V. and Others; (2008) 3 SCC (Cri) 110)**

◆ **S. 149 – Liability of insurer to reimburse owner – Not absolved on ground of driving license found to be fake.**

Notwithstanding the fact that the license possessed by the driver is a fake one, the insurer would not be absolved from the liability to reimburse the owner of a vehicle in respect of the amount awarded in favour of a third party by a Tribunal. An owner of the vehicle is bound to make reasonable enquiry as to whether the person who is authorized to drive the vehicle holds a licence or not. Such a licence not only, be an effective one but should also be a valid one. Indisputably, in a case where the terms of the contract of insurance are found to have been violated by the insured, the insurer may not be held to be liable for reimbursing the insured. So far as a driving licence of a professional driver is concerned, the owner of the vehicle, despite taking reasonable care, might have not been able to find out as to whether the licence was a fake one or not. He is not expected to verify the genuineness thereof from the Transport offices. (**National Insurance Co. Ltd. v. Geeta Bhat & Ors.; AIR 2008 SC 1837**)

◆ **S. 149(2)(a)(ii) – Third party insurance – Defence of improper licence available to insurer in motor accident cases.**

Section 10 of the Act provides for classes of the driving licence. Different classes of vehicle have been defined in different provisions of the Motor Vehicles Act. The ‘transport vehicle’ is defined in Section 2(47) of the Act to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. We have noticed hereinbefore the provisions of sub-section (4) of Section 41. We have also noticed the notification issued by the Central Government in this behalf. The said notification clearly postulates that a three-wheeled vehicle for transport of passengers or goods comes within the purview of Class 5 of the Table appended thereto. The licence granted in favour of the said Salim Amadbhai goes to show that the same was granted for a vehicle other than the transport vehicle. It was valid from 13.5.2004 to 12.5.2024. Section 14(2)(a) provides that a driving licence issued or renewed under the Act shall, in case of a licence to drive a transport vehicle will be effective for a period of three years whereas in the case of any other vehicle it can be issued or renewed for a period of 20 years from the date of issuance or renewal. The fact that the licence was granted for a period of 20 years, thus, clearly shows that Salim Amadbhai, driver of the vehicle, was not granted a valid driving licence for driving a transport vehicle.

From the discussions made hereinbefore, it is evident that the driver of the vehicle was not holding an effective licence. Possession of an effective licence is necessary in terms of Section 10 of the Motor Vehicles Act.

For the reasons aforementioned, the impugned judgment cannot be sustained. The same is set aside accordingly. However, in exercise of the court's jurisdiction under Article 142 of the Constitution of India, the Court direct that the appellant may satisfy the award in favour of the claimants to recover the same from the owner. **(New India Assurance Company Ltd. v. Roshan Ben Rahemansha Fakir & Another; (2008) 8 SCC 253)**

◆ **Section 163-A - Compensation claimed for death – Whether claim under S. 163-A for death of owner is maintainable.**

Owner and another person were riding motorcycle and there was no evidence who was driving the vehicle. Motorcycle went out of control resulting in death of both the riders. Insured paid extra premium covering his personal accident insurance. Legal representatives of the deceased owners filed claim under section 163-A. It was held, no claim under S. 163-A for death of owner is maintainable. Owner cannot be a third party. An amount of Rupees One Lac admissible under personal accident insurance is payable. The liability under section 163-A of the Act is on the owner of the vehicle as a person cannot be both, a claimant as also a recipient. **(Oriental Insurance Company v. Rajani Devi; 2008 ACJ 1441)**

◆ **Section 163-A - Quantum – Fatal accident**

Deceased who met with an accident was a tutor in Army School. Claim petition filed in terms of section 163-A of motor vehicle Act. Tribunal assessed income at Rs. 3000/- p.m. dependency at Rs. 2000/- p.m., adopted multiplier of 16 and awarded Rs. 3,84,000.00. High Court adopted multiplier of 15 and reduced the award from Rs. 3,84,000.00 to 3,64,500.00. Supreme Court upheld the multiplier of 15 and reduced the rate to 7%. **(Managing Director, Bangalore Metropolitan Transport Corporation v. Sarojamma & Another; 2008 ACJ 1619)**

◆ **Ss. 166 and 163-A – Nature of liability of owner of vehicle under when vehicle is driven by a driver, explained – Held, the said liability is vicarious in nature.**

Ordinarily, a contract of insurance is a contract of indemnity. When a car belonging to an owner insured with the insurance company and it is

being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment of compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurance company. A third party for whose benefit the insurance is taken, is therefore entitled to show, when he moves under Section 166 of the Motor Vehicles Act, that the driver was negligent in driving the vehicle resulting in the accident; that the owner was vicariously liable and that the insurance company was bound to indemnify the owner and consequently, satisfy the award made. (**Oriental Insurance Co. Ltd. v. Meena Variyal, (2007) 5 SCC 428**)

◆ **S. 168 – Accident compensation – Multiplier - Determination of choice of multiplier.**

Even as per the Second Schedule the multiplier in case of the persons between 35 to 40 years is 16. In the present case the rate of interest granted is only 6% considering the general rate of interest prevalent in 2004. In our opinion, therefore, the proper multiplier would be 14 as the value of the notional income has been increased. It was nobody's case that the deceased was not working at all. His wife has entered in the witness box and had asserted that he earned Rs.140/- per day. Even if we ignore the exaggeration, the figure arrived at by the High Court at Rs. 100/- per day and Rs. 3,000/- per month appears to be correct. However, considering that the claimant would get only 6% interest, we would chose to grant the multiplier of 14 instead of 12. (**Laxmi Devi & Ors. v. Mohammad Tabbar & Anr.; AIR 2008 SC 1858**)

◆ **S. 168 – Compensation – Determination of – What would have been income of deceased on date of retirement was not relevant factor.**

Where, as on the date of death, the salary of the deceased was revised with retrospective effect from 1994. Salary would be revised or not was not known at that part of time. Only because such salary was revised at a later point of time, the same by itself would not have been a factor which could have been taken into consideration for determining the amount of compensation.

Therefore, are of the opinion that what would have been the income of the deceased on the date of retirement was not a relevant factor in the light of peculiar facts of this case and, thus, the approach of the Tribunal

and the High Court must be held to be incorrect. It is impermissible in law to take into consideration the effect of revision in scale of pay w.e.f. 1.1.1997 or what would have been the scale of pay in 2002. **(Oriental Insurance Company Ltd. v. Jashuben & Ors.; AIR 2008 SC 1734)**

◆ **Section 168(1) – Liability of financier for compensation**

Name of the appellant as a financier indisputably was incorporated in the Registration Book of the vehicle. Said vehicle was held under a hire purchase agreement with the appellant which met an accident resulting death of a person. Vehicle was all along in possession and control of hire purchaser. Whether financier would be owner of vehicle within the meaning of section 2(30) of Motor Vehicle Act, 1988 and liable for compensation. Held, No. In case of a motor vehicle which is subjected to a hire purchase agreement, the financier cannot ordinarily be treated to be the owner. The person who is in the possession of the vehicle and not the financier being the owner would be liable to pay damages for the motor accident. **(Godavari Finance Company v. Degala Satyanarayamma; 2008 ACJ 1612)**

◆ **Section 173 — Appeal under**

The challenge in the appeal was to the award made by the Motor Claims Appellate Tribunal,. By the said award, a sum of Rs.4,03,650/- was awarded to the claimant-respondent in the appeal. The dispute related to the rejection of appellant's claim for exoneration on the ground of violation of policy condition. It was pointed out that the driving license of the driver of the offending vehicle was not in force on the date of accident. The insurance company would have no liability in the case of this nature. The impugned order of the High Court set aside. It is open to the claimant to recover the amount from respondent. **(National Insurance Co. Ltd. Appellant v. Vidhyadhar Mahariwala & others; Civil Appeal No. 5721 of 2008)**

◆ **Section 173(1)**

Application was filed under section 173(1). By order passed by Division Bench of Jharkhand High Court order challenged in this appeal. There are no copies of the income tax return or the assessment order. But the documents on record can certainly throw light on the income aspect. Award of Act set aside as affirmed by the High Court and remit the matter to MACT to consider the matter relating to income of the deceased and determine the compensation afresh taking into account the documents

already on record. **(Anita Devi & others v. Satyendra Narain Singh & others; Civil Appeal No. 4291 of 2008)**

◆ **Contributory negligence – Apportionment of liability**

Appellant claimed the compensation for injuries sustained by him in a motor accident. That was a collision between the motorcycle driven by him and a bus belonging to Karnataka State Transport Corporation. Tribunal by its judgment held both the injured and the bus driver equally negligent. High Court held that the responsibility of the injured to the accident was 75% and that of bus driver 25%. Apex Court held that the judgment of the Tribunal assessing the ratio of liability at 50:50 is proper and the High Court modified the ratio without much justification. Tribunals finding restored. **(Sri Krishna Vishweshwar Hedge v. General Manager KSRTC; 2008 ACJ 1617)**

Narcotic Drugs & Psychotropic Substances Act, 1985

◆ **Ss. 2(xvi)(e), (xi), (xx), (xxiii-a), (vii-a) 8(c) and S. 21 – Quantum of punishment – Determination of – Punishment would vary depending upon whether quantity of offending material is “small quantity”, “commercial quantity” or something in between.**

In the present appeal, the appellant’s submission was confined to the limited issue related to his sentence under Section 21 of the NDPS Act. As per the appellant, his conviction and sentence was contrary to law because the total quantity of contraband seized from him was 4.07 kg and since the purity of heroin was 1.4% and 1.6% respectively in two samples, therefore, the quantity of heroin in his possession was only about 60 gm $[(1.4+1.6)/2+1.5\%; 1.5\% \text{ of } 4.07 \text{ kg} + 61.05 \text{ gm}]$. Thus, the total quantity of heroin seized was below 250 gm i.e. below the commercial quantity. It was submitted that it was not the total weight of the substance allegedly recovered that was material, but the percentage content of heroin translated into weight that was relevant.

In the present case, the opium derivative which was found in possession of the appellant-accused is prohibited under Section 8 of the NDPS Act and thus punishable under Section 21 thereof. The question is only with regard to the quantum of punishment.

The provisions of the NDPS Act were amended by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001) (w.e.f. 2.10.2001), which rationalized the punishment structure under

the NDPS Act by providing graded sentences linked to the quantity of narcotic drugs or psychotropic substances carried. It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment.

The intention of the legislature is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity.

The punishment would vary depending upon whether the quantity of offending material is “small quantity”, “commercial quantity” or something in between. **(E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau; (2008) 2 SCC (Cri) 558)**

◆ **Section 8/18(b), 8/29/18(b), 8/21(c) — Conviction under — Questioned**

It was pointed out in the instant case that Sections 42 and 50 of the Act have no relevance because the alleged seizure took place in a public place and search was not of person. The Court need not deal with the merits of the case as it finds that the counsel appointed by the Legal Aid Committee did not appear on the date fixed before the High Court. The High Court could have in such circumstances required the Legal Aid Committee to appoint another counsel. Considering the seriousness of the offence it would have been appropriate for the High Court to do so — matter remitted to the High Court for a fresh hearing. **(Man Singh & another Appellants v. State of M.P.; Criminal Appeal No. 1516 of 2008)**

◆ **Ss. 37(1)(b) and 37(2) – Grant of bail without specifically considering parameters of S. 37(1)(b) would be invalid.**

On 17.1.2000 the appellant received information in writing from a casual source that a Tata truck bearing Registration No. MN 5113 carrying

ganja would be proceeding from Imphal area towards Guwahati in the early hours of 18.1.2000. It was immediately reported by the appellant to its superior officer i.e. Superintendent, NCB, RU., Imphal, who issued order to the appellant to take necessary action. The appellant along with other members of Staff of NCB led by the Superintendent kept vigil along the Imphal-Ukhrul Road and started checking of vehicles.

Around 7.00 a.m. on 18.1.2000 a Tata truck was seen approaching the road. The said vehicle was intercepted and stopped by the appellant. The vehicle was occupied by a driver (the respondent herein) and one Purna Bahadur, handyman. The vehicle, the accused and the handyman were brought to the Revenue complex for a thorough checking. After following the procedure laid down under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the Act”), the respondent and the driver were asked whether they would like to be taken before the Magistrate or the gazetted officer. During search 6 packets of ganja in pressed form, from a specially constructed chamber in the fuel tank were recovered. On weighing, the same was found to be 163 kg in total.

The representative samples were taken and sent for analysis by the Chemical Examiner of the Government of Assam, at the State Forensic Science Laboratory in Guwahati. The voluntary statement of the respondent was recorded in the presence of the witnesses on 18.1.2000. The respondent was put on arrest under Section 43(a) of the Act and case was registered for offence in relation to possession punishable under Section 20, 29 and 60 of the Act. The Forensic Science Laboratory report was to the effect that the sample was ganja.

On 4.3.2000 an application for bail was filed before the learned Special Judge, NDPS, Manipur, Imphal, under Section 437 of the Code of Criminal Procedure, 1973 (in short “Cr.P.C.”) and Section 37 (1)(b)(ii) of the said Act. But without taking note of Section 37 of the Act, bail was granted. The same was challenged before the High Court. By the impugned order, the same was rejected. The High Court noted that attendance of the accused can be secured by means of bail bonds already signed. The respondent may be allowed to remain on bail in order to enable him to have adequate consultation with the lawyer of his choice. **(N.R. Mon v. Mohd. Nasimuddin; (2008) 3 SCC (Cri) 29)**

◆ **Ss. 67 & 42 – Incriminatory statements of person called to provide information relevant to inquiry – Nature of – Held, not the same as the**

statement under S. 161 of Cr.P.C. and can be made as basis of conviction and bar under S. 24 to 27 of Evidence Act and would not operate as incriminatory statement under provision of Art. 20(3) of Constitution of India.

The appellant K had appeared before the officer concerned and his statement was taken under Section 67 of the NDPS Act. In his statement the appellant confessed that he too was involved in the smuggling of opium along with other co-accused persons. On the basis of his confessional statement K was arrested tried under Sections 8 and 18 read with Section 29 along with R and P from whom the opium was recovered. The Special Judge framed several issues and ultimately held that the charges had been fully proved against P. As charges were not proved against R and the appellant, the trial Judge acquitted him.

The High Court allowed the appeal against the acquittal of R and K upon holding that the statement made by R and the appellant under Section 67 of the NDPS Act did not require any corroboration and were sufficient in themselves to convict the said two accused.

The Supreme Court has held that the consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence. Even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

If a statement under Section 67 of the NDPS Act is made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provisions will come into play. A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Section 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of

Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002 and the TADA Act, 1987, are much more stringent and excludes from its purview the provisions of Sections 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continue to attract the provisions of the Evidence Act. In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any rule or order made thereunder. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof.

A statement made under Section 67 of the NDPS Act, 1985 by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. A conviction can be maintained solely on the basis of such confession. **(Kanhaiyalal v. Union of India; (2008) 2 SCC (Cri) 474)**

Negotiable Instruments Act

◆ **S. 138 – Dishonour of cheque – Demand notice – Sent by registered post with properly addressed to recipient inspite of this presumption of service can be raised.**

In this case the allegation in paragraph no. 8 of the complaint was that the notice had been sent by the complainant's wife, who was the payee and aggrieved person by registered post on 19.2.2007 and in paragraph No. 9, it was further submitted that the notice had been received by the accused, but he has not given any reply and the registry had not been returned. It may be useful here to quote Section 27 of the General Clauses Act.

“Meaning of service by post.-Where any (Central Act) or Regulation made after the commencement of this Act authorizes or requires any document to be served by post whether the

expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

The said provision clearly points out that where any letter properly addressed to the recipient is sent and posted by registered post, then unless the contrary is proved, it shall be deemed that the notice shall have reached the recipient in the ordinary course of post. However, the drawer can rebut the presumption during trial that he was not served the letter or the address was wrong. **(Amit Yadav v. State of U.P. & Anr.; 2008 (4) ALJ 480)**

◆ **Ss. 138 and 147 – Complaint regarding dishonour of cheque – compromise petition in terms of S. 147 – When binding on the party – Authority of advocate to enter into settlement.**

Consent terms were filed by the counsel without any instructions from appellant – Validity – Held, NI Act is a special Act – S. 147 provides for a non obstante clause -Indisputably, provisions of Cr.P.C. Would be applicable to the proceedings pending before courts for trial of offences under NI Act – Stricto sensu, however, the table appended to S. 320 Cr.P.C. Is not attracted as the provisions mentioned therein refer only to provisions of IPC and non other – In such a situation, a settlement could be arrived at by and between complainant and accused – While a settlement is arrived at, it is not necessary under provisions of NI Act and/or Cr.P.C. To file any affidavit affirmed by complainant or accused – By reason of authority granted by a litigant in favour of his advocate which, inter alia, empowers the latter to enter into a settlement, any settlement arrived at, on behalf of a party to a lis would be binding on the parties thereto. **(R. Rajeshwari v. H.N. Jagadish, (2008)4 SCC 82)**

◆ **S. 142 – Complaint for offence of dishonour of cheque – Who can file?**

The complainant in the present case was signed not by the payee, i.e. Smt. Urmila Devi, but by the power of attorney holder Har Singh Pal her husband. The attention of the court to Section 142 of the Negotiable Instruments Act has been drawn wherein it is mentioned in clause (a) that

no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. The holder in due course has been defined under Section 9 to mean any person who for consideration became the possessor of a promissory note, bill of exchange or cheque, if payable to the bearer or payee or the payee or indorse thereof. Therefore there is force in the submission of the learned counsel for the applicant that the power of attorney holder cannot be said to be either the payee or the holder in due course. **(Amit Yadav v. State of U.P. & Anr.; 2008 (4) ALJ 480)**

Prevention of Corruption Act

◆ Sections 7 and 13(1)(d) — Conviction under

After admission of the appeal, respondent filed an application in terms of Section 389(1) of the Code of Criminal Procedure, 1973 read with Section 482 of the Code for suspension of the judgment of learned Special Judge, the High Court by order dated 27.1.2005 stayed the conviction. The High Court dismissed that application only on the ground that the review of the order was not permissible. Learned Single Judge while directing suspension of conviction indicated no reasons. 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; Criminal Appeal No. 1075 of 2008)**

Rent Control Act

◆ Eviction Proceedings

Eviction proceedings Initiated against the appellant in respect of a shop on the ground floor of Shop-cum-Flat NO.5 Sector 20-C, Chandigarh in which the appellant was inducted as a tenant at a monthly rental of Rs.500/- per month by the respondent. Subsequently, in the month of April, 2007, an eviction petition was filed by the respondent/landlord on the ground of personal need which was allowed by Rent Controller and against the said order of Rent Controller, an appeal was filed before the Appellate Authority which is still now pending. During the pendency of the appeal before the Appellate Authority, the landlord filed an application for determination of the provisional rent/mesne profits inter alia claiming rent @ Rs.58 sq.ft/Rs.55 sq. ft. The Appellate Authority on the said application for determination determined the provisional rent/mesne profits @ Rs.59/-

sq. ft (Rs.9600/- per month) and feeling aggrieved by such determination, the appellant had filed a revision petition which was dismissed by the impugned order — appellant had been using the premises in question for commercial purpose, court held that the order of the Appellate Authority can be modified by directing the appellant to pay Rs.5,000/- per month provisionally till the disposal of the appeal pending before the Appellate Authority. **(Sadhu Ram v. Parminder Singh; Civil Appeal No. 4760 of 2008)**

Right to Information Act

◆ S. 2 (h)(d)(ii) – Public authority – Definition of

Where the petitioner-institution was receiving 95% aid from the State of Haryana to disburse the salary and to meet the expenses of its employees, it would be covered by the expression used in Section 2(h)(d)(ii) of the Act namely ‘non-Government organization substantially financed directly or indirectly by the funds provided by the appropriated Government. The use of expression ‘includes’ in clause (d) of S. 2(h) of the Act clearly indicates that the definition is illustrative and not exhaustive. Therefore, petitioner is fully covered by the expression ‘public authority’ and as such order passed by Commission directing petitioner to furnish information sought by respondent would be proper. **(Principal, M.D. Sanatan Dharam Girls College, Ambala City and Anr. V. State Information Commissioner, Haryana, Chandigarh and Anr.; 2008 (4) ALJ (NOC) 920 (P & H) = AIR 2008 P. & H. 101)**

◆ S. 3 – Right to Information – Refusal to furnish answer-sheet to examinee to keep examiner’s identity connected so that examiner is not threatened – Not proper.

If the Central Information Commission could have recognized the spirit of the Act to have recommended the return of answer scripts to examinees, that there is an immediate hardship or harsh consequence is of no relevance. The Act provides a right to receive information and the consequence of the making over of such information is immaterial in the matter of construction of its provisions. As to whether an examinee would use the information received on inspection of his answer script to undo the finality of the process of examination is not an argument that can be considered to curb the operation of the statute. The Act begins with a citizen’s right to obtain information and ends with the information being

made available to him or his request being justly rejected on the grounds recognized by the Act; What happens before and what may be the consequence of the information being made available or rightfully denied is a matter beyond the operation of the Act.

The University's challenge that what an examinee seeks in asking for inspection of his answer script is not information at all, cannot be accepted. In the stricter sense, if such answer script answers to the description of information, whether such information is of the examinee's creation, counts for little. In the broader perspective, if a document submitted takes on any marking it becomes a new document. The University's offer of making the marks allotted to each individual question available to all candidates is fair and laudable, but not if it comes with the rider that the answer scripts should then be exempted from being divulged. Notwithstanding the principle of severability contained in S. 10 of the said Act, the answered paper with or without an examiner's etchings thereon is not information exempted under any of the limbs of Section 8.

Whether or not an examiner puts his pen to the answer script that he proceeds to evaluate would not rob the answer script of retaining its virtue as information within the meaning of the said Act, even if it is made available for inspection in the same form as it was received from the examinee. The etchings on an answer script may be additional information for a seeker, but the answer script all along remains a document liable to be sought and obtained following a request U/s. 6 of the Act. That the etchings may be pointless or that they may be arbitrary or whimsical in the absence of any guidelines, makes little difference.

As a matter of principle, if answer script cannot be opened up for inspection it should hold good for all or even most cases. Since the said Act permits a request for third party information, subject to the consideration as to desirability in every case, a third party answer script may, theoretically, be sought and obtained. An examinee who has written hurried answers and solved problems under examination conditions sometimes several months before he gets the mark sheet does not really "know" his answers. His memory of what he wrote will not be complete or accurate. He may not even have a clear recollection of what he has recorded in his answers. Alternatively, he may feel that he has written something that he actually has not. His silly mistakes, graphical or grammatical errors and oversights may not be obvious to him. A look at his evaluated answer script can serve the

wonderful purpose of pointing out his mistakes whether or not the evaluated paper marks such mistakes clarifying his doubts and helping him to know once and for all, what he wrote and what he did not. If inspection of answer-scripts is denied to the examinee, the spirit of the Constitutional right to expression and information may be lost. The knowledge builds the University's bid to perpetuate the draconian, elitist, one-sided right to know and judge and rule without being open to question or accountable to the examinee cannot be encouraged. For a system to foster meaningful proliferation of knowledge, it must itself be crystal clear to its core. **(Pritam Rooj v. University of Calcutta & Ors.; 2008(4) ALJ (NOC) 911 (Cal) = AIR 2008 Cal 118)**

SC & ST (Prevention of Atrocities) Act

◆ **S. 3(1)(x) – Addressing a member of SC by using word “chamar” is offence U/s. 3(1)(x) – Held, “Yes”.**

One V, a driver who belonged to a Scheduled Caste, lodged on FIR against the appellants alleging that Appellant 2 and her daughter i.e. Appellant 3 called him “chuda-chamar” while he stood at the gate of the premises of his employer. It was also alleged that when V complained about this to Appellant I, who was husband of Appellant 2 and father of Appellant 3, he also said that V was a chuda-chamar and that Appellants 2 and 3 did not say anything wrong.

After the investigation was completed, a charge-sheet was filed against the appellants under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Thereafter, charges were framed against the appellants. Against the order framing charges, criminal revision petitions were filed in the High Court which were dismissed by the impugned judgment. Hence, the present appeals.

While deciding the issue as to quashing of the proceedings in the present case, the primary question which arose for consideration was whether on considering the alleged act of the appellants, an offence under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was prima facie made out against them or not.

It is true that chamar is the name of a caste among Hindus who were traditionally persons who made leather goods by handicraft. But today the word “chamar” is often used by people belonging to the so-called upper

castes or even by OBCs as a word of insult, abuse and derision. Calling a person “chamar” today is nowadays an abusive language and is highly offensive. In fact, the word “chamar” when used today is not normally used to denote a caste but to intentionally insult and humiliate someone.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent indignities, humiliation and harassment to the members of SC/ST community, as is evident from the Statement of Objects and Reasons of the Act. Hence, while interpreting Section 3(1)(x) of the said Act, what has to be taken into account is the popular meaning of the word “chamar” which it has acquired by usage, and not the etymological meaning. If the etymological meaning is taken into account, it may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.

Thus, calling a member of the Scheduled Caste “chamar” with intent to insult or humiliate him in a place within public view is certainly an offence under Section 3(1)(x) of the Act concerned. Whether there was intent to insult or humiliate by using the word “chamar” will depend on the context in which it was used. **(Swaran Singh and Others v. State through standing counsel & Antoher; (2008) 8 SCC 435)**

Service Law

◆ Appointment on compassionate ground

It is an admitted fact that the husband of the writ petitioner was serving with the appellant Bank. He indulged in illegalities and committed misconduct for which departmental proceedings were initiated against him. An Inquiry Officer was appointed, who after giving opportunity of hearing to the deceased employee, recorded a finding that the charges levelled against the employee were proved. It is also not in dispute that in January, 2000, the employee expired and an application for appointment on compassionate ground was submitted by his widow, the writ petitioner. At that time, the appellant Bank was governed by scheme which was in force with effect from January 01, 1978 as amended up to January 01, 1998. Even under the policy in force in 2000, the appellant Bank was wholly right and fully justified in declining the prayer of the widow of deceased employee in rejecting her prayer for extending benefit of appointment on compassionate ground. The orders passed by both the Courts are, therefore, liable to be set

aside on that ground alone. **(General Manager, State Bank of India & others v. Anju Jain; Civil Appeal No. 5224 of 2008)**

◆ **Appointment by Judicial Direction – impermissible**

High Court cannot direct State Government by a writ of mandamus to appoint a person against a post which has been abolished by the State Government. The respondent even after selection has no indefeasible right to be appointed on the post because selection does not confer a right of getting appointment which can be enforced by filing a writ petition under Article 226 of the Constitution. Since the respondent has only an inchoate right to the post, there is no question of contempt. **(Balakrushna Behera v. Satya Prakash Dash, (2008) 1 SCC 318)**

◆ **Back wages — Payment of**

The service of the respondent was terminated as he was unauthorisedly absent from duty from 15th of February, 1984 to 3rd of March, 1984 and after the order of termination respondent had not worked for a long time with the appellant board till he was reinstated — appropriate to modify the award in question to the extent of payment of fifty per cent of back wages to the respondent instead of full back wages. **(M.P. Electricity Board & others v. Maiku Prasad; Civil Appeal No. 5425 of 2008)**

◆ **Criminal conviction – dismissal when warranted – Factors to be considered.**

Conviction for a criminal offence does not imply that dismissal must be imposed in every case – disciplinary power must be exercised reasonably and fairly, keeping in view nature of offence and sentence imposed – Doctrine of proportionality also be invoked – Respondent, a peon in Middle School, convicted under S. 323 r/w S. 34, IPC, for assaulting a person, and consequently fine of Rs 500 imposed on him – Conviction leading to respondent's removal from service – Departmental penalty of dismissal, held disproportionate. **(State of M.P. v. Hazarilal, (2008)3 SCC 273)**

◆ **Constitution of India - Article 14 & 16**

Respondent were lecturers in private aided college. The age of superannuation of the respondent was 60 years. By an amendment in the education code this age was brought down to 58 years. Aggrieved thereby respondent preferred writ petition before the High Court and pleaded that cut off date fixed for grant of promotion was arbitrary and discriminatory.

High Court held that the cut off date as arbitrary. It was held that fixing of cut off date is within the domain of the executive authority and the court should not normally interfere with the fixation of cutoff date by the executive authority unless such order appears to be on the date of it bluntly discriminatory and arbitrary. **(Government of Andhra Pradesh & Others v. N. Subbarayudu & Others; 2008(4) SLR 137)**

◆ **Constitution of India - Article 311 – Dismissal from Services**

Respondent, a bank official in the Appellant's Bank. Charges against him were that he had obtained undue pecuniary benefits and sanctioned loans to his relatives. Departmental proceedings were initiated against him and he was also proceeded against in a criminal case and was acquitted of the criminal charges. Criminal court concluded that inadvertent mistakes committed by official and alleged misconduct was not willful. He has been found guilty of commission of procedural irregularity. Court held that punishment of dismissal was not appropriate. Appropriate authority of the appellant would be entitled to impose any suitable penalty upon him. **(The Managing Director, State Bank of Hyderabad & Another v. P. Kanta Rao; 2008(4) SLR 424)**

◆ **Constitution of India - Article 14 & 309 – Promotion – Departmental Examination – Relaxation of condition**

Respondent promoted to post of Senior Accountant without appearing in departmental examination. It was held that power to relax condition of passing departmental examination should be invoked only if eligible candidates are not available for promotion or for similar valid grounds or reasons but should not be exercised to perpetuate a mistake. Since the respondent did not fulfill the conditions of recruitment rules and a large number of accountants who had passed departmental examination were available and awaiting promotion. It would be against their interest to deprive them of promotion and to continue the respondent who had not passed the examination. **(Union of India v. Nagendra Singh, 2008(4) SLR 117 SC)**

◆ **Constitution of India - Article 14 & 309 – Promotion – Departmental Examination – Correction of mistake**

Respondent was mistakenly promoted as Sr. Accountant (functional) after about 4 years. The department realized that the promotion given to the respondent was erroneous and he was not eligible to be promoted. The

mistake was, therefore, sought to be corrected. A notice was issued to the respondent informing him that he could not have been promoted as he has not passed departmental examination of Accountants as required by law. Respondent contended that he was eligible and qualified for getting promotion and accordingly was promoted. He also asserted that he was performing his functions and duties efficiently and there was no occasion. He was on the verge of retirement so much so that only few days remained. The court held, it would not be appropriate to revert him for such a very short period, that too at the verge of retirement. **(Union of India v. Nagendra Singh, 2008(4) SLR 117 SC)**

◆ **Disciplinary Proceedings**

Disciplinary Proceedings were initiated against a Sub-Inspector posted in Intelligence Bureau after 9 years of alleged incident for which he was charged of misconduct. The delinquent employee in the same incident was acquitted in criminal proceedings and proceedings under Customs Act as no proof was found for alleged offence.

It is true that disciplinary proceedings can be initiated even after acquittal of delinquent employee in criminal case for same incident but these proceedings should be initiated bonafidely and not mala fide. Department should also conduct it in accordance with law. In the instant case delinquent employee was neither permitted to examine a witness in his defence nor permitted to take services of his legal practitioner. Documents sought by him were also not supplied to him. Principles of natural justice were violated. Disciplinary proceedings were conducted in violation of rules and deserved to be set aside. The delinquent employee was directed to be reinstated forthwith with all consequential benefits. **(Union of India & others v. Naman Singh Shekhawat; 2008(3) ESC 391 (SC))**

◆ **Dismissal — Set aside — The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.**

Having conformed the involvement of the respondent in the illicit felling of trees, the Division Forest Officer, Haldwani Forest Division, suspended the respondent. A perusal of the report shows that 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. It is clear that the Enquiry Officer himself acted on

the Investigator, Prosecutor and Judge. Such a procedure is opposed to principles of natural justice and has been frowned upon by the Court. Though there is no specific bar in offering views by the enquiry officer, in the case on hand, the enquiry officer exceeded his limit by saying that the officer has no right to continue in the government service and he has to be dismissed from service with immediate effect. The High Court rightly interfered and quashed the orders passed by the Divisional Forest Officer, Haldwani as well as order passed by the Conservator of Forest, Western Circle, Nainital. **(State of Uttaranchal & others v. Kharak Singh; Civil Appeal No. 4531 of 2007)**

◆ **Initiation of departmental enquiry after acquittal in a criminal case – Permissibility – Scope and manner in which such power to be exercised.**

There cannot be any doubt that initiation of departmental proceeding is permissible even after the judgment of acquittals recorded by the criminal court. But the same would not mean that a proceeding would be initiated only because it is lawful to do so. A departmental proceeding could be initiated if the Department intended to adduce any evidence which is in its power and possession to prove the charges against the delinquent officer. Such a proceedings must be initiated bona fide. The action of the authority even in this behalf must be reasonable and fair. **(Union of India v. Naman Singh Shekhawat, (2008) 4 SCC 1)**

◆ **Judicial Review – Scope – Proportionality – Appreciation of evidence – Powers of Administrative Tribunal.**

The departmental proceedings is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Courts exercising power of judicial review are entitled to consider whether relevant piece of evidence has been taken into consideration and irrelevant facts excluded therefrom, while proving misconduct against an employee. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its facts value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidence, the test of doctrine of proportionality has not been

satisfied, the Tribunal was within its domain to interfere. (**Moni Shankar v. Union of India, (2008) 3 SCC 484**)

◆ **Retirement — Permission to retire on medical invalidation as suffering from total blindness due to hypertension.**

When application in process, a dependent son made application for appointment on compassionate ground, granted. In the meanwhile, a Full Bench of the Andhra Pradesh High Court declared that there can be no appointment on compassionate grounds in cases other than death of employees in harness and that the scheme for compassionate appointment of a dependant of an employee on medical invalidation was unconstitutional. The termination of services of the appellant cannot stand and requires to be set aside. The appellant shall be reinstated in service. On the facts and circumstances, though the appellant will be entitled to continuity of service and notional increments, He will not be entitled to any salary for the period he has not worked. (**V. Sivamurthy & another with V.M. Satyanarayana v. State of A.P. & others with The Superintending Engineer, AMRP Circle & others; Civil Appeal No. 4210 of 2003 with C.A. Nos. 4208-4209, 4213 & 4226 of 2003 & 4993 of 2008**)

◆ **Termination on account of false, "scheduled tribe certificate**

The employee having accepted the finding of the Scrutiny Committee, holding that the caste certificate furnished by the employee was false, the very foundation of her appointment vanished and her appointment was rendered illegal. Her conduct rendered her unfit to be continued in service and must necessarily entail termination of her service. Here is absolutely no justification for her claim in respect of the post merely on the ground that she had worked on the post for over twenty years. The post was meant for a reserved candidate but she usurped the same by misrepresentation and deception. The fact that caste certificate was referred to the Scrutiny Committee for verification after ten years of her joining the service and a long time was taken by the Scrutiny Committee to verify the same is of no consequence inasmuch as delay on both the counts does not validate the caste certificate and the consequent illegal appointment. The impugned judgment and order quashing the order of termination of service of the employee and directing her reinstatement cannot be sustained. The order of termination based on the report of the Scrutiny Committee does not suffer from any infirmity and the High Court should not have interfered

with the same. **(Regional Manager, Central Bank of India v. Madhulika Guru Prasad Dahir & others; Civil Appeal No. 4636 of 2008)**

◆ **U.P.Civil Service Regulations – Regn. 351-A, proviso and Expln. - Governor's sanction – When necessary.**

Governor's sanction not required where departmental proceedings are instituted while the employee was in service and the proceedings were continued after his retirement.

This case involved interpretation of Regulation 351-A of the U.P. Civil Service Regulations.

The Administrative Tribunal and the High Court held that continuance of departmental proceedings after the respondent's retirement were invalid because the Governor's sanction was not obtained under Sub-clause (a)(i) of proviso to Regulation 351-A.

Reversing the interpretation given by the Administrative Tribunal and by the High Court and allowing appeal of the State,

Held: If the departmental proceedings are instituted before an officer has attained the age of superannuation and before his retirement, Proviso (a) can have no application. **(State of U.P. v. R.C. Misra, (2007)9 SCC 69)**

◆ **Workmen Compensations Act - Section 2(1)(n) (as it stood prior to its amendment in 2000)**

Whether a casual employee who was appointed for a limited period to carryout the repairing job in a building would be a workmen within the meaning of the Act.

Appellant was the owner of a residential building situated by the side of an industrial establishment. The predecessor-in-interest of the respondent, suffered an accident coming in contact with a high-tension electrical wire passing over a roof of the said industrial establishment and expired. Respondent was a workmen under the Appellant. Proceeding was initiated by the Workmen's Compensation Commissioner under the Act. The Court held that the workmen in the present case was employed for a limited period for carryingout repair works in a residential house. The same doesnot answer the description of a workmen as contained in the provisions of the Act. Therefore, Schedule 2 appended to the said Act to which reference was made is not applicable as it is subject to the provisions of S. 2(1)(n) of the Act. If therefore, the law as it then stood would exclude the

applicability of the Act, having regard to the definition of the term 'workmen'. The same cannot be held to include deceased only because he was working in connection with a building activity. **(Om Prakash Batish v. Ranjit & others; 2008 ACJ 1700)**

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

◆ **Ss. 17(4), 13(4) – Appeal – Mere filing of appeal by borrower against recovery measure by Bank does not automatically suspend right of Bank to take recovery measures.**

The right of the Bank is not automatically suspended upon filing of an appeal by borrower under S. 17 of the Securitisation Act and the Bank secured creditor can proceed to auction secured asset where no stay is granted by the Tribunal. There is nothing in S. 17 of the Securitisation Act which would indicate that the Legislature intended that there would be automatic stay of recovery proceedings by Bank under S. 13(4) on filing an appeal by borrower under S. 17. Use of the expressions "if" and "then" under S. 17 would not mean that the bank can take one or more measures laid down under S. 13(4) only if the Tribunal declares that the action taken already is in accordance with the provisions of the Securitisation Act and the rules made thereunder. Use of the word "if" does not connote a condition precedent. It is a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they harmonized with the object of the Statute and which effectuate the object of the legislature. The provisions of Section 17 must, therefore, receive such construction at the hands of the Court as would advance the object and at any event not thwart it. In other words, the principle of purposive interpretation should be applied while construing the said provision. The Securitisation Act is enacted to provide a speedy and summary remedy for recovery of thousands of crores which were due to the banks and financial institutions. **(M/s. Lakshmi Shankar Mills (P) Ltd. & Ors. Etc. v. Authorised Officer/Chief Manager, Indian Bank & Ors. etc.; AIR 2008 Mad 181)**

Societies Registration Act

◆ **S.25 – Civil Procedure Code, S. 9 – Merely because summary remedy was provided for resolving dispute under S. 25 of above Act will not take away the 'jurisdiction of civil court.**

The proceedings under S. 25 of Societies Registration Act, 1860 are summary in nature and they are amenable to jurisdiction of Civil Court which is not ousted by S. 25 of the Act. In the instant case the petitioner was removed from the post of Mantri for working against the interest of society for enrolling farji members which affected the rights of other members of the society. The fact whether the proceedings enrolling 'Farji' members in the society or for doing an act which was in the interest of society or against the interest of society was the question which required findings of facts by adjudication on basis of oral and documentary evidence which may be adduced by the parties before the Civil Court. Thus merely because summary remedy was provided for resolving a dispute will not take away the jurisdiction of the Civil Court to decide the matter since S. 25 does not provide either adequate effective final remedy. **(Ram Kumar Sharma v. State of U.P. & ors.; 2008 (4) ALJ472)**

Specific Relief Act

◆ **Relief of specific performance – Is discretionary – Court would take into consideration the circumstances of the case.**

The relief for specific performance lies in the discretion of the Court and the Court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the Court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the Court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void. **(Bal Krishna & Anr. V. Bhagwan Das (Dead) By L. Rs & Ors.; AIR 2008 SC 1786)**

◆ **S.16(C) – Suit for specific performance of contract – Averment in plaint of plaintiff's readiness and willingness to perform contract is mandatory.**

Explanation (ii) to clause (c) of Section 16 makes it clear that plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiffs readiness and willingness must be in accordance with the terms of the agreement. **(Bal Krishna & Anr. V. Bhagwan Das (Dead) By L.Rs & Ors.; AIR 2008 SC 1786)**

◆ **S. 16-C(c) – Willingness and readiness – Conclusion of.**

The plaintiff Abdul Salam Qureshi was tenant of the defendant Jagdish Prasad Gupta at the rent of Rs. 35 per month. According to the plaintiff, his tenancy subsisted till 16.10.1970 and thereafter an agreement was executed between them on 17.10.1970, it was an agreement to sell. The deed was registered and the sale consideration was Rs. 31,000/- An amount of Rs.15,500/- was paid at the time of execution of the deed. A suit for specific performance was instituted on the ground that the defendant Jagdish Prasad Gupta had executed a registered agreement to sale relating to the house in question on 17.10.1970 of his 11/12 share situated in Mohalla Sarai Khair Nagar, at Meerut City, for a consideration of Rs. 31,000/-. Prior to this, SCC suit was instituted by the defendant Jagdish Prasad Gupta against the plaintiff for eviction on the ground of arrears of rent, which was dismissed on 10.9.1993 holding that regular payment of Rs. 232.50 per month by the plaintiff was towards part performance of the agreement to sale and the amount of Rs. 232.50 per month by the appellants was an interest at the rate of 1.5% per month on balance sale consideration of Rs. 15,500/-, Revision filed by the defendant was allowed on 29.3.1996. The revisional order was challenged by the appellants in Writ Petition No. 14259k of 1996, which was allowed by this Court.

It was held in the writ petition that balance sale consideration was payable to the defendant Jagdish Prasad Gupta at the time of execution of the sale deed. It was also contended that period agreed for executing the sale deed was one year, which was subsequently extended on the date 9.10.1971 and thereafter from time to time. Finally, the instant suit for specific performance was instituted, which was dismissed and appeal preferred by the plaintiff was also dismissed.

No doubt, this Court while deciding the writ petition arising out of the suit for arrears and eviction held that there was Thekanama executed between the parties. This finding alone or fact that the suit was not decreed for arrears of rent is not sufficient to set aside the two documents where the courts have refused to rely and pass a decree of specific performance on the basis of the alleged deed said to be an agreement to sale, it is not proper to record a conclusion that the findings of the Courts below is perverse. Besides, the aforesaid findings, the Courts have also given their conclusions on the willingness and readiness especially on the face of the finding that the documents adduced in evidence to support the argument that the period was extended from time to time is on the basis of manufactured document and heavy burden lies on the shoulder of the plaintiffs, which they have miserably failed to do so. Findings recording against the plaintiffs on the question of readiness and willingness are findings of fact and court not in agreement with the submission made by the Counsel for the appellants. **(Abdul Salam (Dead) through L.Rs & Others v. Jagdish Prasad (Dead) through LRs.; 2008 (105) RD 224)**

◆ **Ss. 19(b), 20 and 21 Agreement on strength of power of attorney – Relief of Specific Performance – Discretionary**

The agreement for Sale entered into on strength of General Power of Attorney was valid and protected by provision - Granting relief of specific performance is purely discretionary and is dependent on the provisions of S. 20 of the aforesaid Act and the Court under S. 21 thereof has the power to award compensation for breach of contract instead of decreeing the suit for specific performance **(Abdul Khader v. Abdul Wajid, Special Leave Petition (C) No. 2770 of 2006)**

Transfer of Property Act

◆ **S. 52 doctrine of lis pendens - Specific performance**

Execution of agreement in respect of the property declined on ground that third party rights had intervened, suit property purchased without knowledge or notice of the prior sale agreement was a bona fide purchaser for value without notice **(Abdul Khader v. Abdul Wajid, Special Leave Petition (C) No. 2770 of 2006)**

◆ **S. 53-A – Entitlement of part performance – Doctrine of part performance can only be invoked by a person who honours terms of agreement and has been willing and ready to perform of his part.**

The purchaser cannot claim protection u/S. 53A of T.P. Act since the doctrine of part performance can only be invoked by a person who honours the terms of the agreement and has been willing and ready to perform his part of the agreement. Purchaser did not honour the terms of the agreement as he neither got the sale deed executed nor paid nor offered to pay the balance of the sale consideration. **(M/s. T.P. Textile Waste Pvt. & Anr. V. State of U.P. & Ors.; 2008(4) ALJ 751 (DB)**

◆ **Section 58 – Contracts relating to re-conveyance of property.**

If sale and agreement to re-purchase are embodied in separate documents, it cannot be a case of mortgage and in such cases relating to re-conveyance time is always the essence of contract. **(Gauri Shanker Prasad v. Bramha Nand Singh; 2008(5) Supreme 201)**

U.P. Cooperative Societies Act

◆ **S. 122 – Disciplinary Inquiry against rules of Natural Justice was illegal and order passed by Enquiry Officer would liable to be quashed.**

A plain reading of the enquiry report indicates that the Enquiry Officer has not fixed any date, time or place to record the oral evidence. The enquiry report further reveals that no effort was made by the department to adduce any oral evidence to substantiate the charges contained in the charge sheet. There is nothing on record which may indicate that the documents relied upon against the petitioner in the enquiry were duly proved by cogent evidence. Further, the enquiry report does not reveal that the Enquiry Officer had given opportunity to the delinquent employee to defend his case.

In view of the above, we are of the view that the Enquiry Officer had not discharged his duty in accordance with law and he had acted in violation of principles of natural justice. Since the impugned orders have been passed relying upon the report of enquiry which was held in utter violation of principles of natural justice, they vitiate. The writ petition deserves to be allowed. **(Pradeep Kumar Saxena v. Chairman/Managing Director, U.P. Sahakari Gram Vikas Bank Ltd. & Ors.; 2008 (4) ALJ 422)**

U.P. Industrial Disputes Act

◆ **S. 1 - Applicability of – Provisions of I.D. Act would not be applicable to the employees of cooperative society.**

In *R.C. Tiwari v. M.P. State Cooperative Marketing Federation Ltd. & ors.* [AIR 1997 SC 2652] this Court had held that in view of the arbitration clause in the Uttar Pradesh Societies Act (in short ‘Societies Act’) provisions of the Industrial Disputes Act are not applicable. (**Prabhu Dayal v. Sadhan Sahkari Samiti Mujuri Vikas Khand Paniyara & Ors.**; AIR 2008 SC 1681)

◆ **S. 11-A – Misconduct – Penalty of removal from service for non issuance of tickets to passengers would not be improper.**

It is the settled law that a conductor holds a post of trust. A person guilty of breach of trust should be imposed punishment of removal from service. In the instant case, on two occasions, it was found by the checking squad during the surprise check that the passengers were traveling in the vehicle without tickets. On 16.10.1989, nine passengers were found in the vehicle traveling without tickets and thereafter again on 26.10.1989, twenty-two passengers were traveling without tickets.

The proved acts amount either to a case of dishonesty or of gross negligence, and Bus Conductors who by their actions or inactions cause financial loss to the Corporation are not fit to be retained in service.

There is no illegality or infirmity in the impugned judgment and order passed by the State Public Services Tribunal. (**Mannu Ram v. U.P. State Road Transport Corporation, Lucknow & Ors.**; 2008 (4) ALJ 431)

U.P. Krishi Utpadan Mandi Adhiniyam

◆ **S. 17(iii)(b) – Market fee – Levy of.**

Under S. 17(iii)(b) the measure of levy of the fee is on the price of the goods sold. It obviously means that there must be a complete transaction of sale or a concluded sale. If there is only an agreement and the agreement fails, the remedy for the aggrieved party is to suit for damages. Obviously, no fee can be charged on damages. The action for levy of fee can arise only on a concluded sale and as the sale has not taken place within the market area of Ghaziabad, no mandi fee can be levied.

The stand of the appellant is that the market fee is levied on “transaction of sale” and not on “sale” only and, therefore, what is to be seen is where the transaction took place and not the situs of the sale. If this argument is accepted then even an agreement to sale without the presence

or existence of the agricultural produce will come within the ambit of the charging provision. It would also mean that if the agreement takes place outside the boundaries of State of Uttar Pradesh, the provisions would still become applicable.

The High Court rightly noted that the admitted position was that the rice was never brought or was in existence within the market area. Mandi Samiti, Ghaziabad or for that matter within the State of Uttar Pradesh. The High Court recorded a categorical finding that the sale took place only when the rice was loaded on the sea at the port in terms of the agreement. That being so, there was no transaction of sale within the market area of the Mandi Samiti, Ghaziabad. Therefore, the High Court rightly held that the Mandi Samiti was not entitled to levy any market fee. **(Krishi Utpadan Mandi Samiti, Ghaziabad and Another v. M/s. Metal Craft and Others; 2008 (105) RD 166)**

◆ **S. 17(iii)(b), Expln. – Whether physical presence of good in the market area is necessary in order to attract S. 17(iii)(b) – Held, “yes”.**

The Committee is empowered under Section 17(iii)(b) to levy and collect market fee which shall be payable on transaction of sale of agricultural produce in the market area. The words “specified agricultural produce in the market area” have great relevance. Reference is to “produce”. This apparently shows that physical presence of the agricultural produce within the market area is necessary for levy of market fee. The Explanation has application only if the agricultural produce is physically present within the market area. The Explanation becomes redundant if the stand of the appellant that Section 17(iii)(b) is applicable even in cases where agricultural produce is neither physically brought nor is in existence within the market area.

Under Section 17(iii)(b) the measure of levy of the fee is on the price of the goods sold. It obviously means that there must be a complete transaction of sale or a concluded sale. If there is only an agreement and the agreement fails, the remedy for the aggrieved party is to file suit for damages. Obviously, no fee can be charged on damages. The action for levy of fee can arise only on a concluded sale and as the sale has not taken place within the market area of Ghaziabad, no mandi fee can be levied. **(Krishi Utpadan Mandi Samiti, Ghaziabad & Another v. Metal Craft & Others; (2008) 7 SCC 780)**

U.P. Land Revenue Act

◆ S. 14-A(3) – Expression “Collector” – Scope

The Additional Collector exercises powers and discharges duties under sub-section (3) of S. 14A as Collector of the district. Therefore, by legal fiction the order passed and the jurisdiction exercised by Additional Collector by virtue of Sub-section (3) of S. 14A would be deemed to be that of a Collector of district because of sub-section (4) of S. 14A of 1901 Act. Thus, the Additional Collector when acts and discharges duties and functions or exercises such powers of a Collector either under 1901 Act or under any other Act for the time being in force, that would be deemed to have been exercised by him as Collector of the district under that Act. Thus, the Additional Collector has all the powers of a Collector under sub-section (4) of S. 14A when he exercises power under sub-section (3) of S. 14A. **(Brahm Singh & Ors. v. Board of Revenue & Ors.; 2008 (4) ALJ 697)**

U.P. Municipality Act

◆ S. 48(2) – Scope of – No requirement for observance of principle of natural justice for exercise of power under the proviso to sub section (2) of Sec. 48.

It is submitted by the petitioner that exercise of power by the District Magistrate under the proviso to sub-section (2) of Section 48 of the Act, cannot be done unless the petitioner has been afforded an opportunity of hearing because for the exercise of power under sub-section (2) of section 48 of 1916 Act an opportunity of hearing must be afforded to the petitioner. Court do not find any such provision in the present proviso, which is the subject matter of challenge in the present writ petition. Court are unable to agree with the argument that before appointing the sub-Divisional Magistrate concerned for exercise of administrative powers of the petitioner as Chairman/President of the ‘Municipal Board’ concerned during the pendency of the proceedings for removal under section 48 of the Act, it is necessary to afford an opportunity of hearing to the petitioner. Court said that neither it is the requirement of the Statute, nor principles of natural justice so necessarily warrants considering the nature of dispute because no rights of the petitioner are being adjudicated upon while power under proviso to sub-section (2) of section 48 of the Act is exercised. The scope of exercise of power under the proviso has been dealt with by the Apex Court

in the case of *S. Sundaram Pillai etc. v. R. Puttabiraman* (AIR 1985 SC 582), in paragraph 42, which reads thus –

“42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

- (1) qualifying or excepting certain provisions from the main enactment;
- (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
- (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provisions.”

(Smt. Swarn Prabha Singh v. State of U.P. & Ors; 2008 (105) RD 171)

U.P. Public Money Recovery of Dues Act

◆ **S. 4(2)(b) – Recovery of dues as arrears of land revenue – Mere non-compliance of procedure provided U/s. 32G of financial corporation Act cannot be granted to exercise equitable jurisdiction in favour of debtor.**

Under S. 32G the purpose of the exercise which the State Govt. is required to perform is for determining the liability. Where there is no dispute about the liability of the petitioner debtor, reference to State Govt. on point of determination of liability would be a mere academic exercise for even under the provisions of S. 32G the recovery has to be made as arrears of land revenue. IN view of the fact that the liability in instant case was not disputed and the value of the mortgaged properties was quite insufficient to meet the liability and non-compliance of the procedure provided under S. 32G of Act viz. omission to apply for a certificate of the State Govt. was only academic because the exercise which the State Govt. was required to

perform was for determining the liability which was not disputed then no purpose would be served by relegating the Corporation to apply to the State Govt. under S. 32G of the Act when under that provision too the recovery was to be made just in the same manner as is being made here as arrears of land revenue.

Thus, where the liabilities are not in dispute a writ Court which is a Court of equitable jurisdiction is not bound to interfere in the recovery of dues as arrears of land revenue even though that course may not be available to the U.P. Financial Corporation under the law. **(Deepak Kumar Pandey v. State of U.P. & Ors.; 2008 (4) ALJ 311)**

U.P. Public Premises Eviction of Unauthorised Occupants Act

◆ S. 2(e) – Expression “Local Authority” includes university – Premises owned by University would be entitled to file eviction suit under above Act.

When the ‘local authority’ was widely defined under the General Clauses Act to include ‘any authority’, a University must be construed to be any other authority within the meaning of Section 3(31) of the General Clauses Act as applicable to the State of U.P. Therefore, the establishment of a University being by an authority established under the Universities Act, the amount spent from the University fund is a local fund within the meaning of S. 3(31) of the General Clauses Act.

In a view of the discussion above, Court hold that the approach of the learned District Judge that the University is a local authority and the premises in question owned by Kumaon University are the public premises is correct. The contention of the learned counsel for the petitioner that the provisions of the Act are not applicable to the case at hand is not acceptable. To my mind the case law, (1998) 3 Supreme Court Cases 530: AIR 1998 SC 1125, does not help the petitioner. The findings recorded by the learned District Judge on this score do not call for any interference in writ jurisdiction by this Court. **(Smt. Veermati v. State of Uttaranchal & ors.; 2008 (4) ALJ 783)**

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

◆ Sub-letting/sub tenancy – Proof required for establishing allegation as to.

What constitutes sub-letting has repeatedly fallen for the consideration of this Court in various cases and it is now well-established that a sub-tenancy or a sub-letting comes into existence when the tenant inducts a third party stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof. The lessor and/or a landlord seeking eviction of a lessee or tenant alleging creation of a sub-tenancy has to prove such allegation by producing proper evidence to that effect. Once it is proved that the lessee and/or tenant has parted with exclusive possession of the demised premises for a monetary consideration, the creation of a sub-tenancy and/or the allegation of sub-letting stands established. **(Nirmal Kanta (Dead) through LR's v. Ashok Kumar and Another; (2008) 7 SCC 722)**

◆ **Section 12 - Vacancy – Declaration thereof.**

Petition was filed for setting aside the order by which vacancy of the premises in dispute declared by the Rent Control and Eviction Officer, Mathura. Case of tenant was that his household things were kept in the premises and alongwith it articles belonging to Khandelwal Jan Sabha were also kept. A report was submitted that as neither tenant nor his counsel were present at the time of inspection. Hence, presumption was drawn that tenant was not in possession. Vacancy was declared. The court held that presumption about vacancy drawn is not sustainable. Petition was allowed. Direction were issued to RCEO to pass a fresh order in accordance with law. **(Phool Chand Khandelwal (dead) through L.Rs. v. Rent Control & Eviction Officer, Mathura & others; 2008(2) ARC 577)**

◆ **Section 12/16 and 16(9)**

A shop was allotted to petitioner by RCEO. Respondent was dispossessed. Possession was delivered to petitioner without any notice. Respondent filed review petition against allotment order before RC & EO as well as revision which was belated and accompanied by delay condonation application. The District Judge rejected the delay condonation application and dismissed the revision as time barred. Thereafter review petition was also rejected by RC & EO holding that allotment order had merged in the Revisional Court's order. Against the said order writ petition was filed. No rent was mentioned in the allotment order. The Court held that there was no error passed by the Revisional Court. By virtue of rule 8(2) of the Rules framed under the Act, it is essential to give notice to the

occupant also and as far as possible inspection should be made in the presence of occupant also. Petition was dismissed. **(Mahendra Singh Chaudhary v. Rent Control & Eviction Officer, Mathura & others; 2008(2) ARC 595)**

◆ **Section 12, 16, 18 & 34**

An application was filed for the allotment of a part of a house which was allegedly fallen vacant. There were in all 13 application for the allotment of the disputed premises by various persons before the RCEO. On the said application an order was passed by RCEO directing the Rent Control Inspector to enquire and report and allotment was made. Revision of Respondent was dismissed against which writ was allowed. The Court held that legality of the fact that simply because the gate was locked, it was not ground to conclude that the disputed premises was vacant cannot be ignored. The fact of the gate being locked and the absence of the Respondent at the time of the inspection would not mean that substantial removal of effects of the respondent had being made. Therefore, no deemed vacancy was occurred. Appeal dismissed. **(R.K. Shukla v. Sudhrist Narain Anand (dead) by L.Rs.; 2008(2) ARC 613)**

◆ **Section 16(2) – Comparative Hardship**

Rule 16 provides for some factors for the purpose of determining comparative hardship. The court would not determine a question only on basis of sympathy or sentiment. *Stricto sensu equity* as such may not have any role to play. The provisions of the statutory rules must be interpreted so as to give effect to the object and purport of the Act. It cannot be applied in a vacuum, as the statute requires comparison of the hardship of both the tenant as also the landlord. **(Ganga Devi v. District Judge, Nainital; 2008(2) ARC 584)**

◆ **Section 16(9) & 21(1)(a)**

When can High Court increase rent in exercise of its power under Article 226 of Constitution? The Supreme Court held that in writ petitions by landlord against rejection of eviction petition, there is no scope for issue of interim direction to the tenant to pay higher rent. But in writ petition like tenants against grant of eviction the High Court may, as a condition of stay, direct the tenant to pay higher rent during the pendency of writ petition. This again is subject to two limitation. First, the condition should be reasonable. Second, there should not be any bar in the respective State Rent

Control Legislation in regard to such increase in rent. **(Niyas Ahmad Khan v. Mahmood Rahmat ullah Khan & another; 2008(2) ARC 579 SC)**

◆ **Section 20(2)(a)**

Petitioner was a tenant of shop owned by landlord on the basis of will executed by his wife. He executed a will in favour of his grandson. A partition suit was pending. Grandson on the basis of will filed a suit for arrears of rent, damages and eviction against petitioner. The suit was decreed and revision was dismissed. A writ petition was filed. Late landlord neither renounced by ownership of the house nor his status of landlord but only instructed the tenant to pay rent to his son. Court held that status of son is not of landlord but he was the agent of landlord. Petitioner did not pay any rent. He was held defaulter. Instruction of late landlord becomes extinguished after his death. Will creates new right in favour of grandson as owner and landlord. **(Ram Murti Yadav v. Rishabh Kumar Dubey; 2008(2) ARC 582)**

◆ **S. 21(1)(a) and fourth proviso – Bona fide requirement – Comparative hardship is essentially a question of fact, which is to be determined in accordance with S. 21(1)(a), fourth proviso and R. 16(2)(c)**

Comparative hardship, indisputably, is a relevant factor for determining the question as to whether requirement of the landlord is bona fide or not within the meaning of the provisions of the said Act and the Rules. It is essentially a question of fact. Such a question of fact, however, is to be determined on the touchstone of the statutory provisions as contained in Section 21(1)(a) of the Act and Rule 16(2)(c) of the Rules.

Rule 16 provides for some factors which are required to be taken into consideration for the purpose of determining comparative hardship. The landlord in this case does not have any business. If he has no business, the question of application of factors as envisaged in first part of Clause (c) of sub-rule (2) of Rule 16 will not arise. On the findings of the appellate authority, no accommodation is available with him. The question of thus any premises being let out in favour of the tenant also does not arise.

The provisions of the statutory rules must be interpreted so as to give effect to the object and purport of the Act. It cannot be applied in a vacuum, as the statute requires comparison of the hardship of both the tenant as also the landlord. It is, therefore, not a case where Rule 16 has any

application. (**Ganga Devi v. District Judge, Nainital & Others; (2008) 7 SCC 770**)

◆ **Section 21(1)(a)**

Release application was filed by the Land lady for the need of her sons, daughter-in-law and grandchildren. Need of the landlord is to be seen on the date of application for release and landlord is the best judge of his requirement and courts have no concern to dictate the landlord as to how and in what manner he should live. The bonafide personal need of the landlord is the question of fact and should not be normally interfered with. Appeal against was dismissed. (**Deep Chandra Juneja v. Smt. Lajwati Kathuria (dead) through L.Rs.; 2008(5) Supreme 136**)

◆ **S. 21(1)(a) – Bona fide need or requirement can be decided by authority -**

Authority can decide whether the need or requirement was or was not bona fide -But authority cannot decline prayer of landlords on the ground that they belonged to upper class society -Similarly, the Prescribed Authority wrong in commenting on experience in business -As to comparative hardship, nothing has been stated by the tenant as to whether any attempt has been made by him to get alternative accommodation and he failed to get such accommodation - There was no evidence to show that no shop was available to tenant -That would not preclude the landlords from getting possession of the suit-shop once they had proved genuine need of the property. (**Relief Fund & Member Management Committee v. Mohan Lal, Civil Appeal No.5607 of 2008**)

◆ **Section 21 (1)(b) — Application filed under — On the grounds that the building was in a dilapidated condition and was required for demolition and reconstruction.**

The application filed by the respondent was, however, opposed by the appellant by filing a written objection in which the ground of non-compliance of mandatory provision of Rule 17 framed in the Act was taken. The prescribed authority allowed the application and passed an order of eviction against the appellant. An appeal was carried by the appellant before the learned District Judge against the order of eviction passed by the prescribed authority. Since the eviction of the appellant from the disputed premises was based on the ground, dilapidated and dangerous condition requiring reconstruction, it would be fit and proper that an independent

Engineer/Advocate Commissioner is appointed by the High Court for coming to a proper finding in that respect. **(Radhey Shyam Rastogi v. Ashish Kumar & another; Civil Appeal No. 5427 of 2008)**

◆ Section 25

Landlord filed SCC suit for arrears of rent and ejectment. Suit was decreed and revision was dismissed. Tenant deposited rent under section 30(2) of U.P. Urban Building (Regulation of letting, rent and eviction) Act, 1972. Courts below did not believe the version of tenant that neither the notice nor the tenders of rent were deposited in court. Tenant needs one more opportunities to file these documents. Tenant under the Rent Control Act cannot be evicted except on specific grounds like bonifide need of the landlord, arrears of rent, subletting and material alteration etc. Petition was allowed. Matter remanded to trial court for expeditious disposal. **(State of U.P. through Regional Prohibition & Social Uplift Officer, Allahabad v. Judge, Small Causes Court, Allahabad; 2008(2) ARC 570)**

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

◆ S. 29 – Auction sale – Only owner of holding has rights to prefer objection within 30 days of auction sale for setting aside sale before collector.

From Rule 285-H, it appears that only owner of holding has right to prefer objection within thirty days of auction sale for setting aside sale and the Collector has power to set aside the sale. Further, a plain reading of Rule 285-I shows that within a period of thirty days from the date of sale, application can be made to the Commissioner to set aside the sale on, the ground of some material irregularity etc. Since under rule 285-H, owner of holding has been given same right, therefore, it is evident that under rule 285-I, the objection can be made by any person before the Commissioner. As discussed earlier, the objection raised by three persons regarding sale were preferred by those, who were neither owner of land nor bidder. They were not at all concerned with the property auctioned. Therefore, this argument of learned counsel for the petitioner is acceptable that, third person had right only to prefer objection before the Commissioner concerned and, not before the Deputy Collector concerned, who was the incharge of conducting sale. **(Ajay Upadhyay v. Collector, Ballia & Ors.; 2008 (4) ALJ 827)**

◆ S. 157A – Restriction on transfer of land by members of SC – Person belonging to SC cannot transfer land in favour of person not belonging to SC; but for transfer in favour of person not belonging to SC prior approval of Asstt. Collector is necessary.

There is a clear distinction between the restrictions contained under S. 157A and S. 157AA. S. 157A provides that no bhumidhar or asami belonging to a Scheduled Caste can transfer the land to a person not belonging to the Scheduled Caste except with the previous approval of the Collector whereas S. 157AA contains a clear restriction that a person belonging to Scheduled Caste who have become bhumidhar with transferable rights under S. 131-B shall have no right to transfer to any person other than person belonging to Scheduled Caste. The transfer under S. 157AA is permissible only to a person belonging to Scheduled Castes in the order of preference as prescribed in sub-sec. (1). Thus, Scheduled Caste cannot transfer the land in favour of a person not belonging to Scheduled Caste in any contingency. Further, this restriction is on reasonable basis since land which has been contemplated under S. 157AA is a land which is allotted to a person belonging to Scheduled Caste. The restriction is more stringent in this sub-section since the land is lease land and grant of agricultural lease is contemplated under the Act for the specified object and purpose. Much emphasis has been laid down by learned counsel for the petitioner that sub-sec. (1) of SW. 157AA will not apply when transfer is in favour of Scheduled Caste. Sub-sec. (4) of S. 157AA contains an injunction to the effect that no transfer under this Section shall be made Assistant Collector concerned. Sub-sec. (4) is in a very wide terms when it refers to 'transfer under this Section'. Clearly means that it embraces itself all the transfers which are contemplated in S. 157AA. Thus, even if the transfer is by a Scheduled Caste in favour of a Scheduled Caste, it is fully covered by the restrictions contained under Sub-sec. (4) of S. 157AA. There is valid reason for requiring previous permission of the Assistant Collector. The reason which is deciphered from the scheme is Section is, that even the transfer by a Bhumidhar belonging to Scheduled Caste to a person belong to Scheduled Caste shall be in accordance with the preference mentioned in sub-sec. (1). A Scheduled Caste who is bhumidhar with transferable right under S. 131-B has no free choice of transfer to any Scheduled Caste of his own choice. The order of preference given under sub-sec. (1) has its own object and purpose. The object obviously is that if transfer is made, the said transfer shall first go to landless agricultural labourer and thereafter to

marginal farmer. The reason obviously is that the land being a lease land, the rights of a lessee have to be regulated in a manner which may advance the object and purpose of the Act. Thus, the prior approval of the Assistant Collector is contemplated which is obviously to consider and decide as to whether permission can be accorded and the transfer which is sought, is in accordance with the Scheme of sub-sec. (1) of S. 157AA. If no permission is required for land to be transferred by Scheduled Caste to another Scheduled Caste, then there will be no stage of inquiry whether the transfer is in accordance with the preference given in sub-sec.(1) (**Man Singh v. Commissioner, Bareilly & Ors.; AIR 2008 (NOC) (All) = 2008 (3) ALJ 643**)

◆ **S. 229-D – Order granting injunction U/s. 229-D is revisable U/s. 333 of above Act.**

Under S. 333 of the Act, the Court is empowered to call for record of any suit or proceeding. The order under S. 229-D is not specifically excluded from the purview of S. 333 of Act. By U.P. Act No. 11 of 2002, an amendment has been inserted excluding one proceeding from the revisional jurisdiction that is proceedings under sub section (4-A) of S. 198. Had the legislature intended to have excluded the proceeding under S. 229-D, there was no reason of not indicating or mentioning the same in S. 333. The amendment made in 2002 clearly shows the intendment of the Legislature that no other proceeding has been excluded except the proceeding under sub-section (4-A) of S. 198 from the purview of S. 333 of the Act.

In view of the provisions of S. 333, it is to be held that an order passed under section 229-D is not excluded from the revisional jurisdiction provided under S. 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. (**Talib Khan v. Additional Commissioner (Administration), Moradabad & Ors.; AIR 2008 (NOC) 1846 (All)**)

◆ **S. 229-D – Power to pass injunction order under S. 229-D – Court is required to consider the existence of conditions before granting injunction order.**

No doubt, power has been conferred under section 229-D on revenue authorities to pass injunction orders in appropriate cases. But grant of an interim relief is not a matter of course. It is acknowledged legal position that before granting an injunction order the Court is required to record a

finding on the following three questions: (i) Prima facie case (ii) Balance of convenience and (iii) Irreparable loss; in favour of the applicant who is seeking ad interim injunction order.

The Hon'ble Apex Court in its decision reported in *Industrial Credit & Investment Corporation of India Ltd. v. Grapco Industries Ltd. and Others* (1999 (36) ALR 592 (SC)), has observed that "An ex-parte order is only of a short duration and it is granted to safeguard the interest of the applicant, but, at the same time such an order cannot be granted as a matter of course. A Court or Tribunal has also to consider the consequences of such an order if ultimately the order is to be revoked after hearing the defendant. In such circumstances, the Tribunal must put the applicant on terms while granting an ex-parte order and compensate the defendant in case the ex-parte order was obtained without any justification and harm has been caused to the defendant. An ex-parte order can also affect the reputation of the person against whom it is issued and sometimes it may be difficult to undo the damage caused by an interim order. A Tribunal while granting an ex-parte order of stay or injunction must record reasons, may be brief ones, and cannot pass a stereotyped order in terms of the prayer made. Thus an ex-parte order cannot be allowed to continue indefinitely and the continuance of an interim order has to be decided without undue delay when the defendant puts in his appearance. It is not necessary to hear long drawn arguments.

The principles on which interim order can be granted, are well settled. Further, the Hon'ble Supreme Court in the case of *Margan Stanley Mutual Fund v. Kartick Das* (1994 (4) SCC 225), has held that "An ex-parte order could be granted only under exceptional circumstances. Grant of an ex-parte order is not a rule but an exception. The factors which should weigh with the Court in the grant of ex-parte injunction are (a) Whether irreparable or serious mischief will ensue to the plaintiff; (b) Whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve; (c) the Court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented; (d) the Court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex-parte injunction; (e) the Court would expect a party applying for ex-parte injunction to show utmost good faith in making the application; (f) even if granted, the ex-parte injunction would be for a limited period of time; and (g) general principles like prima facie case,

balance of convenience and irreparable loss would also be considered by the Court. **(Om Prakash and Others v. Addl. Commissioner (Admn.) Faizabad Division, Faizabad & Others; 2008 (105) RD 197)**

Words and Phrases

◆ **“Misconduct” – Meaning**

Where the petitioner, a Ticket Collector in Railways was charged for unauthorisedly using retiring room of Railways only for one night, such a conduct would not amount to not maintaining absolute integrity, not maintaining devotion to duty and this conduct cannot be said to be unbecoming of a railway servant. Therefore, unless and until it is a misconduct it cannot be said that petitioner had violated any provision of Conduct Rules. If authorities were of opinion that petitioner had violated any provision of Service Rules some minor punishment should have been awarded. But as in view of definition of misconduct it cannot be said that act of petitioner was in any way misconduct as defined. It is not the case of the authorities that except this action of the petitioner any point of time there was any complaint against petitioner regarding discharging of his official duty. It was also clear from the record that petitioner had not been afforded proper opportunity which was necessary to follow the principle of natural justice. In such circumstances, awarding punishment of dismissal from service to petitioner is wholly disproportionate and cannot be sustained. **(Smt. Urmila Varma v. Presiding Officer, Central Govt. Industrial Tribunal-cum-Labour Court, Kanpur & Ors.; 2008 (4) ALJ 635)**

◆ **“So considered necessary”**

The expression: so considered necessary’ is again of crucial importance. The term ‘consider’ means to think over; it connotes that there should be active application of the mind. In other words the term ‘consider’ postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have becomes necessary. **(Bhikhubhai Vithlabhai Patel & Ors. v. State of Gujarat & Anr.; AIR 2008 SC 1771)**
